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Donoval v. City of Sun Valley Appellant's Brief 1 Dckt. 40853

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IN THE SUPREME COURT OF IDAHO

JAMES R. DONOVAL,
Appellant-Plaintiff,

v.

THE CITY OF SUN VALLEY, an Idaho)
municipal corporation,)
Respondent-Defendant.)

Supreme Court Case No. 40853

APPELLANT'S BRIEF

Appeal from the District Court of the Fifth Judicial District, State Of Idaho,
In and for the County of Blaine
HONORABLE JONATHAN BRODY, Presiding District Judge
Case No. CV-2010-600

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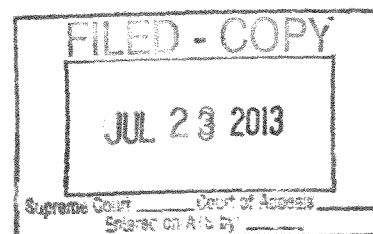


TABLE OF CONTENTS

OUTLINE OF ARGUMENT	Page 2-3
TABLE OF CASES AND AUTHORITIES	Page 4
STATEMENT OF THE CASE	Page 5-30
(i) Statement Of The Case	Page 5
(ii) Course Of The Proceedings	Page 5-6
(iii) Statement Of Facts	Page 6-30
ISSUES PRESENTED FOR REVIEW	Page 31
ATTORNEY’S FEES ON APPEAL	Page 31
ARGUMENT	Page 32-47
Issue I	Page 32-43
Issue II	Page 43-46
Issue III	Page 46-47
CONCLUSION	Page 47-49

OUTLINE OF ARGUMENT

In March of 2012, Appellant James R. Donoval (“Mr. Donoval”) submitted to the Appellee the City Of Sun Valley (“Sun Valley”) three public records requests seeking back up authorization documentation related to Sun Valley issued credit card expenditures. After extensive delays and excuses, Sun Valley only produced about half of the requested back up authorization documents.

During the proceedings, Mr. Donoval submitted affidavits by former Sun Valley Mayor Wayne Willich (“Former Mayor Willich”)¹ (Record 572-606) and former Sun Valley City Administrator Sharon R. Hammer (“Former Administrator Hammer”)² (Record 485-571) confirming that all the fully authorized credit card related documents Mr. Donoval had requested were in existence, and in the possession of then Sun Valley Treasurer/Finance Manager Michelle Frostenson (“Former Treasurer Frostenson”)³ when both left office in January of 2012. In addition, the affidavits of Former Mayor Willich and Former Administrator Hammer certified that the authorization documents which were provided to Mr. Donoval by Sun Valley were forgeries and falsifications.

In response to the law suit, Sun Valley failed to submit any counter affidavits or sworn-to testimony to answer why the documents Mr. Donoval requested were not produced, or to answer the forgery allegations. Instead, Sun Valley merely filed an unverified response by Sun Valley’s legal counsel (Record 392-410), asserting that Sun Valley could not find the documents sought by Mr. Donoval and that therefore Sun

¹ Former Mayor Willich’s term as Sun Valley Mayor ended in January of 2012 (Willich Aff., Record 572)

² Former Administrator Hammer’s contract as the Sun Valley City Administrator was terminated by Sun Valley on January 19, 2012 (Hammer Aff., Record 485).

³ Former Treasurer Frostenson resigned her position as the Sun Valley Treasurer in June of 2012 (Donoval Aff., Record 450-451), after Mr. Donoval had filed the public record requests described herein, but before Sun Valley provided Mr. Donoval with any documents in regards to Mr. Donoval’s public record requests.

Valley had no other duty to further explain the whereabouts of the documents sought by Mr. Donoval – or to answer the forgery allegations.

The District Court (Honorable Judge Jonathan Brody, “Judge Brody”) denied Mr. Donoval’s request to hold an evidential hearing related to the circumstances associated with the documents sought and actually produced (Record 632)⁴, and instead relied solely on Sun Valley’s un-verified brief and oral arguments of legal counsel to make his rulings. Judge Brody’s rulings (Record 666-675) found that Sun Valley had complied with the Idaho Public Writings statutes, *Idaho Statutes 9-303* et. seq., even though half the credit card authorization documents requested by Mr. Donoval were never produced, nor was an explanation ever given regarding what efforts Sun Valley made to locate the requested documents or what happened to the documents not produced. Judge Brody also did not require Sun Valley to respond to the sworn-to allegations of Former Mayor Willich and Former Administrator Hammer that the documents that were produced by Sun Valley were forgeries. Finally, Judge Brody denied Mr. Donoval’s request for statutorily imposed fines pursuant to *Idaho Statute 9-345* of the Idaho Public Writings statutes (Record 666-675), even as to the documents that Sun Valley failed to produce.

Mr. Donoval asserts, supported by Idaho, Federal and other state cases, that whereas Sun Valley failed to provide certified or sworn-to testimony in the record as to the efforts Sun Valley made to locate the original, authorized documents Mr. Donoval sought, or to counter the allegations of bad faith refusal to produce the documents Mr. Donoval sought, that the ruling of the District Court must be reversed.

⁴ Because Sun Valley had not responded with any affidavits or other sworn to testimony, Mr. Donoval sought that the District Court hold an evidentiary hearing on the issue of the whereabouts of the missing documents and the allegations of forgeries as part of his Memorandum In Support Of Amended Complaint (Record 608-633).

TABLE OF CASES AND AUTHORITIES

Idaho Statutes

Idaho Statute 50-208	6,7,8,11,14,21,22,40,44
Idaho Statute 50-907	6,8,13,40,41,45
Idaho Statute 50-908	7,10,36,40,41,42,43,44,45
Idaho Statute 90-349(3)	7,10,37,41,43,44,45
Idaho Statute 18-3201	7,40,41,46
Idaho Statute 9-338	32
Idaho Statute 9-337	31,32,43,41,46
Idaho Statute 9-339	33,34,41
Idaho Statute 9-345	3,6,31,46,49

Cases Cited

<i>Bolger v. Lance</i> ,	36,37
137 Idaho 792, 53 P.3d 1211 (Id. Sup.Ct. 2002)	
<i>Ward v. Portneuf Medical Center</i> ,	36,37,44
150 Idaho 501, 248 P.3d 1236, (Id. Sup.Ct. 2011)	
<i>Henry v. Taylor</i> ,	37,42
152 Idaho 155, 267 P.3d 1270 (Id. Sup.Ct. 2012)	
<i>Renegotiation Board v. Bannerkraft Clothing Co., Inc.</i> ,	38,44
415 U.S. 1, 94 S.Ct. 1028 (U.S. Sup.Ct. 1974)	
<i>Laughlin v. Commissioner Of IRS</i> ,	38,39,44,49
103 F.Supp.2d 1219 (U.S. S.D.Cal. 1999)	
<i>Miller v. U.S. Dept. Of State</i> ,	38
779 F.2d 1378 (U.S. 8 th .App. 1985)	
<i>Weisberg v. U.S. Dept. Of Justice</i> ,	39,44
705 F.2d 1344 (U.S. D.C. 1983)	
<i>Island Film, S.A. v. Dept. Of Treasury</i> ,	39,44
869 F.Supp.2d 123 (U.S. D.C. 2012)	
<i>Lazaridis v. U.S. Dept. Of State</i> ,	39,40,44,47,49
-- F.Supp.2d --, 2013 WL 1226607 (U.S. D.C. 2013)	
<i>Maydak v. U.S. Dept. Of Justice</i> ,	40,44,47,49
254 F.Supp.2d 23 (U.S. D.C. 2003)	
<i>Office Of Governor v. Scolforo</i> ,	40
65 A.3d 1095 (Comm. Ct. Of Penn. 2013)	
<i>Legal Aid Society v. New York Dept. Of Corrections</i> ,	40
962 N.Y.S.2d 773, 105 A.D.3d 1120 (Sup.Ct. N.Y.3d 2013)	
<i>Tamayo v. U.S. Dept. Of Justice</i> ,	44,45
544 F.Supp.2d 1341 (U.S. S.D.Fla 2008)	

STATEMENT OF THE CASE

(i) Statement Of The Case

In March of 2012, Mr. Donoval served upon Sun Valley written public record requests seeking not only credit card statements, but the authorization documents associated with those credit card statements, all of which had been fully signed/initialed by the four Sun Valley officials required to do so (the Treasurer, the City Administrator, the Mayor and a City Council Member). During the record request process, Mr. Donoval was never provided any of the forty two (42) formally authorized credit card authorization forms (either originals or copies), and was instead provided *copies* of authorization forms associated with about half of the credit card statements at issue that were eventually asserted, under oath, to be forgeries. Even though he made multiple written demands to view the *original* documents at issue, Mr. Donoval was only allowed to review the *original* credit card statements, and the falsified authorization documents, well after he had filed suit against Sun Valley.

(ii) Course Of The Proceedings

Mr. Donoval filed the Complaint herein on August 20, 2012. As is further described, Mr. Donoval originally named the Idaho Attorney General's office as a defendant, and then the Blaine County Prosecutor's office as a defendant, but both were eventually voluntarily dismissed as defendants by Mr. Donoval.

Although Mr. Donoval requested that evidential hearings be held by the District Court, Judge Brody instead proceeded solely on the non-verified pleadings of Sun Valley, holding oral arguments by counsel on January 15, 2013. On February 14, 2013, Judge Brody entered his Memorandum Decision Denying Plaintiff's Request For An Order To

Compel Production Of Public Records (Record 666-674) (the “Memorandum Decision”), finding that Sun Valley had adequately responded to Mr. Donoval’s public record requests. Judge Brody also denied Mr. Donoval’s request that fines be entered against Sun Valley officials pursuant to Idaho Statute 9-345 (Record 666-674).

On March 20, 2013, Mr. Donoval filed the Notice Of Appeal herein (Record 676-691).

(iii) Statement Of Facts

The Sun Valley Credit Card Approval And Record Retention Procedures

Idaho Statute 50-208 provides in relevant part:

“The treasurer of each city shall be the custodian of all moneys belonging to the city; he shall keep a separate account of each fund or appropriation, and the debits and credits belonging thereto; he shall give a receipt to every person paying money into the treasury, thereon specifying the date of payment and on what account paid; he shall also file copies of such receipts with his monthly reports; ***he shall at the end of every month and as often as may be required, render an account to the city council, under oath, showing the state of the treasury at the date of such account and the balance of money in the treasury; he shall also accompany such accounts with a statement of all receipts and disbursements, together with all warrants redeemed and paid by him*** (emphasis added), which said warrants, with any and ***all vouchers held by him, shall be filed with his said account in the clerk’s office*** (emphasis added), and if said treasurer neglect or fail for the space of ten (10) days from the end of each month, to render his said account, his office shall be declared vacant, and the city council shall fill the vacancy by appointment.”

