

11-12-2013

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

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# IN THE SUPREME COURT OF IDAHO

JAMES R. DONOVAL,  
Appellant-Plaintiff,

v.

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

)  
)  
)  
) No. 40853  
)  
)  
)

## APPELLANT'S REPLY BRIEF

Including

A) Objections To Improper Citations To Unverified Information Not Included In  
The Record On Appeal And Other Impermissible References In The Respondent's  
Brief

B) Response To The Issue Raised In The Respondent's Cross-Appeal

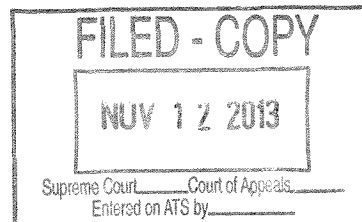
Appeal from the District Court of the Fifth Judicial District, State Of Idaho,  
in and for the County of Blaine  
HONORABLE JONATHAN BRODY, Presiding District Judge  
Case No. CV-2010-600

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## PRELIMINARY MATTERS

### I) Sun Valley Has Improperly Sought To Redefine The Three Specific Issues Presented To The Supreme Court By Mr. Donoval In The Appellant's Brief, Rather Than Just Responding To The Issues Presented By Mr. Donoval In The Appellant's Brief

In the Appellant's Brief, Mr. Donoval makes clear three separate issues on appeal, namely, I) Did the District Court fail to recognize the District Court's inherent authority to mandate Sun Valley to respond to allegations of loss and destruction of the public records Mr. Donoval sought and which were never produced by Sun Valley?; II) Did the District Court err in failing to require Sun Valley to respond, under oath, as to the whereabouts of the public records that Mr. Donoval sought or as to the efforts made by Sun Valley to locate the records sought by Mr. Donoval?; and, III) Did the District Court err by not designating the Sun Valley "custodian" of records pursuant to Idaho Statute 9-337(3) and entering penalties of \$1,000 per document that was not produced by Sun Valley for Mr. Donoval, against whoever is defined as the "custodian" pursuant to Idaho Statute 9-345?

Instead of directly and accurately responding to Mr. Donoval's well defined issues in the Appellant's Brief, in the Respondent's Brief, Sun Valley has instead attempted to redefine what Mr. Donoval is actually seeking from the Supreme Court by claiming throughout the entire Respondent's Brief that Mr. Donoval is seeking that the District Court (or the Supreme Court) file *criminal charges* against Sun Valley officials or that the District Court (or the Supreme Court) assess *criminal penalties* against Sun Valley officials<sup>1</sup>. In fact, there are forty eight (48)

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<sup>1</sup> For example, on Page 1 of the Respondent's Brief, Sun Valley asserts that Mr. Donoval is seeking that Sun Valley officials be assessed "\$87,000" in *criminal* fines. Nowhere in the Appellant's Brief is the sum of "\$87,000" ever mentioned or that any Sun Valley officials should be *criminally* charged as part of the public records proceedings. Instead, Mr. Donoval has sought that the District Court or the Supreme Court designate who was the "custodian" of the Sun Valley public records sought by Mr. Donoval pursuant to Idaho Statute 9-337(3), and that fines of \$1,000

separate uses of the phrase “criminal” or references that Mr. Donoval is seeking either a *criminal investigation* or *criminal prosecution* of Sun Valley officials in this proceeding in the Respondent’s Brief, when such is simply not true. Nowhere in the Appellant’s Brief has Mr. Donoval sought that any Sun Valley officials be *criminally* charged as part of the public records request or the proceedings herein, or that any *criminal* fines be assessed against any Sun Valley officials. Mr. Donoval has very succinctly requested that the documents he sought from Sun Valley be produced, or that the requisite explanation be made, under oath, as to the loss or destruction of the documents Mr. Donoval sought, including describing, under oath, the circumstances surrounding the efforts made by Sun Valley officials to locate the documents that were never produced. If the Supreme Court finds that Sun Valley officials improperly withheld or failed to produce documents Mr. Donoval sought, then the provisions of Idaho Statute 9-345 should be enforced and the Sun Valley “custodian” of public records should be assessed the \$1,000 per document penalty provided for in Idaho Statute 9-345 related to such failure<sup>2</sup>. There is an inherent difference between Mr. Donoval seeking that Sun Valley “produce” documents it is mandated to produce under the Idaho Public Writings laws, and the District Court or the Supreme Court *criminally* penalizing Sun Valley officials for the failure to produce or for destroying the documents Mr. Donoval sought. Any statements in the Respondent’s Brief (which are numerous) attempting to re-define the issues presented to the Supreme Court by Mr. Donoval should be stricken or ignored by the Supreme Court, both in the Respondent’s Brief and at oral argument.

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“per document” be assessed against such person for each public record determined not to have been produced to Mr. Donoval as is provided for in Idaho Statute 9-345 (see pages 46-47 of Appellant’s Brief).

<sup>2</sup> It should be noted that any fines that are assessed pursuant to Idaho Statute 9-345 do not go to Mr. Donoval, but are paid to the “general account” of the State Of Idaho. So any assertions that Mr. Donoval is seeking fines pursuant to Idaho Statute 9-345 for his own benefit, are simply fallacious.

**II) Mr. Donoval's Intent Or Motive Is Statutorily Irrelevant In A Public Records Case, And Thus Sun Valley's Allegations Of Mr. Donoval's Purported Improper Intent Should Be Stricken And/Or Ignored By The Supreme Court**

*Idaho Statute 9-338(5)* specifically prohibits the governmental entity from whom public records are sought from making “any inquiry of any person who requests a public record”<sup>3</sup>.

Sun Valley has made multiple statements in the Respondent's Brief describing Mr. Donoval's malicious or nefarious intent in seeking the public records. Early in the Respondent's Brief, Sun Valley summarizes what it believes to be Mr. Donoval's reasoning for seeking the public records at issue, unsupported by any reference to the Record On Appeal, in a clear effort to assert that Mr. Donoval's basis for seeking the documents somehow should affect the Supreme Court's decision.

“This lawsuit arises generally out of events in Sun Valley related to Sharon R. Hammer's (Donoval's wife) tenure as Sun Valley City Administrator, and various allegations of wrongdoing by her in connection with the management of city affairs. In addition to this case, those events resulted in the other lawsuits (and counting) involving Donoval as either a party or as counsel for his wife.” (citing in Footnote 2 of the Respondent's Brief to several Idaho District Court cases). (Respondent's Brief, Pg. 3)

Separate from the fact that nothing in this little soliloquy can be found anywhere in the Record On Appeal, and therefore must be stricken from the Respondent's Brief (or ignored by the Supreme Court), this type of “inquiry” into the reasons for why Mr. Donoval sought the public records at issue is clearly barred by *Idaho Statute 9-338(5)*, whether it was at the initial Sun Valley denial level, at the District Court level, or on appeal herein.

Further on in the Respondent's Brief, Sun Valley continues to make assertions about Mr. Donoval's intent by stating that:

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<sup>3</sup> *Idaho Statute 9-338(5)* makes three exceptions, none of which are at issue here, namely a) to verify the identity of the requester, b) to ensure the requester is not using the information for mass mailings, and c) to protect personal information.

“Donoval’s factually unfounded allegations in this case of criminal misconduct, including that Mayor Briscoe “allowed” a break-in and theft of public records and that Sun Valley officials destroyed and forged yellow sheets . . . combined with Donoval’s formal request of referral for criminal prosecution, even though plainly not authorized under the Public Records Law, raises concern regarding Rule 4.4., and generally reflects the frivolous nature of the law suit”. (Respondent’s Brief, Pg. 22)

And on Page 29, of the Respondent’s Brief Sun Valley asserts:

“Donoval seeks to criminally prosecute Sun Valley by putting officials on the stand so that he can inquire into his personal allegations of criminal activity and have civil penalties imposed. This attempt to commandeer the role of the prosecutor and/or attorney general, and to expropriate a civil penalty scheme to stand in for criminal sanctions, has no basis in law”

Even if Mr. Donoval was seeking the public records to eventually turn over to the Blaine County Prosecutor as evidence that either Former Treasurer Frostenson had lied under oath to the Sun Valley City Council in obtaining approval to pay the credit card expenditures in the first place, or that Sun Valley officials (i.e. Current Mayor Briscoe, Former Treasurer Frostenson, Executive Assistant Egger, Assistant Clerk Kinsey-Lovey, and Attorney Naylor himself) were removing or potentially criminally destroying or falsifying public records regarding the approval of the credit card transactions at issue herein – those motives are not improper.

The fundamental reason why public records laws are in place in the first place is for citizens to ensure that their government officials are not performing acts of misconduct, including acts of potential criminal misconduct. And Sun Valley, in the Respondent’s Brief, even admits that a civil court can refer matters it discovers during proceedings for criminal prosecution<sup>4</sup>. So, Sun Valley’s criticism of Mr. Donoval’s intent as evidence of some evil plot is misplaced, because ensuring that government officials are not acting illegally is a legitimate pursuit, and is well within a citizen’s rights. Just as Attorney Naylor’s own referral of allegations

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<sup>4</sup> In the Respondent’s Brief, Sun Valley confirms that “a court generally has the discretion to refer a matter for criminal prosecution if the court believes such is warranted.” (Respondent’s Brief, Pg. 22).



of criminal misconduct on the part of prior Sun Valley administration officials to the Idaho Attorney General's office or the Blaine County Prosecutor's office is apparently proper conduct, it was legitimate for Mr. Donoval to provide notice to the District Court that some of the actions of current Sun Valley officials related to the public records at issue may have criminal implications.

However, Sun Valley's questioning of Mr. Donoval's intent is simply prohibited by statute, and thus any and all reference to Mr. Donoval's intent or motive, including the specific quotes described above, should be stricken from the Respondent's Brief and/or ignored by the Supreme Court, both in the Respondent's Brief and at oral argument.