Idaho Statute 50-907 provides in relevant part:

“(2) “Semipermanent records” shall consist of:

(a) Claims, canceled checks, warrants, duplicate warrants, purchase orders, vouchers, duplicate receipts, utility and other financial records:

(4) Semipermanent and temporary records ***may only be destroyed by resolution of the city council*** (emphasis added), and upon the advice of the city attorney. Such disposition shall be under the direction and supervision of the city clerk. The resolution ordering the destruction shall list in detail records to be destroyed.”

Idaho Statute 50-908 provides in relevant part:

“The unauthorized ***destruction or removal*** (emphasis added) of city records, is prohibited.”

Idaho Statute 90-349(3) provides in relevant part:

“Public records of the state and/or territory of Idaho are the property of the citizens of the state in perpetuity and ***they may not be improperly or unlawfully transferred or removed from their proper custodian*** (emphasis added).”

Idaho Statute 18-3201 provides:

“Any public officer, law enforcement officer, or subordinate thereof, who ***willfully destroys, alters, falsifies*** (emphasis added) or commits the theft of the whole or any part of any police report of any record kept as part of the official government records of the state or any county or municipality in the state, shall be ***guilty of a felony*** (emphasis added) and is punishable by imprisonment in the state prison for not more than fourteen (14) years.”

To supplement the requirements of Idaho Statute 50-208 (and the other statutes described above), Sun Valley officials established a formal procedure by which every expenditure of Sun Valley was to be formally approved by the Sun Valley Treasurer, then the Sun Valley City Administrator, then the Sun Valley Mayor, and then a Sun Valley City Council Member, ***in that order***. (Aff. Of Hammer, Record 485-489; Aff. Of Willich, Record 572-575). The Sun Valley Treasurer was then required to present the expenditures to the Sun Valley City Council for approval, ***under oath*** (pursuant to Idaho Statute 50-208), certifying that the Sun Valley Treasurer had obtained all necessary expenditure sign-offs described in the expenditure approval process (Aff. Of Hammer, Record 485-489; Aff. Of Willich, Record 572-575). The form that was to be used to obtain the expenditure sign-offs of all necessary Sun Valley officials (Record 41) was named the “Yellow Sheet” because it was prepared on yellow paper (Aff. Of Hammer, Record 485-489; Aff. Of Willich, Record 572-575). The Yellow Sheet expenditure

approval procedure applied to all Sun Valley issued credit card transactions (Aff. Of Hammer; Record 485-489; Aff. Of Willich, Record 572-575). The Yellow Sheet approval process also required the Sun Valley Treasurer to retain all of the original Yellow Sheets associated with all expenditure transactions, including in regards to all credit card transactions (Aff. Of Hammer; Record 485-489; Aff. Of Willich, Record 572-575).

The Sun Valley City Council also established a written formal policy related to the usage of Sun Valley issued credit cards (the “Credit Card Policy”) (Record 495-498), which made the Sun Valley Treasurer the sole Sun Valley official responsible for the legitimacy of any and all transactions utilizing a Sun Valley issued credit card (Aff. Of Hammer, Record 485-489; Aff. Of Willich, Record 572-575)⁵.

Once formal approval for payment of the credit card statements was obtained by the Sun Valley Treasurer, it was also then the Sun Valley Treasurer’s sole responsibility to retain the credit card statements and associated Yellow Sheets (see Idaho Statute 50-208 and the Credit Card Policy), and to ensure that neither were destroyed without the formal approval of the Sun Valley City Council pursuant to Idaho Statute 50-907 (Aff. Of Hammer, Record 485-489; Aff. Of Willich, Record 572-575).

Mr. Donoval’s Public Record Requests Related To Sun Valley Issued Credit Cards

a) The Public Record Requests

During November and December of 2011, Former Mayor Willich and Former Administrator Hammer discovered that Former Treasurer Frostenson was removing

⁵ Both copies of the Credit Card Policy in the record (Record 35-37 and Record 496-498) are difficult to read in places because certain portions were highlighted in yellow magic marker in the original documents filed with the District Court. The highlighted portion of the Credit Card Policy at the bottom of the first page actually states “B. The Finance Manager is responsible for administration of credit cards to include selection of card provider, payment of credit card bills, managing the issuance of credit cards, and ensuring proper use”. The highlighted portion of the Credit Card Policy in the middle of the second page actually states “Ensure Proper Use: The Finance Manager will ensure that all cards are used in accordance with this policy. Any misuse will be reported to the City Administrator.”

financial records from Sun Valley City Hall without the knowledge or approval of either Former Mayor Willich or Former Administrator Hammer (Aff. Of Hammer; Record 490; Aff. Of Willich, Record 575; Donoval Aff., Record 450). Both Former Administrator Hammer and Former Mayor Willich certified under oath that Former Treasurer Frostenson's actions in removing the financial records from Sun Valley City Hall warranted that Former Treasurer Frostenson be immediately terminated as the Sun Valley Treasurer during the remainder of Former Mayor Willich's term as Mayor Of Sun Valley (Aff. Of Hammer, Record 490; Aff. Of Willich, Record 575). Although Former Mayor Willich sought to have Former Treasurer Frostenson terminated by Sun Valley City Council vote before the end of his term as Mayor Of Sun Valley, the Sun Valley City Council (with Mayor Elect DeWayne Briscoe ("Current Mayor Briscoe") still as its President), which was required to vote to terminate Former Treasurer Frostenson pursuant to Sun Valley policies, refused Former Mayor Willich's request to hold a Sun Valley City Council meeting before the end of Former Mayor Willich's tenure as the Mayor of Sun Valley to take up the issue of Former Treasurer Frostenson's termination (Aff. Of Willich, Record 578).

Likewise, during December of 2011, attorney Kirtlan Naylor ("Attorney Naylor") was found to have also removed Sun Valley public records from Sun Valley City Hall without the authority of either Former Mayor Willich or Former Administrator Hammer (Donoval Aff., Record 450)⁶.

⁶ Attorney Naylor's role in the matter herein is certainly questionable, as Attorney Naylor was not the duly appointed Sun Valley City Attorney (attorney Adam King was the Sun Valley City Attorney). There is no evidence in the record herein (other than that Attorney Naylor was somehow involved in trying to settle the law suit Former City Administrator Hammer had filed against Sun Valley after her termination on January 19, 2012) (Donoval Aff., Record 440), as to what work Attorney Naylor was actually ever formally retained to perform on behalf of Sun Valley. There is simply no evidence in the record that Attorney Naylor

On November 18, 2011, Mr. Donoval (Former Administrator Hammer's husband and a resident of Sun Valley) filed a public records request to Sun Valley seeking that he be provided with certain payroll and bank account records of Sun Valley (the "Original Public Records Request")(Donoval Aff., Record 438-439; Record 453-454). Sun Valley denied the Original Public Records Request (Donoval Aff., Record 439). Mr. Donoval thereafter filed a law suit in Blaine County (*Donoval v. Sun Valley*, CV-2011-985 Blaine County) (the "Original Public Records Law Suit") seeking the payroll and bank statement records that Mr. Donoval believed that Former Treasurer Frostenson had improperly removed from Sun Valley City Hall and which Sun Valley had refused to produce (Donoval Aff., Record 439). On March 6, 2012, Hon. Judge John K. Butler entered his judgment in the Original Public Records Law Suit requiring that Sun Valley produce the bank statements that Mr. Donoval had requested in the Original Public Records Request (Donoval Aff., Record 439; Record 4567-458)⁷.

Mr. Donoval thereafter filed six (6) new public record requests seeking additional financial information from Sun Valley that was described in the bank records produced by Sun Valley (Donoval Aff., Record 439-440), which Mr. Donoval also believe Former Treasurer Frostenson had improperly removed from Sun Valley City Hall. Three of the new public record requests (the "Credit Card Record Requests") (Donoval Aff., Record 440; Record 43-56; Record 58-72; Record 74-86), sought credit card statements and back up authorization documents (including the Yellow Sheets) for Sun Valley issued credit

was formally authorized pursuant to the previously described *Idaho Statute 50-908* or *Idaho Statute 90-349(3)* to obtain Sun Valley public records, to remove Sun Valley public records from the Sun Valley City Hall, or to provide Sun Valley Public records to any third parties, as Attorney Naylor later admitted that he had, including purportedly the public records that had been requested by Mr. Donoval.

⁷ As part of the Order, Judge Butler denied Mr. Donoval's request for certain confidential Sun Valley employee payroll records.

cards issued to three Sun Valley employees (Former Administrator Hammer, Former Treasurer Frostenson, and, former Sun Valley Fire Chief Jeff Carnes (“Former Fire Chief Carnes”)) for the periods of September of 2010, through and including, October of 2011 (i.e. fourteen (14) months).

In Affidavits filed in the matter herein, both Former Mayor Willich and Former Administrator Hammer certified that during the period covered by the Credit Card Record Requests, that a properly approved Yellow Sheet was prepared for each of the credit card statements Mr. Donoval sought in the Credit Card Record Requests (Hammer Aff., Record 492; Willich Aff., Record 577), and that Former Treasurer Frostenson had appeared at a monthly Sun Valley City Council meeting during each of the months at issue and had sworn, ***under oath*** pursuant to Idaho Statute 50-208, to the Sun Valley City Council, that Former Treasurer Frostenson had obtained the proper sign-offs of the Yellow Sheets for each of the credit card statements covered by the Credit Card Record Requests (Hammer Aff., Record 487-488; Willich Aff., Record 573-574). Former Administrator Hammer certified under oath that on multiple occasions during 2009 through 2011, Former Treasurer Frostenson confirmed to Former Administrator Hammer that Former Treasurer Frostenson had obtained all the necessary approvals on all of the Yellow Sheets associated with credit card transactions, and had retained all of the Yellow Sheets associated with credit card transactions in files in Sun Valley City Hall (Hammer Aff., Record 489).

The Credit Card Record Requests submitted by Mr. Donoval therefore should have produced fourteen (14) credit card statements each for the Sun Valley credit cards issued to Former Administrator Hammer, Former Treasurer Frostenson, and, Former Fire

Chief Carnes (or forty two (42) separate credit card statements). Likewise, the Credit Card Record Requests response should have also included fourteen (14) Yellow Sheets associated with each of the fourteen (14) credit card statements associated with the Sun Valley credit cards issued to Former Administrator Hammer, Former Treasurer Frostenson, and, Former Fire Chief Carnes for the periods of September of 2010 through October of 2011 (or a total of forty two (42) Yellow Sheets), all of which should have included the initials of Former Treasurer Frostenson, Former Administrator Hammer, Former Mayor Willich, and one Sun Valley City Council Member on each and every Yellow Sheet. As the credit card statements and all associated Yellow Sheets requested by Mr. Donoval were to have been retained in files in Sun Valley City Hall by Former Treasurer Frostenson, the response to the Credit Card Record Requests should have simply required Sun Valley to show Mr. Donoval the original credit card statements and associated Yellow Sheets, and to copy the files associated with Former Administrator Hammer's, Former Treasurer Frostenson's, and, Former Fire Chief Carnes' Sun Valley issued credit card files which Former Treasurer Frostenson was required to maintain pursuant to Idaho statutes and Sun Valley adopted policies and procedures, and which Former Treasurer Frostenson had verified on multiple occasions that she had retained (Hammer Aff., Record 489).

What followed, however, was nothing short of what Mr. Donoval believes was a deceptive and purposeful effort on the part of Sun Valley to refuse to provide Mr. Donoval the Yellow Sheets associated with the Credit Card Record Requests Mr. Donoval was entitled to receive, and to instead provide Mr. Donoval with forgeries.

b) The Initial Review Of Records On July 27, 2012

For a short period after Mr. Donoval filed the Credit Card Record Requests, at the request of Attorney Naylor, Mr. Donoval and Sun Valley agreed to stay the production of the documents Mr. Donoval was seeking, because Former Administrator Hammer's attorney (Eric Swartz) and Attorney Naylor were seeking to settle Former Administrator Hammer's pending discrimination, harassment and retaliation law suits against Sun Valley related to Former Administrator Hammer's termination on January 19, 2012 as the Sun Valley City Administrator (Donoval Aff. Record 440). Thereafter, and before Sun Valley produced any of the documents requested by Mr. Donoval in the Credit Card Record Requests, Former Administrator Hammer and Mr. Donoval were both informed by Sun Valley employees that Former Treasurer Frostenson, Sun Valley Assistant City Clerk Julia Kinsey-Lovey ("Assistant Clerk Kinsey-Lovey"), and other Sun Valley employees were shredding hundreds, if not thousands, of pages of Sun Valley documents at the direction of Sun Valley Interim Executive Assistant Virginia Egger ("Executive Assistant Egger")⁸ in Sun Valley City Hall (many of which both Mr. Donoval and Former Administrator Hammer believed were original financial records of Sun Valley) without explicit approval of the Sun Valley City Council, as was required by Idaho Statute 50-907, including the documents sought by Mr. Donoval in the Credit Card Record Requests (Hammer Aff., Record 493-494; Donoval Aff., Record 450-451)⁹.

⁸ Executive Assistant Egger was hired by Sun Valley subsequent to Former Administrator Hammer's termination on January 19, 2012 (Donoval Aff., Record 450-451).

⁹ Neither Former Administrator Hammer or Mr. Donoval revealed their sources of this information due to their fears that the Sun Valley employee(s) would be retaliated against, but confirmed that they would reveal the name of their source(s) to either the District Court in-camera or to the Blaine County Prosecutor (Hammer Aff., Record 493-494; Donoval Aff., Record 450-451).

In addition, in June of 2012, while Mr. Donoval's Credit Card Record Requests were still pending, Former Treasurer Frostenson resigned her position as the Sun Valley Treasurer (Donoval Aff., Record 451), after Sun Valley had commenced a forensic audit of the Sun Valley finances¹⁰ that Former Treasurer Frostenson was responsible for by the previously described *Idaho Statute 50-208*.

By early July of 2012, as Attorney Naylor had failed to reach a settlement with Ms. Hammer's attorney in regards to Ms. Hammer's pending law suit, Mr. Donoval started making multiple written demands to Sun Valley and Sun Valley City Attorney Adam King ("City Attorney King") that Mr. Donoval be able to review the original documents sought in the Credit Card Record Requests (Donoval Aff. Record 440). Mr. Donoval was required to pay in advance for all of the records he sought in the Credit Card Record Requests (Donoval Supp. Aff., Record 638).

Although Mr. Donoval admits that he did not specifically check the box to examine "original" records in the request forms submitted as part of the Credit Card Record Requests (Record 43; Record 58; Record 74), Mr. Donoval sent City Attorney King an email on July 25, 2012 specifically demanding that Mr. Donoval be able to review "original" documents covered by the public record requests submitted by Mr. Donoval to Sun Valley at Sun Valley City Hall on July 27, 2012 (Donoval Aff., Record 441; Record 88).

¹⁰ See Idaho Mountain Express news articles of March 21, 2012, "Sun Valley pursues city wide audit"; April 4, 2012, "Sun Valley pursues contract with forensic audit firm"; April 11, 2012, "Sun Valley moves to retain outside law firm – City wants confidentiality as it initiates forensic audit"; April 19, 2012, "Forensic audit-related items on today's council agenda"; May 2, 2012, "Sun Valley establishes finance committee – Council members to provide additional oversight of payables"; June 13, 2012, "Investigations ongoing" (Record 191-196).

On July 27, 2012, Mr. Donoval appeared at Sun Valley City Hall to review the records he had requested in the Credit Card Record Requests, as well as the three other public record requests Mr. Donoval had served on Sun Valley back on March 26, 2012¹¹ (Donoval Aff., Record 441; Donoval Supp. Aff., Record 638-639). At the July 27, 2012 document review, Mr. Donoval was told by Executive Assistant Egger that she was “in charge” (Donoval Supp. Aff., Record 638). During the July 27, 2012 inspection of documents, Executive Assistant Egger showed Mr. Donoval copies of some of the documents sought in the Credit Card Record Requests, but no original documents (Donoval Aff., Record 441; Donoval Supp. Aff., Record 638). At the July 27, 2012 inspection, when Mr. Donoval asked Executive Assistant Egger where the original documents were, she responded that she was not “authorized” to provide Mr. Donoval with any original documents and thereafter refused to answer any more of Mr. Donoval’s questions (Donoval Supp. Aff., Record 639). In addition, many of the documents that Executive Assistant Egger provided to Mr. Donoval at the July 27, 2012 inspection, and which Mr. Donoval had pre-paid for, had no relation to the requests made in any of the six (6) public record requests submitted by Mr. Donoval (Donoval Supp. Aff., 638-639). At the end of the July 27, 2012 inspection, Mr. Donoval took copies of any of the documents that related to the Credit Card Record Requests, which included only Former Administrator Hammer’s credit card statements, and a few Yellow Sheets associated with Former Administrator Hammer’s credit card statements, that had been included in the stack of documents Mr. Donoval reviewed (Donoval Aff., Record 441). At the end of the July 27, 2012 inspection, Executive Assistant Egger told Mr. Donoval that she would

¹¹ Mr. Donoval had no disputes with Sun Valley in regards to the documents produced in relation to the other three public record requests (Donoval Supp. Aff., Record 639) and did not seek judicial review related to those three public record requests.

review the documents associated with Former Treasurer Frostenson's and Former Fire Chief Carnes' credit cards and provide Mr. Donoval with copies (Donoval Aff., Record 441), effectively admitting that none of the documents associated with Former Treasurer Frostenson's or Former Fire Chief Carnes' credit cards had been included in the stack of documents provided by Sun Valley and Executive Assistant Egger to Mr. Donoval at the July 27, 2012 inspection.

c) Five Weeks Of Sun Valley's Refusal To Comply With The Record Requests

Immediately after the July 27, 2012 inspection, Mr. Donoval informed City Attorney King in two separate writings of the failures of Sun Valley and Executive Assistant Egger to provide anywhere near the extent of records covered by the Credit Card Record Requests or to produce the original documents Mr. Donoval had sought be produced, and, specifying exactly what Mr. Donoval was still expecting for Sun Valley to come into compliance with the Credit Card Record Requests (Donoval Aff., Record 442; Record 90; Record 92). As Mr. Donoval and Former Administrator Hammer had already been notified by Sun Valley employees that Former Treasurer Frostenson, Assistant Clerk Kinsey-Lovey, and other Sun Valley employees were shredding hundreds, if not thousands, of pages of Sun Valley documents at the direction of Executive Assistant Egger (Hammer Aff., Record 493-494; Donoval Aff., Record 450-451), Mr. Donoval specifically stated to City Attorney King:

“Please provide some type of verification as to whether these yellow sheets for each credit card bill is in Sun Valley's possession, and what happened to them if they are not. These documents were always in the Treasurer's possession, and if they are no longer available we believe Frostenson and Sun Valley has some explaining to do.” (Donoval Aff., Record 442; Record 90).

On August 2, 2012, City Attorney King sent Mr. Donoval an email asserting that the remainder of the records Mr. Donoval had sought in the Credit Card Record Requests were “completed and available” for Mr. Donoval to pick up at Sun Valley City Hall (Donoval Aff., Record 442; Record 96). The packet of photocopies provided to Mr. Donoval in the envelope Mr. Donoval picked up at Sun Valley City Hall on August 3, 2012 continued to fail to provide multiple of the credit card statements for Former Treasurer Frostenson’s or Former Fire Chief Carnes’ Sun Valley issued credit cards, and multiple Yellow Sheets associated with Former Administrator Hammer’s, Former Treasurer Frostenson’s and Former Fire Chief Carnes’ Sun Valley issued credit cards (Donoval Aff., Record 442-443). The continued failure of Sun Valley to fully comply with the Credit Card Record Requests, again, required Mr. Donoval to submit a written demand to City Attorney King that Sun Valley produce the specific credit card statements and Yellow Sheets associated with the credit card statements for Former Administrator Hammer’s, Former Treasurer Frostenson’s and Former Fire Chief Carnes’ Sun Valley issued credit cards that had still not been produced (Donoval Aff., Record 443; Record 102).