**III) The Uncontradicted Actions And Misconduct Of Sun Valley Officials In The Record Are Highly Relevant To Mr. Donoval's Claims Of Sun Valley's "Bad Faith" Refusal To Produce Documents**

As is detailed in the Appellant's Brief (Appellant's Brief, Pg. 37-39), once the question is raised that the government entity has not produced documents that are in its possession, or that the government entity has not adequately searched for the records being sought in "good faith", the efforts of the government and "bad faith" of the government entity can be questioned by the person seeking the documents. There are a multitude of purported "bad faith" acts of Sun Valley officials that were asserted by Mr. Donoval in the Appellant's Brief, supported by the Affidavits of Mr. Donoval (Record 438-434 and 637-646), Former Administrator Hammer (Record 485-571) and Former Mayor Willich (Record 572-606), that have not been responded to by Sun Valley, in either verified or non-verified form, including:

- a) Over the course of 2010 and 2011, Former Treasurer Frostenson potentially committed perjury under *Idaho Statute 50-208*, by appearing before the Sun Valley City Council and certifying, under oath, that she had obtained the requisite sign-offs on the Yellow Sheets covered by the Credit Card Record Requests, when 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 without Former Administrator Hammer's or Former Mayor Willich's approval, potentially in violation of Idaho Statutes 50-908 and Idaho Statute 9-349(1);

c) During early 2012, 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) During February of 2012, the Sun Valley Elkhorn Fire Station was broken into, potentially by Sun Valley employees or officials, and the documents that may have been covered by the Credit Card Record Requests, and specifically the Yellow Sheets associated with the Sun Valley Fire Department credit card use, were stolen or destroyed;

e) City Attorney King admitted that he told Mr. Donoval that the public records at issue were turned over to the Idaho Attorney General's office *pursuant to a Subpoena*, when, in fact, no such Subpoena ever existed. City Attorney King subsequently admitted that the documents Mr. Donoval sought were instead *voluntarily* turned over to the Idaho Attorney General's office<sup>5</sup>;

f) Attorney Naylor, a third party insurance company appointed attorney, admitted that, *without any specified authority*, he voluntarily transferred Sun Valley public records, including the credit card invoices and Yellow Sheets covered by the Credit Card Record Requests, to the Idaho Attorney General's office, in violation of Idaho Statute 50-908 and Idaho Statute 9-349(1);

g) City Attorney King told Mr. Donoval that all of the documents that were covered by the Credit Card Record Requests had been produced to Mr. Donoval, and yet additional documents covered by the Credit Card Record Requests thereafter continued to be sent to Mr. Donoval by Sun Valley officials. Sun Valley asserts that these later found documents had been "inadvertently overlooked"<sup>6</sup>;

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<sup>5</sup> In the Respondent's Brief, Sun Valley asserts that this was a *simple mistake* on the part of City Attorney King (i.e. "King was actually mistaken") (see Respondent's Brief, Pg. 8). Considering that City Attorney King was the highest ranking legal official in the City Of Sun Valley, and should have been made aware of the service of any Subpoenas on Sun Valley, and should have known whether Sun Valley public records were being released to other government entities either voluntarily or pursuant to a Subpoena, Mr. Donoval believes he has the right to assert that City Attorney King's claims that Sun Valley had been served a Subpoena by either the Idaho Attorney General's office or the Blaine County Prosecutor's office was no simple mistake but a purposeful lie to Mr. Donoval by City Attorney King.

<sup>6</sup> After City Attorney King had told Mr. Donoval in writing that he had been provided *all* documents covered by the Credit Card Record Requests, Sun Valley sent Mr. Donoval additional documents not previously produced (Donoval

h) The twenty five (25) Yellow Sheets (of the forty two (42) requested (the “Forty Two Legitimate Yellow Sheets”)) that were eventually produced by Sun Valley to Mr. Donoval (the “Twenty Five Forgeries”) were certified under oath by both Former Administrator Hammer and Former Mayor Willich to be forgeries of their initials and/or signatures;

i) The refusal to produce the Forty Two Legitimate Yellow Sheets, and the preparation of the Twenty Five Forgeries that were eventually produced, on information and belief, was part of a scheme by Sun Valley officials to remove Current Mayor Briscoe from any liability for his own approval of Sun Valley credit card expenditures during his tenure as the President of the Sun Valley City Council, as was being investigated by the forensic audit of Sun Valley’s financial operations.

With all of these allegations of “bad faith” conduct on the part of Sun Valley and its various officials, supported by Affidavits under oath in the record before the District Court, Sun Valley chose to put no sworn-to testimony in the record before the District Court, other than two nominal, and mostly irrelevant, Affidavits of Attorney Naylor. One of Attorney Naylor’s Affidavits (Record 651-664) merely referred to public record requests Mr. Donoval had previously served on Sun Valley unrelated to this case. And Attorney Naylor’s other Affidavit (Record 647-650) merely stated that he had sent a *letter* to the Idaho Attorney General’s office, without providing any sworn-to confirmation as to exactly what *documents* were purportedly served upon the Idaho Attorney General’s office along with the letter at issue, including whether any documents covered by the Credit Card Record Requests were part of that package<sup>7</sup>. And

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Aff., Record 445; Record 126). Sun Valley asserts in the Respondent’s Brief that these documents were “inadvertently overlooked” (see Respondent’s Brief, Pg. 8). As is the case with the Subpoena issue, Mr. Donoval believes he has the right to assert that City Attorney King’s claims that Sun Valley had fully responded to the Credit Card Record Requests, when it clearly had not, was not an “inadvertent” error, but a purposeful lie to Mr. Donoval by City Attorney King. Mr. Donoval continues to believe that he also had the right, based on City Attorney King’s growing list of fallacious statements to Mr. Donoval related to the Credit Card Record Requests, to assert to City Attorney King and Sun Valley “Please excuse my skepticism” (Record, 117) in responding to City Attorney King’s continued assertions that the documents Mr. Donoval sought either did not exist or were not in Sun Valley’s possession.

<sup>7</sup> Attorney Naylor’s letter (Record 650) attached to his Affidavit (Record 647-648) will be further discussed herein. The Affidavit of Attorney Naylor merely confirms that he sent the *letter*, not the *documents* described in the letter. The documents purportedly attached to the letter were not included in the Affidavit of Attorney Naylor. Nor does the letter detail what documents were actually attached to the letter. Attorney Naylor could have expanded his

Attorney Naylor's Affidavit and letter provides no sworn-to evidence of how the documents, and what documents, eventually came into the hands of the Blaine County Prosecutor.

Through the entire proceedings, and in the Respondent's Brief, Sun Valley has simply refused to respond in any way to the multiple allegations of its own misconduct and "bad faith". In particular, Sun Valley simply chose to refuse to respond to the following six (6) highly relevant issues:

a) What Former Treasurer Frostenson or Sun Valley officials actually did with the Forty Two Legitimate Yellow Sheets.

b) How the Twenty Five Forgeries came into existence.

c) Whether Attorney Naylor and Former Treasurer Frostenson improperly removed Sun Valley public records from Sun Valley City Hall (including the documents covered by the Credit Card Record Requests) without the knowledge or approval of either Former Administrator Hammer or Former Mayor Willich, during the last few weeks of Former Mayor Willich's tenure as Mayor of Sun Valley.

d) How Attorney Naylor, as an independent contractor, insurance company appointed attorney, had any legal authority to remove original Sun Valley public records from Sun Valley City Hall or voluntarily transfer Sun Valley public records to either the Idaho Attorney General's office or the Blaine County Prosecutor's office<sup>8</sup>.

e) That documents were being shredded in Sun Valley City Hall, including documents covered by the Credit Card Record Requests, by Executive Assistant Egger, Former Treasurer Frostenson and Assistant Clerk Kinsey-Lovey.

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Affidavit to specifically include the documents which were also purportedly included with the letter – but chose not to. Mr. Donoval asserts that the reason that Attorney Naylor did not do so was because the documents covered by the Credit Card Record Requests were not actually attached to the letter included in Attorney Naylor's Affidavit, and is a further indication of Sun Valley's "bad faith" in the matter. As will be further argued, Sun Valley therefore has no right to assert in the Respondent's Brief (which it did none the less) (Respondent's Brief, Pg. 3-4) that the documents at issue were ever actually turned over to the Idaho Attorney General's office or the Blaine County Prosecutor by Attorney Naylor, as that evidence is nowhere found in the Record On Appeal (either verified or non-verified).

<sup>8</sup> As is further described, Mr. Donoval believes that even when served a Subpoena, Sun Valley had no authority to turn over any original public record to any third party, absent a Court order. Certainly, as an independent contractor, insurance company appointed attorney, Attorney Naylor had no independent authority to possess or turn over Sun Valley public records to any other government agency, absent a specific Sun Valley City Council resolution or a directive from the Mayor of Sun Valley, neither of which is present in the Record On Appeal.

f) What efforts Sun Valley officials actually made to find either the missing Forty Two Legitimate Yellow Sheets, or even the missing seventeen (17) Yellow Sheets (assuming the Twenty Five Forgeries are considered legitimate).

The fact is that there was substantial, if not overwhelming, evidence, sworn to under oath, placed in the record before the District Court, or in the Record On Appeal, that Sun Valley either a) purposefully refused to provide Mr. Donoval with documents that were in existence as of at least January of 2012, b) failed to make any legitimate search for the documents Mr. Donoval sought, c) purposefully destroyed the documents Mr. Donoval sought, and/or d) falsified the documents that Sun Valley did produce for Mr. Donoval. Sun Valley purposefully (or incompetently) failed to provide any explanation countering the verified evidence presented to the District Court by Mr. Donoval. The sworn-to evidence placed in the record before the District Court by Mr. Donoval was highly relevant, and Mr. Donoval argues conclusive, of Sun Valley's "bad faith" refusal to comply with Mr. Donoval's public record requests.

**IV) The Respondent's Brief Is Based Substantially On Factual Assertions Which Were Neither Sworn To Or Entered Into The Record Before The District Court**

*Idaho Appellate Court Rule 35(b)* requires that the respondent to an appeal file a Respondent's Brief that includes a "statement of the case to the extent that the respondent disagrees with the statement of the case set forth in the appellant's brief" (*I.A.C.R. 35(b)(3)*), and an argument "with citations to the authorities and statutes and parts of the transcript and record relied on" (*I.A.C.R. 35(b)(6)*). Inherent in the requirements of *I.A.C.R. 35(b)* is the requirement that a respondent cannot rely on statements made in writings that have been made part of the record, but which were not verified, under oath.

It should be noted that unlike Mr. Donoval who submitted an Affidavit (Record 438-484) and a Supplemental Affidavit (Record 637-646) to the District Court verifying the veracity of the

correspondences and emails entered into the record before the District Court and that they were sent and received, City Attorney King submitted no Affidavit or other verified statements to the District Court in regards to his actions or as to the truthfulness of any of his statements in those correspondences. In its Respondent's Brief, Sun Valley has relied on the multiple *unverified* statements of City Attorney King (and other Sun Valley officials) in the emails and correspondences entered into the record before the District Court.

In addition, Sun Valley has relied on unverified statements of Attorney Naylor in a letter entered into the record before the District Court (Record 650) that Attorney Naylor asserts was sent to the Idaho Attorney General's office, as if the statements in the letter themselves therefore were true and have probative value, when such is not the case. Sun Valley has also relied on the unverified "arguments" of Attorney Naylor at the January 15, 2013 hearing before the District Court as "evidence" of the actions of Sun Valley and its officials in responding to the Credit Card Record Requests.

Although there is not much Idaho case law on the issue of what is considered information outside the record on appeal, the Idaho Supreme Court has specified that it will determine what information in the record it will consider as relevant, and will not consider information outside the record on appeal (see *Lamar Corp. v. City Of Twin Falls*, 133 Idaho 36, 981 P.2d 1146 (Idaho Sup.Ct. 1999); also, *Rizzo v. State Farm Ins. Co.*, 155 Idaho 75, 305 P.3d 519 (Idaho Sup.Ct. 2013)). Other state Supreme Courts (such as in Illinois) have likewise determined that "when a party's brief relies on matters outside the record, a court of review may strike the brief, or simply disregard the inappropriate material." *Keener v. City Of Herrin*, 235 Ill.2d 338, 919 N.E.2d 913 (Ill. Sup.Ct. 2009), also *Bemis v. State Farm Fire and Cas. Co.*, 388 Ill.App.3d 687, 905 N.E.2d 285 (Ill.App. 1 Dist. 2009).

Florida courts have issued several published rulings on the issue. In Altchiler v. Dept. Of Prof Reg., 442 So.2d 349 (Fla.App. 1 Dist. 1983), the Florida Appellate Court, 1<sup>st</sup> District stated: “That an appellate court may not consider matters outside the record is so elemental that there is no excuse for an attorney to attempt to bring such matters before the court.” (@ 350). In Hutchins v. Hutchins, 501 S.2d 722 (Fla.App. 5 Dist. 1987), the Florida Appellate Court, 5th District stated “We are concerned that counsel who appear before this court clearly understand that briefs submitted to us, upon which we must rely so heavily in the discharge of our appellate function, be truthful and fair in all respects.” (@ 723)

As to the unverified statements of attorneys involved in the appellate matter, appellate counsel simply cannot rely on unsworn statements of himself/herself or any other attorneys that may be involved in the matter, just as no unverified statements of non-attorneys in a matter cannot be considered a legitimate part of the record on appeal. (see Sabina v. Dahlia Corp., 650 S.2d 96 (Fla.App. 2 Dist. 1995) “a court cannot make a factual determination based on an attorney’s **unsworn** (emphasis added) statements” (@99), and, Centennial Ins. Co. v. Fulton, 532 S.2d 1329 (Fla.App. 2 Dist. 1988) “representations of counsel as an officer of the court mean nothing” if there is a challenge to the accuracy of the attorney’s unsworn-to representations. (@ 1331).

a) Although City Attorney King’s Emails And Other Correspondences Were Entered Into The Record Before The District Court By Mr. Donoval, None Of The Statements Of City Attorney King In The Emails And Correspondences Were Entered Into The Record Under Oath

Mr. Donoval entered a multitude of emails and correspondences between Mr. Donoval and City Attorney King during July and September of 2012 into the record before the District Court (Record 88-117), as evidence of City Attorney King’s false statements to Mr. Donoval regarding the public records sought by Mr. Donoval and Sun Valley’s refusal to produce the

public records. Mr. Donoval supported his assertions in the emails and correspondences during that period by an Affidavit (Record 438-484) and a Supplemental Affidavit (Record 637-646) submitted as part of the record before the District Court.

Even though City Attorney King failed to provide an Affidavit in the record regarding the content of his statements in the emails and correspondences between July and September of 2012, in the Respondent's Brief, Sun Valley has sought to use the unverified statements of City Attorney King (and other Sun Valley officials) as if they were truthful statements. In particular (as Attorney Naylor had also done at oral argument before the District Court), Sun Valley has attempted to use the unverified statements of City Attorney King (and other Sun valley officials) to attempt to describe the "exhaustive search" (Respondent's Brief, Pg. 27) that Sun Valley officials purportedly had made to find and/or produce the documents Mr. Donoval was seeking in his public record requests. And Sun Valley's claim in the Respondent's Brief regarding Attorney Naylor's "arguments" at the January 15, 2013 hearing before the Circuit Court that "the undersigned pointed out to the District Court, as email and letter communications in the record reflect, that Sun Valley performed an exhaustive search and did not locate more responsive documents" (Respondent's Brief, Pg. 12) is simply *unverified argument asserting unverified facts*. These type of unverified claims of City Attorney King and Attorney Naylor are the exact type of assertions that are prohibited to be used as factual matters in the Respondent's Brief<sup>9</sup>. Therefore, any statements in the Respondent's Brief supported by any statements of City Attorney King in the emails and correspondences of City Attorney King (and other Sun Valley officials) during July through September of 2012, and in particular any unverified assertions as

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<sup>9</sup> On Page 27 of the Respondent's Brief, Sun Valley admits that City Attorney King's statements regarding Sun Valley's officials' purported "exhaustive search" to comply with Mr. Donoval's public record requests was an "argument" of Attorney Naylor at the January 15, 2013 hearing before the District Court, not "facts" entered into the record under oath before the District Court.



to the efforts Sun Valley officials purportedly made to locate the documents covered by the Credit Card Record Requests, should be stricken from the Respondent's Brief as being unverified, and ignored by the Supreme Court at oral argument in the matter.

b) Although Attorney Naylor's Letter Of February 9, 2012 Was Entered Into The Record Before The Circuit Court, None Of The Documents That Were Purportedly Attached To The Letter Were Made Part Of The Record Before The Circuit Court, Nor Was the Truthfulness Of Any Of The Statements In The Letter Put Into The Record By Attorney Naylor

During the course of the proceedings before the District Court, Attorney Naylor entered into the record before the District Court an Affidavit, which had attached to it a letter Attorney Naylor certified under oath that Attorney Naylor had submitted to the Idaho Attorney General on February 9, 2012 (Record 647-650). Mr. Donoval will admit that there is sufficient evidence in the record that Attorney Naylor *sent* the letter at issue to the Idaho Attorney General's office. However, the lack of further detail in Attorney Naylor's Affidavit cannot be minimized.

There is nothing in Attorney Naylor's Affidavit which indicates, under oath, that any of the documents described in the letter were actually provided to the Idaho Attorney General's office. And, there is no verified statement in the Affidavit of Attorney Naylor that the documents that Mr. Donoval eventually viewed at the Blaine County Prosecutor's office on December 31, 2012 were included in any of the documents Attorney Naylor supposedly turned over to the Idaho Attorney General's office along with the letter<sup>10</sup>. It should also be noted that the letter attached to the Affidavit of Attorney Naylor only describes the credit card *statements*, it does not describe that any of the *Yellow Sheets* Mr. Donoval was seeking were part of the documents that

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<sup>10</sup> In the letter attached to Attorney Naylor's Affidavit (Record 650), Attorney Naylor generically describes that he is including "credit card statements", but does not specifically describe what credit card statements were actually being provided, nor apparently was there a detailed log associated with the transfer of documents. There is no specific evidence in the Record On Appeal that the credit card statements that Mr. Donoval eventually viewed at the Blaine County Prosecutor's office on December 31, 2012 were actually included in the documents Attorney Naylor purportedly provided to the Idaho Attorney Generals' office. Nor is there any mention of any of the Yellow Sheets that Mr. Donoval sought in the letter.

Attorney Naylor purportedly provided to the Idaho Attorney General's office along with the letter.

In addition, there is no evidence in the record of how the documents Attorney Naylor provided to the *Idaho Attorney General's office* eventually ended up in the hands of the *Blaine County Prosecutor* such that Mr. Donoval was eventually able to review them on December 31, 2012 at the Blaine County Prosecutor's office.

As is the case with Attorney King's "mistakes" (Respondent's Brief, Pg. 8) and Sun Valley's "inadvertent" actions (Respondent's Brief, Pg. 8), Mr. Donoval simply does not believe that Attorney Naylor's failure to provide the additional explanation in his Affidavit is "inadvertent". Attorney Naylor sought for the District Court (and now the Supreme Court) to find that Attorney Naylor had turned over the Yellow Sheets sought by Mr. Donoval to the Idaho Attorney General's office, when neither Attorney Naylor's Affidavit or the letter attached, or any other verified evidence in the Record On Appeal, actually supports that assertion<sup>11</sup>.

The Supreme Court cannot ignore that there is absolutely nothing in the Record On Appeal, verified or not, as to how the documents Mr. Donoval viewed at the Blaine County Prosecutor's office on December 31, 2012 actually came into the hands of the Blaine County Prosecutor, considering that Attorney Naylor asserted that he gave the documents described in the letter attached to Attorney Naylor's Affidavit to the *Idaho Attorney General's office – not the Blaine County Prosecutor*. Considering that Sun Valley has admitted that these documents were being turned over to either the Idaho Attorney General's office or the Blaine County Prosecutor's office as part of a criminal investigation referral, the lack of any formal "chain of

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<sup>11</sup> In fact, the Affidavit of the Idaho Attorney General's office (Record 284-287) directly disavows Attorney Naylor's assertion that Attorney Naylor provided any of the documents covered by the Credit Card Record Requests to the Idaho Attorney General's office as Attorney Naylor claims in the letter attached to the Affidavit of Attorney Naylor (Record 650).

custody” documentation in the Record On Appeal related to the documents asserted to have been turned over by Attorney Naylor and/or Sun Valley, and the Idaho Attorney General’s office’s refusal to confirm that it received any of the documents covered by the Credit Card Record Requests (Record 284-287), certainly brings into question whether Attorney Naylor ever actually turned over any of the documents covered by the Credit Card Record Requests to the Idaho Attorney General’s office (or the Blaine County Prosecutor’s office), as has been asserted in the non-verified statements of Attorney Naylor

The simple fact is that there is no evidence in the Record On Appeal as to what actual documents were turned over to either the Idaho Attorney General’s office or the Blaine County Prosecutor’s office by Attorney Naylor or Sun Valley officials, *and when*, including in regards to any of the records Mr. Donoval sought in the Credit Card Record Requests, because Sun Valley failed to place any adequate verified statements in the Record On Appeal regarding the documents. Neither the District Court, or the Supreme Court, can infer that any of the records Mr. Donoval sought were not still in Sun Valley’s possession when Mr. Donoval requested them during July and August of 2012, because neither Sun Valley (or its officials), the Idaho Attorney General’s office or the Blaine County Prosecutor’s office have verified, under oath, that they were actually in possession of any of the documents Mr. Donoval sought at any particular time. There simply is no verified testimony in the Record On Appeal that Sun Valley was not still in possession of any of the documents Mr. Donoval sought in the Credit Card Record Requests in July and August of 2012, and subsequently transferred the documents to the Blaine County Prosecutor (or the Idaho Attorney General’s office) sometime thereafter.