On August 8, 2012, Mr. Donoval submitted another formal letter to City Attorney King detailing what had transpired to date (as is described above) (Donoval Aff., Record 443; Record 105-107). The August 8, 2012 letter to City Attorney King specifically put City Attorney King on notice that the Yellow Sheets that had been provided in response to the Credit Card Record Requests were forgeries, and again insisted that Mr. Donoval be allowed to inspect the “original” Yellow Sheets from which the photocopies had been made by August 10, 2012 (Donoval Aff., Record 443; Record 105-107). On August 9,

2012, Mr. Donoval submitted another letter to City Attorney King related to the physical inspection of the original documents to take place on August 10, 2012, which included a draft schedule to be jointly completed by Mr. Donoval and Executive Assistant Egger and/or City Attorney King to confirm what original documents (or copies) had been produced and which original documents (or copies) had not been produced pursuant to the Credit Card Record Requests (Donoval Aff., Record 444; Record 110-113). At approximately 7:00 p.m. on August 9, 2012, City Attorney King submitted an email to Mr. Donoval asserting that:

“The original documents that you have referenced that you are seeking are in the possession of the Attorney General’s Office pursuant to a subpoena served on the City Of Sun Valley in the criminal investigation. Therefore, there will be no additional documents to inspect, so you will not need to come to City Hall tomorrow. The City Of Sun Valley is continuing to investigate the matter and if any originals that you seek are located, I will let you know.” (Donoval Aff., Record 444; Record 115)

Almost everything about City Attorney King’s August 9, 2012 email to Mr. Donoval was eventually found to have been fallacious. First, no Subpoena was ever issued to Sun Valley by either the Idaho Attorney General’s office or the Blaine County Prosecutor’s office related to the documents described in the Credit Card Record Requests¹². Second, an attorney with the Idaho Attorney General’s office confirmed that the Idaho Attorney Generals’ office was not in possession of the documents covered by Credit Card Record Requests (Donoval Aff., Record 447; Record 464) as had been claimed by City Attorney King. This was also confirmed in an Affidavit provided by the Idaho Attorney General’s office confirming that the Idaho Attorney General’s office was not in possession of any of the documents covered by the Credit Card Record Requests

¹² Neither Sun Valley, the Idaho Attorney General’s office or the Blaine County Prosecutor’s office submitted a copy of a Subpoena to Sun Valley as part of their pleadings (Record, 255-259; Record 382-391), nor was a Subpoena ever made part of the record herein.

and stating that *the Idaho Attorney General's office could not verify that any documents that were provided to the Idaho Attorney General's office by Sun Valley included the documents covered by the Credit Card Record Requests* (Donoval Aff., Record 448, Record 466-468). And third, almost half of the Yellow Sheets Mr. Donoval sought in the Credit Card Record Requests were never provided to Mr. Donoval at any time through the entire proceedings, although City Attorney King asserted that *all the records* Mr. Donoval had sought in the Credit Card Record Requests were provided to the Idaho Attorney General's office.

On August 10, 2012, Mr. Donoval submitted an extensive email to City Attorney King demanding that City Attorney King provide multiple answers to Mr. Donoval related to the Credit Card Record Requests, including a) that City Attorney King provide Mr. Donoval with a copy of the Subpoena City Attorney King claimed had been served upon Sun Valley by the Idaho Attorney General's office; b) that either City Attorney King or some other Sun Valley official vouch that the documents covered by the Credit Card Record Requests were actually turned over to the Idaho Attorney General's office, c) that either City Attorney King or some other Sun Valley official certify that the documents provided to Mr. Donoval were actually copied from the documents purportedly turned over to the Idaho Attorney General's office; and, d) that an explanation be provided for when the copies of the original documents covered by the Credit Card Record Requests were actually made (i.e. prior to, or after, Former Treasurer Frostenson's departure from Sun Valley) (Donoval Aff., Record 444; Record 117). City Attorney King never responded to Mr. Donoval's email of August 10, 2012

Later in the day of August 10, 2012, after Mr. Donoval sent the email to City Attorney King, Mr. Donoval received several additional copies of documents in the mail in an envelope marked as being from “The City Of Sun Valley”, postmarked August 8, 2012, but without any indication of who exactly took responsibility for actually sending the documents to Mr. Donoval (Donoval Aff., Record 445; Record 126). The documents Mr. Donoval received in the envelope included copies of all the missing credit card statements associated with Former Treasurer Frostenson’s and Former Fire Chief Carnes’ Sun Valley issued credit cards (Donoval Aff., Record 445). In addition, copies of several of the still missing Yellow Sheets associated with Former Administrator Hammer’s, Former Treasurer Frostenson’s and Former Fire Chief Carnes’ Sun Valley issued credit cards were provided to Mr. Donoval in the envelope, but multiple of the Yellow Sheets covered by the Credit Card Record Requests were still not provided (Donoval Aff., Record 446). In fact, a schedule was provided as part of the envelope Mr. Donoval received on August 10, 2012, apparently prepared by a Sun Valley official, that admitted that seven (7) of the Yellow Sheets associated with Former Administrator Hammer’s Sun Valley issued credit card had still not been provided to Mr. Donoval, that seven (7) of the Yellow Sheets associated with Former Treasurer Frostenson’s Sun Valley issued credit card had still not been provided to Mr. Donoval, and that six (6) of the Yellow Sheets associated with Former Fire Chief Carnes’ Sun Valley issued credit card had still not been provided to Mr. Donoval (Donoval Aff., Record 446).

On August 10, 2012, Mr. Donoval also submitted letters to both the Idaho Attorney General’s office and the Blaine County Prosecutor’s office, describing the history of the Credit Card Record Requests, detailing that the Yellow Sheets that had

been provided were forgeries, and demanding that if either possessed any of the documents covered by the Credit Card Record Requests that Mr. Donoval be allowed to review those documents (Donoval Aff., Record 445; Record 119-123). The Idaho Attorney General's office eventually responded by Affidavit, as has been described herein, confirming that it did not possess the documents covered by the Credit Card Record Requests¹³. As will be described further, Mr. Donoval did not receive any form of response regarding the August 10, 2012 letter to the Blaine County Prosecutor's office until October of 2012, well after suit had been filed herein (Donoval Aff., Record 448). Having not received the remaining Yellow Sheets he was entitled to receive under the Credit Card Record Requests, and having instead been provided forgeries, Mr. Donoval filed the Complaint herein on August 20, 2012 (Record 1-18) with Exhibits (19-198).

In summary, by the time that Mr. Donoval eventually filed the Complaint herein on August 20, 2012, almost half of the Yellow Sheets that had been required to have been completed by Former Treasurer Frostenson and attached to the credit card statements pursuant to Sun Valley financial operating policies, which Former Treasurer Frostenson had sworn under oath to the Sun Valley City Council that she had obtained and possessed before paying the credit cards pursuant to the Credit Card Policy and Idaho Statute 50-208, and which both Former Mayor Willich and Former Administrator Hammer had sworn under oath were in Former Treasurer Frostenson's possession in January of 2012, were not produced for Mr. Donoval's review by Sun Valley (Donoval Aff., Record 446). And, Sun Valley provided Mr. Donoval with no ***original*** documents for any of the public records Mr. Donoval sought in the Credit Card Record Requests (Donoval Aff., Record

¹³ Mr. Donoval did not receive the response of the Idaho Attorney General's office until after he had already filed the Complaint herein (Donoval Aff., Record 447).

446), even though Mr. Donoval had made multiple, formal, written requests to Sun Valley and City Attorney King to do so.

More disturbing, is that the copies of Yellow Sheets which were produced by Sun Valley to Mr. Donoval are asserted by both Former Mayor Willich and Former Administrator Hammer to be forgeries (Hammer Aff., Record 490-491; Willich Aff., Record 576). Former Administrator Hammer has sworn that the initials purporting to be hers on the Yellow Sheets produced by Sun Valley are not her initials, and has given examples from official Sun Valley records indicating what her real initials look like (Hammer Aff., Record 490-491; Record 524-531), and which look nothing like the scribbled single “S” purporting to be Ms. Hammer’s initial(s) on any of the Yellow Sheets actually provided by Sun Valley in response to the Credit Card Record Requests (see Record 505-522; Record 533-547; Record 549-557). And both Former Mayor Willich and Former Administrator Hammer certified that most, if not all, of the Yellow Sheets produced by Sun Valley are not legitimate, as neither would have initialed a Yellow Sheet if the preceding person had not already initialed the Yellow Sheet (i.e. Former Treasurer Frostenson for Former Administrator Hammer, and, both Former Treasurer Frostenson and Former Administrator Hammer for Former Mayor Willich) (Hammer Aff., Record 491-492; Willich Aff., Record 576-577)¹⁴. In addition, in many of the Yellow Sheets actually provided (see Record 505-522; Record 533-547; Record 549-557), no Sun Valley City Council Member initials were obtained by Former Treasurer Frostenson, which was another formal requirement placed upon Former Treasurer

¹⁴ It should be noted that most of the copies of the Yellow Sheets produced (see Record 505-522; Record 533-547; Record 549-557) are missing at least one, if not multiple, initials that Former Treasurer Frostenson was required to obtain before actually paying the credit card bills pursuant to the Credit Card Policy and *Idaho Statute 50-208*.

Frostenson before she was authorized to pay any of the expenditures incurred on the Sun Valley issued credit cards.

It is also curious that almost all of the copies of the Yellow Sheets produced by Sun Valley (see Record 505-522; Record 533-547; Record 549-557) are dated well after the balances due on the credit card statements had been already paid (some by as much as three months)¹⁵, even though the Yellow Sheets were to have been prepared and Former Treasurer Frostenson was to have obtained the proper initials before any of the credit card expenditures were actually paid.

Both Former Mayor Willich and Former Administrator Hammer have certified that had they known that Former Treasurer Frostenson was violating the approval procedures for paying credit card bills and retaining credit card related records, that both would have sought Former Treasurer Frostenson's immediate termination as the Sun Valley Treasurer (Hammer Aff., Record 492-493; Willich Aff., Record 577-578)¹⁶.

d) The Credit Card Authorization Documentation Public Records Law Suit

Based on City Attorney King's false claims that the documents covered by the Credit Card Record Requests were in the possession of the Idaho Attorney General's office pursuant to a Subpoena, Mr. Donoval named both Sun Valley and the Idaho Attorney General's Office as Defendants in the Complaint filed on August 20, 2012 in the matter (Record, 1-18).

¹⁵ For example, the credit card invoice for Former Administrator Hammer's Sun Valley issued credit card for July of 2010 in the sum of \$1,568.90 shows that it was paid on August 10, 2010 (Record 172), although the Yellow Sheet for that credit card invoice is not even dated until a month later on September 6, 2011 (Record 507).

¹⁶ Neither Former Mayor Willich or Former Administrator Hammer had the authority to unilaterally terminate Former Treasurer Frostenson, as only the Sun Valley City Council could terminate Former Treasurer Frostenson pursuant to both Idaho statute and Sun Valley Personnel Policies.

On September 4, 2012, after the Complaint herein had already been filed, Mr. Donoval received an email from City Attorney King asserting that City Attorney King had been misled by Former Treasurer Frostenson (who had already resigned her position as the Sun Valley Treasurer) when he had stated that the documents covered by the Credit Card Record Requests had been turned over to the Idaho Attorney General's office pursuant to a Subpoena (Donoval Aff., Record 447-448)¹⁷. City Attorney King asserted that the original documents covered by the Credit Card Record Requests had not been turned over *pursuant to a Subpoena* to the *Idaho Attorney General's office* after all, but had instead been *voluntarily* turned over to the *Blaine County Prosecutor's office* on an unspecified date, and that the copies that had been provided to Mr. Donoval in response to the Credit Card Record Requests were actually copies of the copies that had been retained by Sun Valley itself (Donoval Aff., 447; Record 272). In his email of September 4, 2012, City Attorney King failed to explain why Mr. Donoval still had not been provided with copies of at least half of the Yellow Sheets covered by the Credit Card Record Requests.