It is axiomatic that when public officials, or attorneys representing those public officials, such as Attorney Naylor, fail to fully and completely (and under oath) detail the facts associated

with the matters they are handling, as is the case regarding what documents (if any) Attorney Naylor actually turned over to the Idaho Attorney General's office (and Attorney Naylor's insinuation that those documents somehow landed on the desk of the Blaine County Prosecutor), that any and all purported facts being claimed by the attorney (such as Attorney Naylor) come into question. In this case, other than that Attorney Naylor sent a *letter* to the Idaho Attorney General's office, there is simply no sworn-to evidence in the Record On Appeal that the *documents* Attorney Naylor asserted in the letter were actually turned over to the Idaho Attorney General's office, or that those documents were ever actually thereafter turned over to the Blaine County Prosecutor, as has been insinuated in non-verified form by Attorney Naylor. Any facts asserted by Attorney Naylor as to what documents he (or Sun Valley) actually turned over to the Blaine County Prosecutor (or the Idaho Attorney General's office), or when the purported transfer occurred, must be stricken from the Respondent's Brief and ignored by the Supreme Court at oral argument in the matter.

**V) Mr. Donoval Was Entitled To Demand The Production Of The Fictitious Subpoena(s) As They Were Also Public Records Subject To Disclosure**

Beginning on August 9, 2012, when City Attorney King told Mr. Donoval that Sun Valley had transferred the original documents that Mr. Donoval was seeking in the Credit Card Record Requests to the Idaho Attorney General's office pursuant to a Subpoena, Mr. Donoval began requesting that City Attorney King and Sun Valley produce the Subpoena(s) that City Attorney King referred to in his email to Mr. Donoval of August 9, 2012 (Record 115). Mr. Donoval immediately sent a specific written request to City Attorney King seeking the Subpoena(s) that City Attorney King had referred to in his August 9, 2012 email (Record 117).

There is no question that the Subpoena(s) City Attorney King referred to were also a “public record” as that phrase is defined in Idaho Statute 9-337(13).

Idaho Statute 9-338(4) states:

“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.”

Mr. Donoval sent a specific written request that he be provided a copy of the Subpoenas(s) referred to by City Attorney King (Record 117), which complied with every requirement of Idaho Statute 9-338(4), as a) the request was in writing, b) Sun Valley and City Attorney King were well aware of Mr. Donoval’s name, mailing address, e-mail address and telephone number, and, c) the request was made by electronic mail (as was allowed pursuant to Idaho Statute 9-338(4)). Mr. Donoval’s email notification to produce the Subpoena(a) was therefore sufficient notice pursuant to Idaho Statute 9-338(4) to require the production of the Subpoena(s).

Mr. Donoval had every right to continue to pursue the production of the Subpoena(s) City Attorney King referred to, *as a separate public record request*, until City Attorney King eventually confirmed on September 4, 2012 (Record 272) (after Mr. Donoval had already filed the Complaint herein) that City Attorney King was “mistaken” and there actually were no Subpoenas served on Sun Valley<sup>12</sup>. Sun Valley’s assertions and insinuations in the Respondent’s Brief that Mr. Donoval in some way was prohibited from seeking the fictitious Subpoena(s) that City Attorney King had asserted required Sun Valley to turn over the records Mr. Donoval was

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<sup>12</sup> City Attorney King blamed his “mistake” on faulty information he received from Former Treasurer Frostenson (Record 272), the same Former Treasurer Frostenson who was in possession of the Sun Valley credit card records Mr. Donoval sought and who had just been arguably forced to resign as the Sun Valley Treasurer because of her own misconduct during the course of the forensic audit being performed on Sun Valley’s finances.

seeking in the Credit Card Record Requests to either the Idaho Attorney General's office or the Blaine County Prosecutor, simply has no bearing on the issue of whether Mr. Donoval was entitled to continue to pursue his request to review the original documents covered by the Credit Card Record Requests and obtain copies of the documents covered by the Credit Card Record Requests.

However, the false statements about the legitimacy of the fictitious Subpoena(s) is additional evidence of Sun Valley's "bad faith" and Mr. Donoval's right to not accept the unverified statements of City Attorney King (or other Sun Valley officials) in his efforts to seek the documents covered by the Credit Card Record Requests.

**VI) Mr. Donoval Had A Legitimate Right To Oppose Allowing That The January 15, 2013 Hearing Transcript Be Entered Into The Record On Appeal, Because Sun Valley Has Used Attorney Naylor's Unverified Arguments At The Hearing As Impermissible "Evidence" Of Sun Valley's Compliance With Mr. Donoval's Public Record Requests In The Respondent's Brief.**

In Mr. Donoval's Objection To Motion To Augment opposing Sun Valley's request to add the transcript of the January 15, 2013 hearing before the District Court into the Record On Appeal, Mr. Donoval stated:

"At the oral argument on January 15, 2013, Attorney Naylor asserted, without any basis for such in the record, that Sun Valley had made substantial efforts to find the documents Mr. Donoval sought, but just could not do so. In essence, Attorney Naylor was allowed to testify (not under oath), and without doing so in the form of the requisite affidavits required by the case law cited by Mr. Donoval in the Appellant's Brief. In his Memorandum Decision ruling, Judge Brody was clearly influenced by this non-verified or sworn-to assertions of Attorney Naylor when he found that Sun Valley had done all it could to provide the documents requested by Mr. Donoval, when no such testimony or sworn-to statements relating to such were ever entered into the record for Judge Brody to have made such a conclusion.

There is no question that Sun Valley now seeks to enter the unnecessary transcript of the January 15, 2013 oral arguments to do the same thing that Attorney Naylor did at the January 15, 2013 hearing before Judge Brody, namely, to influence this Honorable Court's decision by the *un-sworn-to assertions* of Attorney Naylor himself at that hearing, rather than what should have been the *sworn-to and verified* filings and

pleadings of Sun Valley officials regarding the efforts (or lack thereof) made to discover what happened to the documents that Mr. Donoval sought in the public record requests, and to explain the falsification of the documents actually provided to Mr. Donoval. As there was no evidential testimony garnered at the January 15, 2013 hearing, the unverified comments of Attorney Naylor as to the purported efforts made by Sun Valley officials to locate the documents Mr. Donoval sought will certainly be prejudicial, and will have been in violation of the multiple cases cited by Mr. Donoval in the Appellant's Brief that require that any efforts made by the public body related to production of public records be done *pursuant to sworn-to statements* of the Sun Valley officials themselves.”

As had been feared by Mr. Donoval, in the Respondent's Brief, Sun Valley has rampantly used the unverified comments of Attorney Naylor at the January 15, 2013 to assert both that the statements of City Attorney King in the email correspondences in the record were truthful (although not supported by Affidavits) and that Sun Valley made “exhaustive” efforts to locate the records Mr. Donoval was seeking (although there is no evidence in the record of exactly what those actions actually were)<sup>13</sup>.

For example, based on Attorney Naylor arguments at the January 15, 2013 hearing, Sun Valley asserts that Mr. Donoval had admitted that he had “seen all existing public records” (Respondent's Brief, Pg. 12) – when such is simply not the case. And, based on Attorney Naylor's arguments at the January 15, 2013 hearing, Sun Valley asserts that a) “all documents that could be located had been provided” (Respondent's Brief, Pg. 12), and, b) that “Sun Valley had performed an “exhaustive” search and did not locate more responsive documents”,

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<sup>13</sup> The most noteworthy failure on the part of Sun Valley is that there is no evidence of any efforts on the part of Sun Valley to obtain a statement from Former Treasurer Frostenson regarding the whereabouts of the Yellow Sheets covered by the Credit Card Record Requests, considering that it was Former Treasurer Frostenson who had been responsible for the Sun Valley credit card records, who had been accused of taking the credit card records off of the Sun Valley premises during the final days of Former Mayor Willich's tenure as Mayor of Sun Valley, who Former Mayor Willich tried to have terminated for insubordination during the last week of his tenure as Mayor of Sun Valley, and who was accused of shredding Sun Valley records in Sun Valley City Hall prior to Former Treasurer Frostenson's abrupt resignation as the Sun Valley Treasurer (potentially for acts of misconduct) in June of 2012 during the forensic audit being conducted on Sun Valley's finances.

(Respondent's Brief, Pg. 12), when no sworn-to evidence in the Record On Appeal supports those conclusions.

Sun Valley goes on to explain its purported right to convert unverified "arguments" of Attorney Naylor at the January 15, 2013 hearing before the District Court into statements of "fact" by stating: "While the undersigned did assert during the hearing that based on the record of correspondence it was obvious Sun Valley had performed an exhaustive search (Tr. Pp. 31:23 - 32:2) such statements were, in context, plainly argument based upon what the communications in the record show. It was therefore appropriate for counsel to refer to those communications in oral argument, as it was appropriate for the District Court to consider the same in its decision." (Respondent's Brief, Pg. 27). This is the exact type of "argument" morphing into "fact" conversion that attorneys are prohibited from making during their appellate arguments (see the previously cited *Sabina v. Dahlia Corp.*, and, *Centennial Ins. Co. v. Fulton*). There is simply no sworn-to evidence in the record that any of the statements of City Attorney King in any of the emails or correspondences in the record are truthful. And there is simply no sworn-to evidence in the record of what the exact actions were that Sun Valley officials actually took to locate the documents Mr. Donoval sought in the Credit Card Record Requests. Attorney Naylor's conclusions that City Attorney King's claims were truthful or in regards to the purported "exhaustive search" Sun Valley officials took is based on no verified evidence in the Record On Appeal and simply has no legitimate or probative value. Mr. Donoval also made these same arguments to the District Court that it could not use the unverified factual claims being made by Attorney Naylor at the hearing on January 15, 2013 as evidence of any sort, by stating:

"There's no affidavits in the record in regards to the exhaustive search. There's emails from Mr. King not under oath, in affidavits that are not under oath from Ms. Egger, not under oath from anybody under oath, and yet Ms. Hammer and Mr. Willich



have gone to the extent of putting documents in the record under oath saying *they did exist* (emphasis added).

That's the point I'm making. If they wanted to deny this, they need to put something in the record under oath. Either that they searched them and they're not here now, but more importantly, what happened in January to today's date that these documents disappeared or that they never existed. That's the city's obligation right now is to put something in the record countering Mayor Willich and Ms. Hammer's Affidavits about what happened to these records. And there's nothing in the record. There's unsworn emails between parties. There's nothing in the record." (Transcript, Pg. 58).

Sun Valley's assertions in the Respondent's Brief (Respondent's Brief, Pg. 34) that Mr. Donoval had no basis for even objecting to the use of the January 15, 2013 transcript herein, should be ignored by the Supreme Court for the simple reason that Sun Valley ultimately did what Mr. Donoval feared, namely, it improperly used the statements of Attorney Naylor at the hearing of January 15, 2013 in the Respondent's Brief to seek to convert Attorney Naylor's unverified "arguments and perceptions" expressed to the District Court into "facts" to be used in the Respondent's Brief and arguments herein.

**REPLY IN SUPPORT OF THE THREE ISSUES RAISED BY MR. DONOVAL IN THE APPELLANT'S BRIEF**

**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 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?**

**a) Mr. Donoval Never Admitted That He Had Received All The Documents He Sought**

Sun Valley spends a significant portion of space in the Respondent's Brief asserting that at the January 15, 2013 hearing before the District Court that Mr. Donoval had admitted that he was provided with *all* the documents he sought in the Credit Card Record Requests (Respondent's Brief, Pg. 12). That is simply not the case.

What Mr. Donoval acknowledged to the District Court at the January 15, 2013 hearing was that on December 31, 2012 at the Blaine County Prosecutor's office Mr. Donoval was finally allowed to physically inspect the originals of the forty two (42) credit card *invoices* covered by the Credit Card Record Requests he had been trying to inspect since July of 2012. And, Mr. Donoval also acknowledged to the District Court at the January 15, 2013 hearing that on December 31, 2012 at the Blaine County Prosecutor's office Mr. Donoval was finally allowed to physically inspect the originals of the Twenty Five Forgeries that both Former Administrator Hammer and Former Mayor Willich had asserted under oath were forgeries. However, nowhere in the transcript of the January 15, 2013 hearing before the District Court did Mr. Donoval ever concede that he had been provided the Forty Two Legitimate Yellow Sheets that both Former Administrator Hammer and Former Mayor Willich had confirmed under oath had been in Sun Valley's possession as late as January of 2012, and that Mr. Donoval still believed he was entitled to be provided by Sun Valley. And, Mr. Donoval never conceded that, at a minimum, he had actually ever been provided the remaining seventeen (17) Yellow Sheets he was entitled to receive (assuming that the Twenty Five Forgeries were considered by the District Court to have been legitimate).

In fact, the transcript of the January 15, 2013 itself bears this out. The transcript of the January 15, 2013 hearing reveals that there were extensive discussions between the District Court and Mr. Donoval on the issue of Sun Valley's failure to provide either the copies of the Yellow Sheets Mr. Donoval had sought in the Credit Card Record Requests or the originals of either the credit card invoices or the Yellow Sheets Mr. Donoval had sought in the Credit Card Record Requests. At several points in the hearing Mr. Donoval confirmed to the District Court that he had still not been provided some (or all) of the Yellow Sheets he had sought by stating:

“I did see these documents, these Yellow Sheets that Mayor Willich and Ms. Hammer have said are forgeries, at Mr. Thomas’ office on December 31<sup>st</sup>. But what I’m asserting is based on the Affidavits of Ms. Hammer and Mayor Willich there were public records, original public records of these Yellow Sheets, that have not been shown to me that were in existence in the City of Sun Valley in January of 2012. I have still not been shown those documents.” (Transcript, Pg. 22)

“So when it comes to the Yellow Sheets, Judge, I still have not been provided, as we stand here today, the original Yellow Sheets that Mayor Willich and Ms. Hammer swear under oath were in existence in the City of Sun Valley in 2012 and those are: 14 original Yellow Sheets of Ms. Hammer’s credit cards fully signed by Ms. Frostenson, Ms. Hammer, Mayor Willich and a city council member; 14 Yellow Sheets of Ms. Frostenson signed by Ms. Frostenson, Ms. Hammer, Mayor Willich and a city council member; and, 14 credit card Yellow Sheets of Chief Carnes fully signed by all those people. I have not been shown those documents, either photocopies or originals.” (Transcript, Pg. 23-24)

“In regards to the Yellow Sheets there’s still a lot or problems. I still say, whether it was original Yellow Sheets or copies, I still have not been provided with any of them that Mayor Willich or Ms. Hammer said were in existence. Their answer is, without anything under oath, without any explanation to what happened to these documents, is they are no longer in existence. That’s the answer?” (Transcript, Pg. 47-48)

“And then the second issue is, if you buy that the seven --- or half of the Yellow Sheets that were at Jim Thomas’ office were legitimate city records, and I have seen the legitimate city records, you still have to question what happened to the other half of the Yellow Sheets. Those have still not been produced to me and those have still not had any Affidavit or anything in the record to show why I’m not eligible to see even photocopies of these records.” (Transcript, Pg. 48-49)

Contrary to Sun Valley’s claims in the Respondent’s Brief that Mr. Donoval had admitted to the District Court that he had been provided everything he had sought in the Credit Card Record Requests (Respondent’s Brief, Pg. 12), there was extensive discussion and argument at the January 15, 2013 hearing before the District Court of exactly the opposite, namely that Mr. Donoval continued to assert that he had not been provided the entire extent of Yellow Sheets that he had sought in the Credit Card Record Requests. It is as if Sun Valley’s attorneys had not even read the entire January 15, 2013 hearing transcript before they completed the Respondent’s Brief with this type of allegation. Sun Valley’s false assertions in the Respondent’s Brief as to Mr.

Donoval's purported admissions that he had been provided everything he was seeking when he had not made such admissions, is a violation of Sun Valley's duties under Idaho Appellate Court Rule 35 that there be accurate information from the Record On Appeal to support arguments on appeal. Sun Valley's misstatements as to what supposedly happened at the January 15, 2012 hearing before the District Court in the Respondent's Brief, is additional evidence of the extent Sun Valley has gone to misinterpret Mr. Donoval's intent, to re-create what actually happened before the District Court, and to argue facts that simply are not in the Record On Appeal. That Mr. Donoval was required to even have to respond to this kind of spurious allegations should be noted by the Supreme Court as a continuation of Sun Valley's bad faith in the matter.

b) The Idaho Public Writing Laws Clearly Allow The Inspection Of Original Public Records, Contrary To Sun Valley's Claims

Sun Valley has asserted in the Respondent's Brief that Idaho statutes do not specifically allow the inspection of "original" public records (Respondent's Brief, Pg. 17) and therefore Mr. Donoval's continued pursuit of the "original" credit card records covered by the Credit Card Record Requests was unwarranted and frivolous. In reality, Sun Valley's raising of this issue, itself, is frivolous and unwarranted.

Idaho Statute 9-338 specifically states:

"(1) Every person has a right to *examine* (emphasis added) 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 time for *inspection* (emphasis added) 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 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* (emphasis added) or copy such record."

Admittedly, Idaho Statute 9-338 does not specifically use the phrase “original”, as Sun Valley notes in the Respondent’s Brief (Respondent’s Brief, Pg. 17). However, Idaho Statute 9-338, Sections (1), (2) and (3) are replete with references to *examining* and *inspecting* of public records, as well as *copying* of public records, such that there can be no other possible alternative but that the Idaho Legislature intended that citizens were entitled to view the “original” public records of government entities when enacting the Idaho Public Writing laws. Otherwise, if Sun Valley’s assertions are correct, why would the Idaho Legislature have made sure that only officials of the government entity be allowed to handle the public records and use equipment designated by the government entity to make the copies, to protect the public records, if there was no requirement that the requester be allowed to see the “original” public records in the first place? In Adams County Abstract v. Fisk, 117 Idaho 513, 788 P.2d 1336 (Idaho App.Ct. 1990), the Idaho Appellate Court specifically discussed the issue of “original” documents. In Adams County Abstract v. Fisk, the Idaho Appellate Court admitted that it may be dangerous to allow the requester to physically handle the “original” or to allow the requester to copy the “original” him/herself, however, the Idaho Appellate Court did not eliminate the requester’s right to ensure that the copies he/she received were of the actual “original” document, by “examining” and “inspecting” the “original” documents themselves, not just copies of the “originals”.

Sun Valley’s argument that Mr. Donoval had no right to inspect the “original” documents covered by the Credit Card Record Requests flies in the face of the entire purpose of the Idaho Public Writings laws, namely, to ensure that the public has access to “inspect” and “examine” all public records, as is specified in Idaho Statute 9-338, Sections (1), (2) and (3). If Sun Valley’s assertions are correct, and a government is allowed to only provide copies of documents without allowing access to the “original”, then no requester would ever truly know whether they have

been provided a copy of a true public record, because of the potential (as has clearly happened herein) for falsification of the records provided.

c) Attorney Naylor Had No Authority To Voluntarily Transfer The Original Public Records Covered By The Credit Card Record Requests To The Idaho Attorney General's Office

Sun Valley has failed to respond in any way to the assertions in Mr. Donoval's Appellant's Brief that neither Sun Valley officials, or Attorney Naylor in particular, had any legitimate authority to transfer to the Idaho Attorney General's office, the Blaine County Prosecutor, or any third party, any original Sun Valley public records, including the public records covered by the Credit Card Record Requests (see Appellant's Brief, Pg. 42-43, and Pg. 45). When a respondent such as Sun Valley fails to respond to a specific allegation in an appellate brief, it is usually because it does not have an answer to the assertion and wants the appellate court to ignore it. The Supreme Court should not do so as to this issue.

Attorney Naylor has admitted in his Affidavit and letter to the Idaho Attorney General's office (Record 647-650) that Attorney Naylor voluntarily transferred certain undefined Sun Valley original public records to the Idaho Attorney General's office. As the Supreme Court is now aware, contrary to City Attorney King's fallacious claims, the transfer of the Sun Valley original public records by Attorney Naylor was not done pursuant to a Subpoena, but was instead done voluntarily.

Mr. Donoval has consistently raised the issue that Attorney Naylor, who is neither a Sun Valley official or the Sun Valley City Attorney (City Attorney King was), simply had no authority as an independent contractor, insurance company appointed attorney, to make decisions of his own to transfer original Sun Valley public records to either the Idaho Attorney General's office, the Blaine County Prosecutor's office, or any third party, which obviously Attorney

Naylor did – even if Attorney Naylor personally believed that certain members of the prior Sun Valley administration should be criminally investigated.

As has been specified in Mr. Donoval’s Appellant’s Brief (Appellant’s Brief, Pg. 42-43, and Pg. 45), absent some other specific authority, Idaho Statute 50-908 and Idaho Statute 9-349(1)<sup>14</sup> prohibited anyone, including Attorney Naylor, from removing original Sun Valley public records from Sun Valley property and transferring them to anyone else. There is no evidence in the Record On Appeal of what Attorney Naylor’s relationship with Sun Valley actually was in the form of a written retainer agreement, which may have authorized Attorney Naylor to take the actions regarding the original public records that he did. There is no evidence in the Record On Appeal that the Sun Valley City Council ever passed a resolution authorizing Attorney Naylor to transfer the original Sun Valley public records he claims he gave to the Idaho Attorney General’s office in February of 2012, including those covered by Mr. Donoval’s Credit Card Record Requests. And there is no evidence in the Record On Appeal that Current Mayor Briscoe ever provided Attorney Naylor with specific authority to transfer the original Sun Valley public records he claims he gave to the Idaho Attorney General’s office in February of 2012 either. The fact is that there is no evidence in the Record On Appeal of exactly what gave Attorney Naylor the right to turn over the original Sun Valley public records he claims he gave to the Idaho Attorney General’s office in February of 2012, thus denying Mr. Donoval the right to review those same original Sun Valley public records when he sought them in July and August of 2012, and thereafter.