Because of City Attorney King's admitted mea culpa (purposeful or otherwise) related to whether the Idaho Attorney General's office possessed any of the records covered by the Credit Card Record Requests, and because Mr. Donoval received the Affidavit filed by the Idaho Attorney General's Office (Donoval Aff., Record 448; Record 466-478), Mr. Donoval was required to go through the effort of dismissing the Idaho Attorney General's office from the case (Record 263-268), which was granted by

¹⁷ It is hard to fathom how, as the Sun Valley City Attorney, City Attorney King could not have been acutely aware of any of the facts associated with the release of any Sun Valley public records, and instead was apparently relying on the oral assertions of Former Treasurer Frostenson, who was no longer even an employee of Sun Valley by this time, without City Attorney King having adequately investigated the whereabouts of the original documents sought by Mr. Donoval in the Credit Card Record Requests.

the District Court on October 12, 2012 (Record 269). However, because City Attorney King had now asserted that the Blaine County Prosecutor held the documents covered by the Credit Card Record Requests, Mr. Donoval was also required to seek leave to add the Blaine County Prosecutor's office as a defendant in the matter (Record 263-269), which was also granted by the District Court on October 12, 2012 (Record 269). On October 22, 2012, Mr. Donoval filed the Amended Complaint in the matter herein naming the Blaine County Prosecutor's office as a defendant (Record 294-321) with Supplemental Exhibits (Record 270-293).

On October 14, 2012, the Blaine County Prosecutor's office issued a letter to Mr. Donoval asserting that Mr. Donoval could not review any of the documents in its possession that had been provided by Sun Valley because they were part of a criminal investigation (Donoval Aff., Record 448-449; Record 470), even though Mr. Donoval already had copies of Yellow Sheets at issue¹⁸.

On November 13, 2012, Sun Valley filed its unverified Answer To Amended Complaint (Record 322-379). On November 23, 2012, Sun Valley filed its unverified Objection (Record 392 -410). No affidavits or other sworn-to testimony was provided by Sun Valley to describe what type of investigations (if any) were performed by Sun Valley officials related to the documents covered by the Credit Card Record Requests, and what in particular Former Treasurer Frostenson had done with the fully authorized Yellow Sheets. Sun Valley merely asserted, unsupported by any sworn-to statements of any Sun Valley officials, that the Yellow Sheets that had not been provided to Mr. Donoval "did

¹⁸ Mr. Donoval had issued a second letter to the Blaine County Prosecutor dated September 25, 2012 again requesting that Mr. Donoval be able to physically inspect the original documents covered by the Credit Card Record Requests that Sun Valley and City Attorney King asserted had been turned over to the Blaine County Prosecutor's office, under the supervision of the Blaine County Prosecutor's office (Donoval Aff., Record 448; Record 288-293).

not exist”, and therefore Sun Valley had complied with Mr. Donoval’s Credit Card Record Requests. Sun Valley also asserted that because Mr. Donoval had not checked the box for the review of original documents in Sun Valley’s standard request for public records form (Record 43; Record 58; Record 74) that Sun Valley was not obligated to provide any of the original documents Mr. Donoval sought, notwithstanding the multiple written and oral requests Mr. Donoval had made to Sun Valley officials (i.e. Executive Assistant Egger), City Attorney King, the Idaho Attorney General’s office and the Blaine County Prosecutor’s office for the physical inspection of those original documents before Mr. Donoval filed suit.

On November 28, 2012, the Blaine County Prosecutor’s office issued a letter to Mr. Donoval confirming that the criminal investigation was concluded and that Mr. Donoval could inspect the records in the possession of the Blaine County Prosecutor’s office (Donoval Aff., Record 449; Record 472). On December 31, 2012, Mr. Donoval inspected the Sun Valley records being held by the Blaine County Prosecutor’s office under the supervision of staff of the Blaine County Prosecutor’s office (Donoval Supp. Aff., 640-641). The documents Mr. Donoval reviewed at the Blaine County Prosecutor’s office included fourteen (14) files, which included credit card statements, back-up documents and some Yellow Sheets for Sun Valley credit cards for the periods of September of 2010 through October of 2011 (Donoval Supp. Aff., Record 640-641). At the December 31, 2012 inspection, after at least six (6) months of making demands, Mr. Donoval was finally able to actually physically inspect the original credit card statements and back-up documents he sought in the Credit Card Record Requests (Donoval Supp. Aff., Record 640-641).

However, the December 31, 2012 physical inspection of the Yellow Sheets continued to be a problem. Although Mr. Donoval did physically inspect the original Yellow Sheets in the possession of the Blaine County Prosecutor's Office for some of the months at issue, there continued to be no production of any originals (or copies) of a) seven (7) of the Yellow Sheets associated with Former Administrator Hammer's credit card, b) six (6) of the Yellow Sheets associated with Former Treasurer Frostenson's credit card, and c) four (4) of the Yellow Sheets associated with Fire Chief Carnes' credit card (Donoval Supp. Aff., Record 640-641), even though Former Mayor Willich and Former Administrator Hammer had certified under oath that all of the properly authorized Yellow Sheets for each credit card statement were in Former Treasurer Frostenson's possession in at least January of 2012 when both left office (Hammer Aff., Record 492; Willich Aff., 577). And, the original Yellow Sheets that were reviewed by Mr. Donoval continued to be the same Yellow Sheets that both Former Mayor Willich and Former Administrator Hammer asserted under oath included forgeries of at least their initials (Donoval Supp. Aff., Record 640-641).

Mr. Donoval thereafter filed his Memorandum In Support Of Amended Complaint For Production Of Public Records Pursuant To The Idaho Public Writings Law (Record 608-633), supported by the aforementioned Affidavit Of Wayne Willich Former Mayor Of Sun Valley (Record 572-606), the aforementioned Affidavit Of Sharon R. Hammer Former Sun Valley City Administrator Of The City Of Sun Valley (Record 485-571), an Affidavit Of James R. Donoval (Record 438-484), and, a Supplemental Affidavit Of James R. Donoval (Record 637-646).

Because the Blaine County Prosecutor's office had allowed Mr. Donoval to physically review all of the documents in its possession, Mr. Donoval filed a Motion To Dismiss the Blaine County Prosecutor's office from the matter (Record 634-636), which was granted by the District Court on January 15, 2013 (Record 665).

On January 10, 2013, Attorney Naylor filed an Affidavit which included a letter dated February 9, 2012 from Attorney Naylor to Scott Birch of the Idaho Attorney General's office, indicating that Attorney Naylor had sent documents (including *credit card statements*) to Mr. Birch, although a) none of the copies of the documents Attorney Naylor purportedly had sent to Mr. Birch were attached to the Affidavit, b) a detailed log of the documents sent to Mr. Birch was not included with the letter or made part of Attorney Naylor's Affidavit, and, c) the letter failed to specify that Attorney Naylor had also sent any of the *Yellow Sheets*, as opposed to just *credit card statements*, to Mr. Birch.

On January 14, 2013, Attorney Naylor filed an Affidavit (Record 651-664) confirming that Mr. Donoval had checked the box entitled "I wish to examine these records" on the Sun Valley standard public record request form in regards to the previously described Original Public Records Law Suit.

e) Judge Brody's Ruling

At a January 15, 2013 hearing, Judge Brody determined that he would not require that an evidential hearing be scheduled related to the circumstances surrounding the failure of Sun Valley to produce the remaining Yellow Sheets (or any of the legitimate Yellow Sheets as far as Mr. Donoval was concerned) or that Sun Valley explain the forgery allegations related to the Yellow Sheets pursuant to the Affidavits of Former

Mayor Willich and Former Administrator Hammer, as had been requested in Mr. Donoval's filings (Record 632). Instead, at the January 15, 2013 hearing, Judge Brody heard oral arguments, and allowed Attorney Naylor, in essence, to testify, as to the circumstances of Sun Valley's efforts to respond to the Credit Card Record Requests, based on Attorney Naylor's own non-verified impressions, rather than affidavits or other sworn-to testimony of Sun Valley officials. Attorney Naylor was allowed to assert at the January 15, 2013 hearing that statements in many of the letters and other communications to Mr. Donoval by City Attorney King were truthful or accurate, even though (unlike Mr. Donoval's sworn to statements) none of the statements made by City Attorney King in letters or emails to Mr. Donoval were verified to be truthful ***under oath***. In fact, Mr. Donoval argued at the January 15, 2013 hearing, that considering City Attorney King's proven falsifications related to a) that Mr. Donoval was to have received all of the documents covered by the Credit Card Record Requests in the August 2, 2012 package (which did not happen), b) that the Idaho Attorney General's office was in possession of documents that were covered by the Credit Card Record Requests (when it did not have them), and, c) that the documents covered by the Credit Card Record Request were turned over by Sun Valley to either the Idaho Attorney General's office or the Blaine County prosecutor's office pursuant to Subpoenas (when they were not) - that City Attorney King simply was not a credible source of information in the matter.

On February 14, 2013, Judge Brody issued his Memorandum Decision (Record 666-674), finding that the ***sole*** remedy for a person seeking public records is to compel the issuance of records not produced (Record 670). Judge Brody found that the documents Mr. Donoval sought were "public records" and that Sun Valley made no

claims that it was entitled to any exemption from disclosure under the Idaho Public Writing statutes (Record 671). However, Judge Brody found as a matter of law that, even though Sun Valley had not provided documents that Mr. Donoval sought, Sun Valley had not “denied” Mr. Donoval’s public record requests (Record 671). Instead, Judge Brody found that Sun Valley had fully responded by asserting that the documents sought by Mr. Donoval did not currently exist, even though Sun Valley never denied that they had “existed” at some point (Record 671). Judge Brody made no findings as to legitimacy of the Yellow Sheets asserted to be forgeries, but instead concluded that those documents (apparently even if forgeries) complied with the requirements of the Idaho Public Writing statutes (Record 671-672). As to the seventeen (17) Yellow Sheets that were never provided in either original or copy version, Judge Brody found that the Idaho Public Writing statutes provide no authority for the District Court to require Sun Valley to explain what happened to those records (Record 672-673).

ISSUES PRESENTED FOR REVIEW

I) Did the District Court err as a matter of law by failing to recognize the District Court's inherent authority pursuant to Idaho Public Writings Laws, *Idaho Code 3-303 et. seq.*, and in particular *Idaho Code Sections 9-337* through *9-348* (the Idaho Public Writings statutes), to mandate Sun Valley to respond to allegations of loss and destruction of public records demanded to be produced by Mr. Donoval and to allegations of falsification and forgery of documents that were produced in response to the public record requests submitted by Mr. Donoval to Sun Valley?