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<sup>14</sup> It should be noted that Mr. Donoval mis-cited the accurate citation of this provision on Page. 7 of the Appellant’s Brief as Idaho Statute 90-349(3), when in actuality it is Idaho Statute 9-349(1). Mr. Donoval apologizes to the Supreme Court for the typographical error.

Mr. Donoval made this explicit argument to the District Court at the January 15, 2013

hearing by stating:

“Mr. Naylor had no authority to allow official original public records from a public entity to be released to anybody. And I would suggest that Mr. Naylor provide you with exactly what the statute is if he is going to make that argument, because it doesn’t exist. The only thing a government entity has the right to do is give up a *photocopy* (emphasis added) to somebody else, so that when I come in and I’m asking to look at the public records, as I’m entitled to under the public writings law, those original records are there.”

Mr. Donoval argues that even if the fictitious Subpoena(s) City Attorney King claims were served on Sun Valley had been issued, Sun Valley officials would still not have been authorized to turn over the original documents to any third party, absent a Court order, because to do so would still be in violation of Idaho Statute 50-908 and Idaho Statute 9-349(1). As Mr. Donoval explained to the District Court at the January 15, 2013 hearing:

“MR. DONOVAL: The Idaho statutes that I’ve cited in my memorandum prohibit any public entity from disposing or transferring their original public records to anybody. Your Honor, I was the Freedom Of Information Officer for the State Of Illinois Liquor Commission for about four years<sup>15</sup>. I was appointed by, I believe, regulation, to be the Freedom Of Information Officer. Every year at least 100,000 – at least 100,000 original records passed through that agency. Under no circumstance, whether it was a Freedom Of Information request or a Subpoena or a request by anybody, would I give up my original public records of my state agency. If it was a Subpoena, I would give a photocopy; if they didn’t like that I would give a certified copy; if they didn’t like that I would say ‘Come into my office and look at these records.’ And even if I got a Subpoena, I would not produce the document absent a Court order, because there are statutes that say that agency cannot give up the original public records.

Regardless of Mr. Naylor voluntarily giving up those records, I had a right when I walked into Sun Valley City Hall at the end of July, and then when I demanded to be there on August 10<sup>th</sup> to see the original public records, I did not have to be satisfied that I had no right to see original public records, that I had to be satisfied with photocopies.” (Transcript, Pg. 16-17)

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<sup>15</sup> As was plead in the Complaint (Record, 1-2) and Amended Complaint (Record, 294-295) herein, Mr. Donoval “is the former chief legal counsel for a state agency in Illinois (the Illinois Liquor Control Commission) where for 3-4 years he was the freedom of information officer, and over the course of a twenty-five (25) year legal career has served as a municipal and government attorney during which time on multiple occasions he was required to manage public records requests, and therefore is eminently educated in the process , procedures and rights related to the disclosure of public records.”



“MR. DONOVAL: My argument is the City had no right to give up those public records. What Mr. Naylor has said is that City Attorney King said that he turned it over because the prosecutor asked for the documents. There’s no information in the record that the prosecutor asked for those documents. The City voluntarily gave them up. That’s why I asked for the Subpoena, because at least with the Subpoena the City would have had something in the record saying that the prosecutor’s office was seeking those records. They never asked for the records, *they threw them at Jim Thomas* (emphasis added) and that is a violation of the statute prohibiting the City from releasing any of their own public records. So I think under that situation, under Idaho Statute 9-345 ...

THE COURT: Now what happened in this case? Because there could be situations where documents would get into the hands of an investigating agency without perhaps a record or the information you’re seeking. I’m not saying that happened here because of search warrant. If you have a grand jury proceeding, something like that, there could be information of an investigating agency and not the record trail you’re seeking, that might exist on a more routine document.

MR. DONOVAL: And that was my initial argument. When I was at the State Liquor Commission I would never turn over a document unless a Judge signed that he wanted to see those documents. Not a prosecutor, not under a public record request, not under anything else. The City had no legal authority to release those documents, those credit card invoices, to Mr. Thomas.” (Transcript, Pg. 45-47).

Mr. Donoval raised this issue before the District Court, and the District Court simply failed to address it in its Memorandum Decision of February 14, 2013 (Record 666-674). As Sun Valley (and Attorney Naylor) had no legal authority to transfer the original Sun Valley documents covered by the Credit Card Record Requests to anyone, including either the Idaho Attorney General’s office or the Blaine County Prosecutor, absent a Court order, Mr. Donoval was entitled, as a matter of law, to view those original documents (and obtain copies of those documents) when he sought them and appeared at Sun Valley City Hall on July 27, 2012 and thereafter. Sun Valley’s failure to ensure that the documents covered by the Credit Card Record Requests were available for Mr. Donoval’s review and copying, was a violation of Mr. Donoval’s rights under the Idaho Public Writings laws. Sun Valley has purposefully chosen to ignore this issue in the Respondent’s Brief (as it did before the District Court), primarily because there is no plausible denial to Mr. Donoval’s claims.

Mr. Donoval's arguments to the District Court regarding Sun Valley's improper (or illegal) transfer of the documents covered by the Credit Card Record Requests at the January 15, 2013 hearing are just as applicable to the Supreme Court on the issue, namely that:

"Mr. Naylor turned them over voluntarily. He didn't even do it pursuant to a Subpoena. There's no Subpoena in the record. That violated my rights to see original public records at the offices of the government entity." (Transcript, Pg. 18-19)

"They had no legal authority to do it, so when I walked into City Hall I should have been entitled to see those documents. To me that is a public official that in bad faith had improperly disallowed me the right to see those records because they turned over documents outside the scope of statutory authority in Idaho." (Transcript, Pg. 47)

Mr. Donoval asserts that whereas there is no evidence in the Record On Appeal of the authority that Attorney Naylor was provided to transfer any documents covered by the Credit Card Record Requests to either the Idaho Attorney General's office or the Blaine County Prosecutor, that Mr. Donoval is entitled to a finding, as a matter of law, that Sun Valley violated Mr. Donoval's rights to review and obtain copies of those documents pursuant to the Idaho Public Writings laws when Mr. Donoval sought the records covered by the Credit Card Record Requests in July and August of 2012, and through today.

d) The Twenty Five Forgeries Cannot, As A Matter Of Law, Be Considered As Legitimate Public Records

Mr. Donoval believes that before the District Court made any findings regarding whether Sun Valley had complied with Mr. Donoval's request for production of public records, the District Court was required to make factual findings as to whether the Twenty Five Forgeries were legitimate or not. If the Twenty Five Forgeries were determined to have been forgeries by the District Court, then, as a matter of law, the Twenty Five Forgeries could not possibly have been considered as public records, as they were not legitimate records of Sun Valley due to their

falsification. The District Court simply failed to take this necessary step before making its findings in the Memorandum Decision entered on February 14, 2013 (Record, 666-674).

The Supreme Court should note that both Former Administrator Hammer and Former Mayor Willich confirmed under oath that the initials and/or signatures on the Twenty Five Forgeries that purport to be theirs - are not their initials or signatures (Hammer Aff., Record 490-491; Willich Aff., Record 576). In addition, both Former Administrator Hammer and Former Mayor Willich have confirmed under oath that the Twenty Five Forgeries are falsified documents - because neither would have initialed or signed the Yellow Sheets without all preceding initials or signatures being in place, which is not the case on almost all of the Twenty Five Forgeries provided to Mr. Donoval by Sun Valley (Hammer Aff., Record 491-492; Willich Aff., Record 576-577). There is no contradictory testimony in the Record On Appeal which negates either Former Administrator Hammer's or Former Mayor Willich's verified testimony that the Twenty Five Forgeries are, in fact, forgeries.

As there is uncontroverted evidence in the Record On Appeal that the Twenty Five Forgeries are, in fact, forgeries, Mr. Donoval was entitled to a finding by the District Court, and is entitled to a finding by the Supreme Court, that, as a matter of law, the Twenty Five Forgeries cannot be legitimate public records of Sun Valley. Therefore, Sun Valley, also as a matter of law, could not have, and did not, comply with Mr. Donoval's Credit Card Record Requests by providing Mr. Donoval with documents that, as a matter of law, are, by definition, not public records of Sun Valley, because they are forgeries.

e) The Idaho Public Writing Laws Provide For Equitable And Injunctive Remedies, Contrary To Sun Valley's Assertions

In the Appellant's Brief, Mr. Donoval provided case law precedent regarding the equitable and inherent authority that the District Court possessed to mandate that Sun Valley put sufficient evidence in the record of the whereabouts of the public records covered by the Credit Card Record Requests, or at least provide an explanation of what happened to the public records covered by the Credit Card Record Requests which were not produced, considering the verified testimony of both Former Mayor Willich and Former Administrator Hammer that the documents covered by the Credit Card Record Requests (including the Yellow Sheets that were never produced) were in Sun Valley's possession at least as late as January of 2012.

Sun Valley asserts that although federal Freedom Of Information Act ("FOIA") provisions provide specific injunctive authority to federal courts, that the Idaho Public Writings laws do not do so for Idaho courts (Respondent's Brief, Pg. 24). However, a comparison of the language in the FOIA and the Idaho Public Writings laws makes Sun Valley's assertions fallacious.

The FOIA provision that Sun Valley refers to can be found at 5 U.S.C. 552(a)(4)(B) and states that a federal court:

"has jurisdiction to enjoin the agency from withholding agency records and to order the production of agency records improperly withheld from the complainant."

In comparison, the statutory provisions of the Idaho Public Writing laws regarding Idaho court jurisdiction over public record requests, namely Idaho Statute 9-344, states as follows:

"(1) Whenever it appears that certain public records are being improperly withheld from a member of the public, the court shall order the public official charged with withholding the records to disclose the public record or show cause why he should not do so..."

(2) If the court finds that the public official's decision to refuse disclosure is not justified, it shall order the public official to make the requested disclosure."