II) Did the District Court err as a matter of law in failing to require Sun Valley to respond, under oath, pursuant to Idaho Public Writings statutes , *Idaho Code 9-303 et. seq.*, and in particular *Idaho Code Sections 9-337* through *9-348*, as to the whereabouts of public records that were not produced pursuant to a public records request or were alleged to have been forged or falsified, in response to a public records request?

III) Did the District Court err as a matter of law or abuse its discretion in failing to enter penalties of \$1,000 per document pursuant to *Idaho Statute 9-345* that were failed to be produced or falsified and forged by Sun Valley against either Sun Valley Mayor DeWayne Briscoe or the individual designated as the "custodian" of such records pursuant to *Idaho Statute 9-337(3)*?

ATTORNEY'S FEES ON APPEAL

The Appellant seeks attorneys' fees on appeal, pursuant to Idaho Appellate Court Rule 41.

ARGUMENT

Issue I

Did the District Court err as a matter of law by failing to recognize the District Court's inherent authority pursuant to Idaho Public Writings Laws, Idaho Code 9-303 et. seq., and in particular Idaho Code Sections 9-337 through 9-348 (the Idaho Public Writings statutes), to mandate Sun Valley to respond to allegations of loss and destruction of public records demanded to be produced by Mr. Donoval and to allegations of falsification and forgery of documents that were produced in response to the public record requests submitted by Mr. Donoval to Sun Valley?

The relevant portions of Idaho Statute 9-338 related to the right of Mr. Donoval to seek the disclosure of the Sun Valley public records sought in the Credit Card Record Requests state:

“(1) Every person has a right to examine and take a copy of any public record of this state and there is a presumption that all public records in Idaho are open at all reasonable times for inspection except as otherwise expressly provided by statute.

(2) The right to copy public records shall include the right to make photographs or photographic or other copies while the records are in the possession of the custodian of the records using equipment provided by the public agency or independent public body corporate and politic or using equipment designated by the custodian.

(3) Additionally, the custodian of any public record shall give the person, on demand, a certified copy of it if the record is of a nature permitting such copying or shall furnish reasonable opportunity to inspect or copy such record.

(4) A public agency or independent public body corporate and politic may require that a request for public records be submitted to it in a writing that provides the requester's name, mailing address, e-mail address and telephone number. A request for public records and delivery of the public records may be made by electronic mail.

(6) The custodian shall not review, examine or scrutinize any copy, photograph or memoranda in the possession of any such person and shall extend to the person all reasonable comfort and facility for the full exercise of the right granted under this act.”

The relevant portion of the definitions section of the Idaho Public Writings statutes found in Idaho Statute 9-337 related to who the particular Sun Valley official responsible for the production of the public records sought by Mr. Donoval in the Credit Card Record Requests was states:

“(3) “Custodian” means the person having personal custody and control of the public records in question. If no such designation is made by the public agency or independent public body corporate and politic, then custodian means any public official having custody of, control of, or authorized access to public records and includes all delegates of such officials, employees and representatives.”

The relevant portions of Idaho Statute 9-339 of the Idaho Public Writings statutes related to Sun Valley’s responsibility for responding to Mr. Donoval’s Credit Card

Record Requests state:

“(1) A public agency or independent public body corporate and politic shall either grant or deny a person’s request to examine or copy public records within three (3) working days of the date of the receipt of the request for examination or copying. If it is determined by employees of the public agency or independent public body corporate or politic that a longer period of time is needed to locate or retrieve the public records, the public agency or independent public body corporate and politic shall so notify in writing the person requesting to examine or copy the records and shall provide the public records to the person no later than ten (10) working days following the person’s request.

(2) If the public agency or independent public body corporate and politic fails to respond, the request shall be deemed denied within ten (10) working days following the request.

(3) If the public agency or independent public body corporate and politic denies the person’s request for examination or copying the public records or denies in part and grants in part the person’s request for examination and copying of the public records, the person legally responsible for administering the public agency or independent public body corporate and politic or that person’s designee shall notify the person in writing of the denial or partial denial of the request for the public record.

(4) The notice of denial or partial denial shall state that the attorney for the public agency or independent public body corporate and politic has reviewed the request or shall state that the public agency or independent public body corporate and politic has had an opportunity to consult with an attorney regarding the request for examination or copying of a record and has chosen not to do so. The notice of denial or partial denial shall also indicate the statutory authority for the denial and indicate clearly the person’s right to appeal the denial or partial denial and the time periods for doing so.”

There is little guidance, if any, in any of the Idaho Public Writings statutes themselves, related to the scenario described herein, namely, where Sun Valley asserted that approximately half of the Yellow Sheets sought by Mr. Donoval in the Credit Card

Record Requests “do not exist” or “no longer existed”, notwithstanding that the two highest ranking officials of Sun Valley through January of 2012 (i.e. Former Mayor Willich and Former Administrator Hammer) certified under oath that all of the fully authorized Yellow Sheets related to the Credit Card Record Request were completed, and were in the possession of Former Treasurer Frostenson, when both left office in January of 2012. What Sun Valley asserted to the District Court, without providing any sworn-to evidence describing what efforts Sun Valley officials made to locate any of the Yellow Sheets, was that Sun Valley did not *deny* Mr. Donoval’s Credit Card Record Requests pursuant to Idaho Statute 9-339, but that instead Sun Valley *fully responded* to the Credit Card Record Request by providing what Mr. Donoval (and Former Mayor Willich and Former Administrator Hammer) asserts are falsified Yellow Sheets, and otherwise telling Mr. Donoval that the remainder of the Yellow Sheets “do not exist”.

Idaho General Precedent Related To Public Records

Idaho case law and legal precedent provide little guidance as to the issue of what efforts must be made by public officials, such as Sun Valley’s public officials, to comply with the production requirements of Idaho Statute 9-339. Computer research of Idaho cases finds that no Idaho cases even mention Idaho Statute 9-339, nonetheless discuss the efforts that an Idaho public entity must make to come into compliance with Idaho Statute 9-339. And although the Idaho Public Records Manual issued by the Idaho Attorney General (October 2012) covers a broad range of topics related to the disclosure of public records, there is no mention anywhere in the Idaho Public Records Manual of what efforts a public entity must make to ensure that public records requested are searched for

and located, before a public entity can claim that they “do not exist” (or “no longer exist”), as Sun Valley asserted related to the Credit Card Record Requests.

However, this Honorable Court should take into consideration, and seek guidance from, three recent and seminal Idaho cases related to disclosure of public records.

In regards to who bears the burden of proof as to whether documents have been produced in accordance with Idaho Public Writing statutes, in *Bolger v. Lance*, 137 Idaho 792, 53 P.3d 1211 (Id. Sup.Ct. 2002), this Honorable Court described that “the statutory scheme for disclosure of public records, and this Court’s interpretation thereof, clearly envisions that, in responding to an order to show cause, the agency bears the burden of persuasion and must “show cause” or prove, that the documents fit within one of the narrowly-construed exemptions.” (@ 796)

In *Ward v. Portneuf Medical Center*, 150 Idaho 501, 248 P.3d 1236, (Id. Sup.Ct. 2011), this Honorable Court found that the transfer of a public entity to a private entity did not change the status of previously defined public records to private records. In doing so, this Honorable Court analyzed the intent of the Idaho Public Writing statutes, by confirming that in enacting the Idaho Public Writing statutes that the Idaho Legislature intended to ensure the “broad presumption in favor of disclosure” (@ 504-505). In *Ward v. Portneuf*, this Honorable Court went on to describe that the Idaho Legislature intended that once a document is classified as public, that the public entity has no right to alter the status of the document by any means, including “by dissolution, sale or other means.” (@ 505-506) In *Ward v. Portneuf*, this Honorable Court concluded that “so long as the document qualifies as a public record at the time of the request and is not subject to any

exemptions, its subsequent transfer to a non-government entity does not affect its status as a public record.” (@507)

And in *Henry v. Taylor*, 152 Idaho 155, 267 P.3d 1270 (Id. Sup.Ct. 2012), in a footnote, this Honorable Court concluded that public records that remain in the possession of an employee that is terminated or resigns, does not convert the documents into private, as opposed to public, records, making the documents still subject to disclosure. (@ 158)

In regards to the facts associated with this case, this Honorable Court can take guidance from *Bolger v. Lance*, to confirm that it was, and arguably still is, the burden of Sun Valley to “show cause” as to why the Yellow Sheets were never produced, including all forty two (42) of the original, non-forged Yellow Sheets which Former Mayor Willich and Former Administrator Hammer assert were in the possession of Former Treasurer Frostenson and Sun Valley when they both left office in January of 2012. Having failed to provide any sworn-to testimony from any Sun Valley officials in the pleadings before the District Court related to the whereabouts of the non-produced Yellow Sheets or what lead to their demise, this Honorable Court should conclude that Sun Valley failed its burden to explain the whereabouts of the Yellow Sheets covered by the Credit Card Record Requests. And based on *Ward v. Portneuf* and *Henry v. Taylor*, this Honorable Court is certainly entitled to conclude that Sun Valley could not avoid its obligations to produce documents covered by the Credit Card Record Requests by the mere “voluntary” transfer of the documents to either the Idaho Attorney General’s office or the Blaine County Prosecutor’s office (arguable in violation of both *Idaho Statute 50-908* and *Idaho*

Statute 90-349(3)), or because they may have remained in the possession of Former Treasurer Frostenson since her resignation as the Sun Valley Treasurer in June of 2012.

Federal Guidance In Regards To Freedom Of Information Requests

Several Federal cases regarding Federal freedom of information (“FOI”) requests provide guidance as to the efforts a public entity must make to search for public records, and what pleading requirements (including the submission of affidavits) must be made by the public entity when the requester files a law suit seeking records not produced.

In 1974, in Renegotiation Board v. Bannerkraft Clothing Co., Inc., 415 U.S. 1, 94 S.Ct. 1028 (U.S. Sup.Ct. 1974), the U.S. Supreme Court discussed that the intent of the Federal FOI Act was to provide courts with inherent and broad authority, not necessarily specifically described in the FOI Act, to ensure that public entities disclose public records. The Renegotiation Board case confirmed that in an FOI Act matter the burden is on the agency to sustain its actions in failing to provide records. (@ 13) In Renegotiation Board, the U.S. Supreme Court stated:

“The broad language of the FOIA, with its obvious emphasis on disclosure and with its exemptions carefully delineated as exceptions; the truism that Congress knows how to deprive a court of broad equitable power when it chooses to ... makes the District Court the enforcement arm of the statute ... With the express vesting of equitable jurisdiction in the district court by Sec. 552(a), there is little to suggest, despite the Act’s primary purpose, the Congress sought to limit the inherent powers of an equity court.” (@ 19)

In Laughlin v. Commissioner Of IRS, 103 F.Supp.2d 1219 (U.S. S.D.Cal. 1999), the U.S. District Court for the Southern District Of California, extensively discussed the situation where a governmental agency asserts that a document sought under a FOI request has been lost or destroyed. Citing two other federal cases on the matter (Miller v.

U.S. Dept. Of State, 779 F.2d 1378 (U.S. 8th.App. 1985) and Weisberg v. U.S. Dept. Of Justice, 705 F.2d 1344 (U.S. D.C. 1983)), the Laughlin v. IRS Court stated:

“In a case where missing or destroyed documents are at issue, in order to grant a summary judgment in favor of an agency’s claim that it has fully discharged its disclosure obligations under FOIA, the agency must show **beyond a material doubt** (emphasis added) that it has conducted a search reasonably calculated to uncover all relevant documents. The emphasis is not on whether any further documents might conceivably exist but rather whether the government’s search for responsive documents was adequate.

The adequacy of an agency’s search is dependent on the particular circumstances of the case. The burden remains on the agency to demonstrate that it has thoroughly searched for the requested documents where they might reasonably be found. The reasonableness of an agency’s search may be **proved through affidavits of responsible agency officials** (emphasis added) so long as the affidavits are relatively detailed, nonconclusory, and submitted in good faith.

Once the agency has shown **by convincing evidence** (emphasis added) that its search was reasonable, the burden is on the complainant to rebut the agency’s evidence by showing that the search was not conducted in good faith.” (@ 1222)

In Island Film, S.A. v. Dept. Of Treasury, 869 F.Supp.2d 123 (U.S. D.C. 2012) the U.S. District Court for the District of Columbia, in an FOI Act case, reiterated the requirement that the agency bears the burden of confirming that it made the required search and that the agency must verify the effort by non-conclusory affidavits of agency officials entered into the record. (@ 131). The Island Film v. Treasury Court went on to state that the “affidavits or declarations must describe what records were searched, by whom, and through what process.” (@131)

As recently as March of this year, in Lazaridis v. U.S. Dept. Of State, -- F.Supp.2d --, 2013 WL 1226607 (U.S. D.C. 2013), the U.S. District Court for the District of Columbia, also confirmed that when litigation ensues related to public records under the FOI Act, and when the agency has not produced the requested records, the agency must provide affidavits describing the extent of its search for the public records at issue, including “using methods which can reasonably be expected to produce the information

requested.”. The *Lazaridis v. Dept Of State* Court confirmed that “***an inadequate search for records also constitutes an improper withholding*** (emphasis added) under the FOIA” (citing *Maydak v. U.S. Dept. Of Justice*, 254 F.Supp.2d 23 U.S. D.C. 2003)).

In the last year, both Pennsylvania and New York courts have confirmed that under their state public record disclosure statutes that a governmental agency must provide verified and sworn-to testimonials of the efforts made to seek the documents requested. In *Office Of Governor v. Scolforo*, 65 A.3d 1095 (Comm. Ct. Of Penn. 2013), the Commonwealth Court Of Pennsylvania followed the Federal court rulings under FOI Act cases that affidavits must be submitted to justify nondisclosure or failure to produce documents sought in a public record request. (@1103) And in *Legal Aid Society v. New York Dept. Of Corrections*, 962 N.Y.S.2d 773, 105 A.D.3d 1120 (Sup.Ct. N.Y.3d 2013), the New York Supreme Court, Appellate Division, confirmed that an agency’s response to failure to produce documents sought in a public record request was not complete until a certification was filed describing that the requested records could not be found after a diligent search was made. (@ 1122)

Sun Valley Failed To Provide The Requisite Sworn-To Testimony As To The Efforts Made To Search For The Requested Documents, Making the Failure To Produce The Forty Two (42) Fully Authorized Yellow Sheets An Improper Denial Of Mr. Donoval’s Public Records Requests As A Matter Of Law

As is explained in the Statement Of Fact section herein, there is no sworn-to evidence in the record as to what happened to the forty two (42) fully authorized Yellow Sheets sought in the Credit Card Record Requests after Former Mayor Willich and Former Administrator Hammer left office in January of 2012.

Although City Attorney King made multiple statements related to the records sought by Mr. Donoval (most of them inaccurate or outright fallacious), City Attorney

King filed no affidavit in the matter describing his acts, or other Sun Valley officials' acts, related to the search for the original fully authorized, and non-falsified, Yellow Sheets Mr. Donoval sought be produced in the Credit Card Record Requests.

Although Executive Assistant Egger made clear that she was "in charge" at the July 27, 2012 inspection of the documents at Sun Valley City Hall, Executive Assistant Egger filed no affidavit in the matter describing her, or other Sun Valley officials', efforts in seeking the original fully authorized, and non-falsified, Yellow Sheets. In addition, Executive Assistant Egger gave no rebuttal to the accusations that she had directed the destruction of hundreds, if not thousands, of original Sun Valley records, including the records sought by Mr. Donoval, without Sun Valley City Council authority, as is required pursuant to Idaho Statute 50-907 and 50-908, and which would have subjected Executive Assistant Egger (as well as Former Treasurer Frostenson and Assistant Clerk Kinsey-Lovey) to felony criminal charges pursuant to Idaho Statute 18-3201.

Former Treasurer Frostenson filed no affidavit in the matter describing what happened to the original, fully authorized Yellow Sheets. Former Treasurer Frostenson filed no affidavit to explain why she had appeared before the Sun Valley City Council, under oath (as is specified in Idaho Statute 50-208), verifying that she had obtained all necessary sign-offs on the Yellow Sheets, when apparently she had not, potentially subjecting Former Treasurer Frostenson to criminal perjury charges. Former Treasurer Frostenson never responded to the sworn-to allegations of both Former Mayor Willich and Former Administrator Willich that in November and December of 2011 Former Treasurer Frostenson had removed financial records of Sun Valley from Sun Valley City Hall (presumably including the Yellow Sheets at issue), in violation of Idaho Statute 50-

908 and Idaho Statute 90-349(3). As was the case with Executive Assistant Egger, Former Treasurer Frostenson did not respond to the allegations that she took part in a massive effort to destroy Sun Valley public records, without Sun Valley City Council approval, in violation of Idaho Statute 50-907, and subjecting Former Treasurer Frostenson to potential felony charges under Idaho Statute 18-3201. And finally, as this Honorable Court noted in Henry v. Taylor, just because Former Treasurer Frostenson resigned her position as the Sun Valley Treasurer in June of 2012, did not make any records that she held, or continues to hold, any less subject to disclosure, or eliminate the need of Former Treasurer Frostenson to respond to public record requests¹⁹.

Current Mayor Briscoe failed to respond in any way to the allegations in the Complaint (Record 16-17) and the Amended Complaint (Record 319-320) that the reason for the refusal of Sun Valley to produce many of the Yellow Sheets sought by Mr. Donoval (and the forgery of others) was because there was an active scheme on the part of Sun Valley officials, including Current Mayor Briscoe himself, to purposefully destroy any Yellow Sheets which contained Current Mayor Briscoe's authorization, to remove Current Mayor Briscoe from any liability for having personally approved credit card expenditures as the President of the Sun Valley City Council, because such actions were being investigated by the still pending forensic audit Sun Valley had commenced. As the ultimate "custodian" of public records of Sun Valley pursuant to Idaho Statute 9-337, and the "person legally responsible" for responding to public record request pursuant to Idaho Statute 9-339(3), absent specific designation of some other person, at a minimum, Current Mayor Briscoe should have filed the requisite affidavit regarding the actions of

¹⁹ This requirement also applies to Executive Assistant Egger, who also resigned her position with Sun Valley during the proceedings herein.

Sun Valley in searching for all of the Yellow Sheets Mr. Donoval sought in the Credit Card Record Requests - but instead Current Mayor Briscoe remained silent in regards to the entire matter.

And finally, Attorney Naylor's Affidavit (Record 647-650), asserting that he sent a letter to the Idaho Attorney General's office which purportedly included some documents, does very little, if anything, for Sun Valley's cause. The letter confirms that Attorney Naylor purportedly sent *credit card statements, not the Yellow Sheets* Mr. Donoval was seeking, to the Idaho Attorney General's office. There is simply no verified statements in the record, by Attorney Naylor nor anyone else, as to the how's, when's and what's of any documents that were actually transferred to either the Idaho Attorney General's office or the Blaine County Prosecutor's office²⁰. Even the Idaho Attorney General's office's Affidavit confirmed that it could not verify that any of the documents covered by the Credit Card Record Requests were ever provided to the Idaho Attorney General's office (Record 467-468). Attorney Naylor never responded, under oath or otherwise, as to the allegations by both Former Mayor Willich and Former Administrator Hammer that he also had removed original public records from Sun Valley City Hall (potentially including the Yellow Sheets at issue) in December of 2011, without either Former Mayor Willich's or Former Administrator Hammer's authority, in violation of both Idaho Statute 50-908 and Idaho Statute 9-349(3). In addition, there is no sworn-to testimony in the record related to Attorney Naylor's relationship with Sun Valley or how

²⁰ Although Attorney Naylor's letter is dated February 9, 2012 (Record 650), there is no verified statements in the record as to when the Yellow Sheets which Mr. Donoval eventually viewed at the Blaine County Prosecutor's office on December 31, 2012 (Donoval Aff, Record 640-641) were actually transferred to the Blaine County Prosecutor's office, and by whom. Without such verified statements by someone with knowledge, neither the District Court, nor this Honorable Court, can possibly conclude that Sun Valley was no longer in possession of the Yellow Sheets Mr. Donoval sought at any time prior to Mr. Donoval filing suit on August 20, 2012 (Record 1-18).

he came to have authority to voluntarily release original Sun Valley public records in violation of both Idaho Statute 50-908 and Idaho Statute 90-349(3), making Attorney Naylor's transfer of Sun Valley public records to either the Idaho Attorney General's office or the Blaine County Prosecutor's office a *per se* violation of this Honorable Court's findings in Ward v. Portneuf that any transfer of documents from a public entity to anyone else violates public records procedures.

In summary, Judge Brody issued the Memorandum Decision, finding that Sun Valley had fully complied with the Credit Card Record Requests, although no verified testimony was ever garnered from any Sun Valley officials as to the effort made to locate the original Yellow Sheets Mr. Donoval sought, nor responding to the allegations of Mr. Donoval that the denial of the production of the forty two (42) original, fully authorized Yellow Sheets Mr. Donoval sought was done in bad faith.