There is no question that the language of Idaho Statute 9-344 regarding an Idaho court's authority to "order the public official charged with withholding the records to disclose the public record" and to "order the public official to make the requested disclosure", is just as injunctive as the language in 5 U.S.C. 552(a)(4)(B) that a federal court has authority to "enjoin the agency from withholding records" or to "order the production of the agency records." Sun Valley's assertion that the Idaho Public Writing laws provide no "specific authority" regarding equitable or injunctive relief is simply incorrect considering the broad powers provided to Idaho courts pursuant to Idaho Statute 9-344.

f) Sun Valley Has Provided No Basis For Why Mr. Donoval Has Not Been Provided At Least Copies Of The Forty Two Legitimate Yellow Sheets

There should only be two legitimate reasons for why a government entity can answer a public record request by stating "they don't exist", as Sun Valley has done herein. The first is that a representative of the government entity provides a sworn-to statement that the document(s) being sought *never* existed, and thus can't be produced. That simply did not happen here. And considering that the two highest ranking officials from the prior administration of Sun Valley (i.e. Former Mayor Willich and Former Administrator Hammer) have certified under oath that the Forty Two Legitimate Yellow Sheets were in existence when they turned over the operation of the City of Sun Valley to the new administration of Current Mayor Briscoe in January of 2012, Sun Valley simply cannot legitimately say that the documents sought by Mr. Donoval in the Credit Card Record Requests "never existed".

The second legitimate reason for a government entity to assert that a document sought in a public record request does not exist, is for a representative of the government entity to provide

a sworn-to statement that the document was destroyed in some legitimate or quasi legitimate manner, such as by a fire or that the government entity passed a resolution to destroy the document as part of its routine document destruction process (i.e. pursuant to Idaho Statute 50-907 and Idaho Statute 50-908). Again, Sun Valley provided no explanation in the record regarding how the documents Mr. Donoval sought in the Credit Card Record Requests, and in particular, the Forty Two Legitimate Yellow Sheets, disappeared.

Mr. Donoval asserts that it cannot have been the intent of the Idaho Legislature in enacting the Idaho Public Writings laws to let a municipality get away with an un-sworn statement to a citizen seeking public records that “it does not exist” in a situation like this, especially where there are verified statements in the record that the documents being sought were in the municipality’s possession less than six (6) months previously, such that the person seeking the documents has no other recourse, except to say “Thank you – That’s OK” – which is apparently what Sun Valley expected from Mr. Donoval in order for Mr. Donoval to avoid being assessed fees and costs in litigation over the matter.

As is noted in the Appellant’s Brief, the Supreme Court has already confirmed that it is not the burden of the public record requester to prove that the public entity has complied with the requester’s requests for public records, it is the government entity’s burden of “persuasion” in establishing that the government entity has adequately complied with the public record requests and that the government entity “show cause” for why the records requested have not been provided (see Bolger v. Lance, 137 Idaho 792, 53 P.3d 1211 (Idaho Sup.Ct. 2002)). Mr. Donoval asserts that in a situation such as this, where Mr. Donoval has placed sworn-to statements in the record from Former Mayor Willich and Former Administrator Hammer that the documents covered by the Credit Card Record Requests were in existence in at least January of 2012, less

than six (6) months previous to the date of Mr. Donoval's requests, and that the Twenty Five Forgeries are, in fact, forgeries, that Sun Valley could not have borne its burden of "persuasion" or have "shown cause" for not producing any of the Forty Two Legitimate Yellow Sheets by refusing to place any relevant sworn-to evidence in the record before the District Court or the Record On Appeal herein.

The point of the cases cited by Mr. Donoval in the Appellant's Brief, is that Sun Valley bore the burden of proof for why all the documents covered by the Credit Card Record Requests were not produced (see *Bolger v. Lance*), and was required to provide *sworn-to* evidence in the record as to the specific efforts Sun Valley officials made to locate the records covered by the Credit Card Record Requests (see *Laughlin v. Commissioner Of IRS*, 103 F.Supp.2d 1219 (U.S. S.D.Cal. 1999); *Miller v. U.S. Dept. Of State*, 779 F.2d 1378 (U.S. 8<sup>th</sup>.App. 1985) and *Weisberg v. U.S. Dept. Of Justice*, 705 F.2d 1344 (U.S. D.C. 1983)), to counter the sworn-to testimony of Former Mayor Willich and Former Administrator Hammer that the Twenty Five Forgeries are, in fact, forgeries, and to explain why none of the Forty Two Legitimate Yellow Sheets which were in existence in January of 2012 have still not been produced. Sun Valley has not responded in any way to the case law precedent cited by Mr. Donoval in the Appellant's Brief, nor has Sun Valley cited to any legitimate sworn-to evidence in the Record On Appeal which provides any justification for Sun Valley's refusal to explain why Mr. Donoval still has not been provided the Forty Two Legitimate Yellow Sheets. That being the case, Mr. Donoval is entitled to a finding, as a matter of law, that Sun Valley failed to comply with Mr. Donoval's Credit Card Record Requests by failing to produce the Forty Two Legitimate Yellow Sheets.

**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?**

Sun Valley Failed To Put Any Verified Evidence In The Record As To The Efforts Made By Sun Valley Officials To Find The Missing Yellow Sheets

As has been already referred to, and as was detailed in Mr. Donoval's Appellant's Brief, Sun Valley had an affirmative duty to enter into the record *sworn-to* evidence that Sun Valley officials made adequate attempts to locate the documents Mr. Donoval sought in the Credit Card Record Requests (see the previously cited Laughlin v. Commissioner Of IRS, Miller v. U.S. Dept. Of State, and Weisberg v. U.S. Dept. Of Justice), and in particular the Forty Two Legitimate Yellow Sheets. Sun Valley simply failed to enter any *verified* evidence in the record as to what efforts were made by Sun Valley officials to find the Yellow Sheets Mr. Donoval sought in the Credit Card Record Requests.

And although in his argument before the District Court on January 15, 2013, Attorney Naylor claims that based on City Attorney King's correspondences that Sun Valley officials made "exhaustive" efforts to find the documents Mr. Donoval sought in the Credit Card Record Requests, City Attorney King never actually used the phrase "exhaustive" in any of the emails and correspondences of City Attorney King that were placed into the record before the District Court (see emails and other correspondences of City Attorney King, Record 88-117 and 272-274). In fact, City Attorney King never actually describes specifically what it was that Sun Valley officials actually did to search for the records Mr. Donoval sought in the Credit Card Record Requests, even in a non-verified form, in the emails and correspondences that have been submitted into the Record On Appeal (Record 88-117 and 272-274).



There is no evidence in the Record On Appeal of whether Sun Valley officials thoroughly searched Sun Valley City Hall, Former Treasurer Frostenson's home or Attorney Naylor's offices for the non-produced Yellow Sheets. Nor is there any evidence in the Record On Appeal whether Sun Valley officials questioned either Executive Assistant, Former Treasurer Frostenson or Assistant Clerk Kinsey-Lovey about the documents they were shredding in Sun Valley City Hall. The answers to these questions would have been relevant, except for the fact that they were not entered into the Record On Appeal, and it is now too late to do so.

Once the question of Sun Valley's "bad faith" in denying the request of Mr. Donoval was raised, or at least that the question of the lack of "good faith" of Sun Valley was raised, there is no question that Sun Valley had an obligation to place some "sworn-to" evidence in the record to explain its actions, or lack thereof. Having failed to do so, Sun Valley violated Mr. Donoval's right to require Sun Valley to take appropriate and verified action to locate the documents (i.e. the Forty Two Legitimate Yellow Sheets) that clearly existed in at least January of 2012. Therefore, Mr. Donoval is entitled to a finding that, as a matter of law, Sun Valley failed to respond to Mr. Donoval's Credit Card Record Requests, at least in regards to the Forty Two Legitimate Yellow Sheets.

**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)?**

As was asserted earlier, Mr. Donoval has not sought that Sun Valley officials be *criminally* fined or that \$87,000 in *criminal* fines be assessed against Sun Valley officials. However, if the Supreme Court finds as matter of law, that Sun Valley officials failed to provide Mr. Donoval with any of the public records he sought in the Credit Card Record Requests, then

Idaho Statute 9-345 provides that the “custodian” of the Sun Valley public records (as is defined in Idaho Statute 9-337(3)) should be fined \$1,000 per document that was not produced for Mr. Donoval. The determination of the amount, and who should be assessed these fines is not up to Mr. Donoval, but is up to either the Supreme Court, or the District Court should the Supreme Court decide to remand the matter back to the District Court for appropriate findings.

As to the Yellow Sheets, if the Supreme Court determines that the Twenty Five Forgeries are, in fact, forgeries, then none of the Forty Two Legitimate Yellow Sheets have been produced, and thus the “custodian” (whoever that may be) should be required to pay the \$1,000 per document fine required by Idaho Statute 9-345 (or \$42,000). If the Supreme Court rules that the Twenty Five Forgeries are not forgeries, then Sun Valley has still failed to produce seventeen (17) of the Yellow Sheets that Mr. Donoval was entitled to receive, and therefore the “custodian” (whoever that may be) should be required to pay the \$1,000 per document fine required by Idaho Statute 9-345 (or \$17,000).

As to the credit card invoices, as Sun Valley failed to produce the original documents until Mr. Donoval filed suit and was required to view them at the Blaine County Prosecutor’s office, arguably, the \$1,000 per document fine required by Idaho Statute 9-345 should also be applied to the forty two (42) original credit card invoices that Sun Valley failed to allow Mr. Donoval to view as well.

As to who should be defined as the “custodian” of Sun Valley public records pursuant to Idaho Statute 9-337(3), there is a wide range of Sun Valley officials that such a tag could be placed on, from Former Treasurer Frostenson, to City Attorney King, to Executive Assistant Egger, to Attorney Naylor, all of whom took some responsibility at some point for the production, or non-production, of the documents sought by Mr. Donoval in the Credit Card

Record Requests. However, as the Mayor of Sun Valley, Current Mayor Briscoe is the ultimate responsible official of Sun Valley, and should be named as the “custodian” of Sun Valley records pursuant to Idaho Statute 9-337(3).

### **RESPONSE TO THE ISSUE RAISED BY SUN VALLEY IN ITS CROSS APPEAL**

In their own cross appeal, Sun Valley asserts that the District Court’s denial of Sun Valley’s request to assess costs and fees against Mr. Donoval for bringing the matter before the District Court should be reversed. The District Court specifically found that Mr. Donoval’s filing of the law suit herein, considering all of Sun Valley’s own acts in failing to provide Mr. Donoval the documents Mr. Donoval was seeking and Sun Valley’s “poor record keeping”, was not frivolous. (Record, 673)

There have been numerous Supreme Court rulings which stand for the proposition that the decision of a district court regarding whether to assess costs and fees is left to the sound discretion of the district court and can only be reviewed by an appellate court for an abuse of that discretion (see Lakeland True Value Hardware v. Hartford Fire Ins. Co., 291 P.3d 399 (Idaho Sup.Ct. 2012)). Mr. Donoval has enumerated a multitude of “bad faith” actions on the part of Sun Valley officials which makes Sun Valley’s continued pursuit of fees and costs to the Supreme Court frivolous in itself. The District Court made accurate findings that Sun Valley’s own record keeping transgressions were a large, if not the main, reason for why Mr. Donoval was not provided the documents he sought, when he sought them. However, as has been detailed herein, considering that Mr. Donoval was not allowed to review any of the original documents he was entitled to “inspect” and “examine” pursuant to Idaho Statute 9-338, Sections (1), (2) and (3) until he did so on December 31, 2012 at the offices of the Blaine County Prosecutor, and that Mr. Donoval has still not seen any of the Forty Two Legitimate Yellow Sheets or even the

remaining seventeen (17) Yellow Sheets (if the Twenty Five Forgeries are considered legitimate), without any explanation of what happened to the documents that both Former Mayor Willich and Former Administrator Hammer swore under oath were in existence in January of 2012, Mr. Donoval certainly had every right to pursue the action herein, both before the District Court, and before the Supreme Court.