Issue II

Did the District Court err as a matter of law in failing to require Sun Valley to respond, under oath, pursuant to Idaho Public Writings statutes, Idaho Code 9-303 et. seq., and in particular Idaho Code Sections 9-337 through 9-348, as to the whereabouts of public records that were not produced pursuant to a public records request or were alleged to have been forged or falsified, in response to a public records request?

As has been previously described, as a court of equity, a court hearing public records matters has a broad range, rather than a limited range, of authority, in determining whether a government entity has complied with a public records request (see Renegotiation Board, Weisberg v. Justice, Laughlin v. IRS, Island Film v. Treasury, Lazaridis v. State, and Maydak v. Justice. In Tamayo v. U.S. Dept. Of Justice, 544 F.Supp.2d 1341 (U.S. S.D.Fla 2008) the U.S. District Court for the Southern District of Florida described that Court's authority to seek discovery in a public records matter,

especially where the issue of the public entity's efforts to search for records sought is at issue. After first describing the requirement that a public entity must submit affidavits describing its efforts to locate documents covered by a public records request, the Tamayo Court, in analyzing several previous Federal cases regarding the FOI Act, stated: "Discovery is permitted when there is a genuine issue as to the adequacy of the agency's search, its identification and retrieval procedures, or its good/bad faith. Usually after the agency has moved for summary judgment, limited discovery can be allowed when the plaintiff can show evidence of agency bad faith or that an exemption should not apply." (@1344) (citations omitted)

There is no question that in making his rulings related to the production of the documents sought under the Credit Card Record Requests, that Judge Brody believed he had no authority to demand further sworn-to evidence by Sun Valley, or to require that further evidence be garnered before he made any of his rulings, as had been sought by Mr. Donoval.

Mr. Donoval's submissions to the District Court, supported by Affidavits, clearly asserted that:

a) Former Treasurer Frostenson potentially committed criminal perjury under Idaho Statute 50-208, be appearing before the Sun Valley City Council and certifying, under oath, that she had obtained the requisite sign-offs on the credit card statements, when apparently she had not;

b) In November and December of 2011, both Former Treasurer Frostenson and Attorney Naylor removed original public records (including potentially the Yellow Sheets covered by the Credit Card Record Requests) from Sun Valley City Hall in violation of Idaho Statutes 50-908 and Idaho Statute 90-349(3);

c) Executive Assistant Egger, Former Treasurer Frostenson and Assistant Clerk Kinsey-Lovey destroyed substantial amounts of Sun Valley public records (including potentially the Yellow Sheets covered by the Credit Card Record

Requests) in violation of Idaho Statute 50-907, potentially subjecting them all to felony prosecution under Idaho Statute 18-3201;

d) Attorney Naylor, without any specified authority, voluntarily transferred Sun Valley public records, including the Yellow Sheets covered by the Credit Card Record Requests, to either the Idaho Attorney General's office or the Blaine County Prosecutor's office, in violation of Idaho Statute 50-908 and Idaho Statute 90-349(3); and,

e) Sun Valley and its employees and officials refused to produce the Yellow Sheets Mr. Donoval demanded, and prepared the forgeries of the Yellow Sheets that were produced, as part of a scheme to remove Current Mayor Briscoe from any liability for approving Sun Valley credit card expenditures during his tenure as the President of the Sun Valley City Council, as was being investigated by the pending forensic audit.

Mr. Donoval placed into the record, sufficient, if not overwhelming, sworn-to evidence that Sun Valley refused to provide Mr. Donoval the Yellow Sheets he demanded, and instead provided him with forgeries of Yellow Sheets, in bad faith. Judge Brody assumed that he had no additional authority to subject Sun Valley to either additional discovery, or to hold the evidential hearing that Mr. Donoval requested, before making his rulings, based on the non-verified brief filed by Attorney Naylor on behalf of Sun Valley, and the oral argument of Attorney Naylor, which merely asserted that the documents "did not exist" (or "no longer existed"). As with any court of equity, Judge Brody certainly possessed almost unlimited authority to demand additional evidence be submitted by Sun Valley related to its efforts to search for, and obtain, the documents sought by Mr. Donoval. Having failed to do so, Judge Brody denied Mr. Donoval his right to ensure that Sun Valley made the requisite efforts to find the Yellow Sheets in question, including providing sworn testimony of all Sun Valley officials involved, as to the circumstances related to the loss or destruction of the original forty two (42) Yellow Sheets that had been prepared prior to the approval of the credit card expenditures at

issue by the Sun Valley City Council, and which were in Former Treasurer Frostenson's possession in at least January of 2012.

Issue III

Did the District Court err as a matter of law or abuse its discretion in failing to enter penalties of \$1,000 per document pursuant to Idaho Statute 9-345 that were failed to be produced or falsified and forged by Sun Valley against either Sun Valley Mayor DeWayne Briscoe or the individual designated as the "custodian" of such records pursuant to Idaho Statute 9-337(3)?

Idaho Statute 9-345 states as follows:

"If the court finds that a public official has deliberately and in bad faith improperly refused a legitimate request for inspection or copying, a civil penalty shall be assessed against the public official in an amount not to exceed one thousand dollars (\$1,000), which shall be paid into the general account."

As has been detailed herein, the failure of Sun Valley to adequately search for the public records Mr. Donoval sought, or to detail by verified statements in the record what process and efforts Sun Valley officials followed to seek the forty two (42) original and authorized Yellow Sheets, was a *per se* denial of Mr. Donoval's Credit Card Record Requests (see Lazaridis v. Dept Of State and Maydak v. Dept. Of Justice).

Judge Brody denied Mr. Donoval's request that some Sun Valley "custodian" or other responsible party be assessed penalties pursuant to Idaho Statute 9-345 for purposefully refusing to search for, or provide, any of the forty two (42) original and authorized Yellow Sheets Mr. Donoval was seeking in the Credit Card Record Requests. Mr. Donoval asserts to this Honorable Court that a) whereas Sun Valley failed to adequately search for the Yellow Sheets at issue, and provided no certified testimony in the record as to what efforts Sun Valley officials made to find the records sought by Mr. Donoval, and, b) whereas Sun Valley and its officials purposefully failed to provide Mr. Donoval with the legitimate Yellow Sheets related each of the forty two (42) credit card

statements at issue in the Credit Card Record Requests, and instead provided Mr. Donoval with forgeries of approximately half of the Yellow Sheets, all in an effort to insulate Current Mayor Briscoe from any responsibility for approving the credit card expenditures at issue while he was the President of the Sun Valley City Council – that this Court enter findings that either Current Mayor Briscoe (as the ultimate “custodian” and responsible party of Sun Valley), or some other individual, be assessed fines for each of the forty two (42) original, authorized Yellow Sheets Mr. Donoval sought, but that were never produced for Mr. Donoval, due to their bad faith actions.

CONCLUSION

This Honorable Court should recognize that Judge Brody acknowledged that Sun Valley officials did not deny that the Yellow Sheets Mr. Donoval sought “existed” at one time (Record 671). Sun Valley simply could not thereafter avoid the disclosure of the records sought by the purposeful destruction, or unauthorized removal or transfer, of those records. And, this Honorable Court should recognize that Judge Brody found that there was only a “possibility” that the Yellow Sheets Mr. Donoval sought were “taken” or otherwise transferred from Sun Valley’s possession (Record 673), confirming that the fully authorized Yellow Sheets could still be in Sun Valley’s possession.

Mr. Donoval also asserts that a falsified or forged record, cannot, by definition, be considered a “public record”, as it has not been officially sanctioned by the public body (i.e. the Sun Valley City Council in this situation). Therefore, considering the uncontroverted affidavits of both Former Mayor Willich and Former Administrator Hammer that the initials purporting to be their initials on the Yellow Sheets provided to Mr. Donoval, were not their initials, until the District Court first made findings related to

the legitimacy of the Yellow Sheets that were provided to Mr. Donoval, the District Court was prohibited from finding that the Yellow Sheets that were provided to Mr. Donoval were even “public records”.


There is no question that Sun Valley failed in its burden to provide affidavits or other sworn-to evidence in the record as to the extent of efforts Sun Valley made to locate and produce all forty two (42) of the original authorized Yellow Sheets which “existed” at one time and which Mr. Donoval sought in the Credit Card Record Requests, as opposed to the forgeries that were ultimately produced. As is described in Laughlin v. IRS, the burden of Sun Valley was to show “**beyond a material doubt**”, based on “**convincing evidence**”, **by affidavit**, that Sun Valley officials had taken all necessary efforts to locate all forty two (42) of the original, authorized Yellow Sheets Mr. Donoval sought in the Credit Card Record Requests.

Considering a) the sworn-to allegations regarding both Former Treasurer Frostenson’s and Attorney Naylor’s unauthorized removal and transfer of financial records (potentially including the Yellow Sheets Mr. Donoval was seeking), b) the sworn-to allegations of unauthorized destruction of public records by Executive Assistant Egger, Former Treasurer Frostenson, and Assistant Clerk Kinsey-Lovey (also potentially including Yellow Sheets Mr. Donoval was seeking), and c) the sworn-to allegations that the Yellow Sheets provided to Mr. Donoval were forgeries - all of which was asserted to have been done to insulate Current Mayor Briscoe from responsibility for approving Sun Valley credit card expenditures while Current Mayor Briscoe was the President of the Sun Valley City Council because of the pending forensic audit – leave this Honorable Court with no other conclusion but that Sun Valley failed to adequately respond to the

Credit Card Record Requests submitted by Mr. Donoval – and did so in bad faith. As a failure to adequately investigate a public record request is a *per se* denial of such a request (see Lazaridis v. Dept Of State and Maydak v. Dept. Of Justice), Judge Brody should have found (and this Honorable Court must find), that as a matter of law, Sun Valley improperly denied Mr. Donoval’s Credit Card Record Requests.

As a court making a de novo ruling of review of a denial of a public record request, and with as much equitable authority as the District Court, this Honorable Court has a wide array of options in making its findings. Pursuant to Idaho Statute 9-345, this Honorable Court can assess fines against Current Mayor Briscoe, or any other person (or all persons) it defines as being responsible for the failure to comply with Mr. Donoval’s requests for production of documents.

However, Mr. Donoval suggests that the most equitable procedure would be for this Honorable Court to remand the matter back to the District Court with directions that Sun Valley be required to provide affidavits of all persons involved (including City Attorney King, Attorney Naylor, Current Mayor Briscoe, Executive Assistant Egger, Assistant Clerk Kinsey-Lovey, and particularly Former Treasurer Frostenson) describing their actions in the matter, and answering the forgery allegations, and that Mr. Donoval be allowed to thereafter take depositions of each person related to a) the disappearance of the forty two (42) original, fully authorized Yellow Sheets, and, b) the forgeries actually provide to Mr. Donoval.


Respectfully Submitted
Plaintiff James R. Donoval