Sun Valley has placed nothing in the Record On Appeal which shows that the District Court abused its discretion in denying the fees and costs sought by Sun Valley against Mr. Donoval. The District Court's decision to not enter the fees and costs requested by Sun Valley, considering Sun Valley's own substantial errors and inappropriate actions, should therefore not be disturbed.

### **SUMMARY**

Mr. Donoval would certainly like to know what actually happened to the Forty Two Legitimate Yellow Sheets. However, at this stage, the issue is not what happened to the Forty Two Legitimate Yellow Sheets, but why did Sun Valley not put any sworn-to evidence in the record before the District Court explaining what happened to, or the whereabouts of, the Forty Two Legitimate Yellow Sheets?

Mr. Donoval would also like an explanation related to the circumstances surrounding the preparation of the Twenty Five Forgeries. However, at this stage, the issue is not how the Twenty Five Forgeries came into being, but why did Sun Valley not put any sworn-to evidence in the record before the District Court explaining the Twenty Five Forgeries?

And, Mr. Donoval would also like an explanation of what legal authority Attorney Naylor ever had to voluntarily transfer original Sun Valley public records to either the Idaho Attorney General's office or the Blaine County Prosecutor in violation of Idaho Statute 50-908

and Idaho Statute 9-349(1). However, at this stage, the issue is not what authority Attorney Naylor may have believed he possessed to transfer original Sun Valley public records to either the Idaho Attorney General's office or the Blaine County Prosecutor, but why there was no response to such allegations before the District Court or in the Respondent's Brief?

Separate from the multiple allegations of misconduct of Sun Valley officials in not providing Mr. Donoval with the public records he sought, the more important issue in the matter is Sun Valley's gross failures to comply with the procedural requirements of placing verified evidence in the record before the District Court (or ultimately in the Record On Appeal) to justify its arguments as to the legitimacy of Sun Valley's actions in denying Mr. Donoval the right to inspect and copy the Sun Valley public records he sought.

As Mr. Donoval described in the Appellant's Brief, there is a wide array of equitable actions that the Supreme Court can take to rectify Sun Valley's failures to adequately respond to Mr. Donoval's public record requests. Mr. Donoval prays that the Supreme Court enter several final and binding rulings, and that the Supreme Court remand the matter back to the District Court for additional evidential hearings and determinations, as is described below.

**1) Enter An Order Finding That, As A Matter Of Fact And Law, That The Twenty Five Forgeries Are, In Fact, Forgeries.**

As is detailed in the Appellant's Brief, Mr. Donoval entered into the Record On Appeal the two Affidavits of Former Mayor Willich and Former Administrator Hammer, swearing, under oath, that the Twenty Five Forgeries are, in fact, forgeries. There is no contradictory testimony or other evidence in the Record On Appeal to negate that sworn-to testimony of either Former Mayor Willich or Former Administrator Hammer. Therefore, Mr. Donoval believes he is entitled to a final and binding finding of fact and law that the Twenty Five Forgeries are, in fact

forgeries. As the Twenty Five Forgeries cannot possibly have been legitimate public records of Sun Valley because of their falsification, Mr. Donoval believes he is entitled to a ruling of the Supreme Court that Sun Valley failed to respond to Mr. Donoval's Credit Card Record Requests by providing Mr. Donoval with the Twenty Five Forgeries.

**2) Enter An Order Finding That, As A Matter Of Law, Neither Attorney Naylor Or Sun Valley Had Any Legitimate Or Legal Authority To Voluntarily Transfer Any Of The Original Sun Valley Public Records Mr. Donoval Sought To Either The Idaho Attorney General's Office Or The Blaine County Prosecutor's Office.**

Both City Attorney King and Attorney Naylor readily admitted that Attorney Naylor (and/or other Sun Valley officials) voluntarily turned over original Sun Valley public records that may have been covered by the Credit Card Record Requests to third parties, including either the Idaho Attorney General's office or the Blaine County Prosecutor. There is no verified evidence in the Record On Appeal as to what records, if any, Attorney Naylor actually gave to the Idaho Attorney General's office, especially considering the Idaho Attorney General's office's refusal to confirm that it actually received any of the documents covered by the Credit Card Record Requests from Attorney Naylor. And there is also no sworn-to evidence in the Record On Appeal as to how any documents ended up with the Blaine County Prosecutor (as opposed to the Idaho Attorney General's office); what documents were actually transferred to the Blaine County Prosecutor; and, when the transfer of the documents actually occurred<sup>16</sup>.

But what is more disturbing, is the question of what gave Attorney Naylor (or any Sun Valley official) the right to voluntarily transfer original public records to *anyone* in violation of the provisions of Idaho Statute 50-908 and Idaho Statute 9-349(1). There is no evidence in the

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<sup>16</sup> Because of the failure of Sun Valley to put any sworn to evidence in the Record On Appeal, Mr. Donoval argues that the documents he sought in the Credit Card Record Requests, and eventually reviewed at the Blaine County Prosecutor's office on December 31, 2012, could very well have still been in the possession of Sun Valley officials when Mr. Donoval sought them in July and August of 2012, and not actually transferred to the Blaine County Prosecutor until well after that time.

Record On Appeal that the Sun Valley City Council passed an ordinance or resolution allowing the transfer of the public records at issue, nor is there any sworn-to evidence in the Record On Appeal that Current Mayor Briscoe allowed such a transfer. And as Mr. Donoval has argued, such actions would arguably have been illegitimate anyway unless there was a Court order demanding such transfer of documents.

At the January 15, 2013 hearing before the District Court, Mr. Donoval extensively discussed the issue that neither Attorney Naylor, or any Sun Valley officials, had any authority to voluntarily transfer any original public records of Sun Valley to any third party, absent potentially a Court order. And Mr. Donoval also raised the issue in the Appellant's Brief. Sun Valley has simply ignored the issue, due in large part to the fact that there is no plausible argument which could justify the unauthorized and voluntary transfer of original Sun Valley public records to *anyone*.

Mr. Donoval believes that he is entitled to an Order of the Supreme Court that, as a matter of law, the transfer of any of the original documents covered by the Credit Card Record Requests was an illegitimate action on the part of Attorney Naylor and Sun Valley officials, thus denying Mr. Donoval the right to "inspect" and "examine" the documents he sought in the Credit Card Record Requests pursuant to Idaho Statute 9-338 when he appeared at Sun Valley City Hall in July and August of 2012 to inspect and obtain copies of the documents covered by the Credit Card Record Requests.

**3) Enter An Order Remanding The Matter Back To The District Court For Evidential Hearings Related To The Forty Two Legitimate Yellow Sheets.**

Arguably, the Supreme Court could also enter a final Order finding that Sun Valley failed to provide Mr. Donoval with even copies of the Forty Two Legitimate Yellow Sheets, and assess

finer for such pursuant to Idaho Statute 9-345. However, that would frustrate the true purpose of the Idaho Public Writings laws, namely, to ensure that the requester (Mr. Donoval in this case) actually is able to inspect and obtain copies of the public records he/she is seeking.

As Mr. Donoval stated in the Appellant's Brief, Mr. Donoval believes the appropriate action for the Supreme Court to take in regards to the Forty Two Legitimate Yellow Sheets, is to remand the matter back to the District Court, with directions that discovery and evidential hearings should be held, in regards to a) the issue of the whereabouts of the Forty Two Legitimate Yellow Sheets, b) the circumstances surrounding the loss or destruction of the Forty Two Legitimate Yellow Sheets, and, c) the efforts that Sun Valley officials made to locate the Forty Two Legitimate Yellow Sheets.

**4) Enter An Order Remanding The Matter Back To The District Court For The Entry Of Fines Pursuant to Idaho Statute 9-345.**

Mr. Donoval again wants to confirm that he is not seeking that any *criminal* sanctions be entered against any Sun Valley official, as was alleged by Sun Valley in the Respondent's Brief.

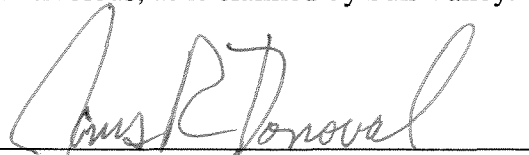
However, assuming that the Supreme Court makes the findings and enters the Orders described above, Mr. Donoval believes that the appropriate course of action would be for the Supreme Court to remand the matter back to the District Court for a determination of who is (or was) the "custodian" of the Sun Valley public records covered by the Credit Card Record Requests, as is defined in Idaho Statute 9-337(3), and that the \$1,000 per document fine specified in Idaho Statute 9-345 be entered by the District Court against the "custodian" for any documents that the District Court finds were not produced in copy form or for which Mr. Donoval was not allowed to examine the original document.



**5) Enter An Order Finding That Mr. Donoval's Actions In Continuing To Seek To Examine The Original Public Records, And To Obtain Copies Of The Public Records, Covered By The Credit Card Record Requests, Was Legitimate.**

As Mr. Donoval has detailed in his Appellant's Brief, and herein, Mr. Donoval was authorized by *Idaho Statute 9-338, Sections (1), (2) and (3)* to continue pursuing that he be allowed to "inspect" and "examine" the original public records he sought in the Credit Card Record Requests. Any inference by Sun Valley otherwise, should be expressly negated by the Supreme Court in a formal finding.

In addition, as Mr. Donoval has provided sworn-to testimony that the Twenty Five Forgeries are, in fact, forgeries, and that Mr. Donoval has still not been shown or provided copies of any of the Forty Two Legitimate Yellow Sheets, Mr. Donoval certainly had a legitimate right to continue to pursue his demand for the production of such documents, both at the District Court level, and herein. Mr. Donoval is also entitled to a finding that his actions in pursuing such public records have been legitimate, as opposed to frivolous, as is claimed by Sun Valley.



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Respectfully Submitted  
JAMES R. DONOVAL  
Appellant Herein