

2008

Lori Ann Busche v. Matthias Busche : Brief of Appellant

Utah Court of Appeals

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LORI ANN BUSCHE,

APPELLANT'S BRIEF

V.

Trial Court No. 044400503

MATTHIAS BUSCHE,

Respondent/Appellant.

Appellate Court No. 20080388

ON APPEAL FROM JUDGMENT IN THE FOURTH DISTRICT COURT
THE HONORABLE CLAUDIA LAYCOCK PRESIDING

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ORAL ARGUMENT IS REQUESTED IN THIS MATTER
PUBLISHED OPINION IS REQUESTED IN THIS MATTER

FILED
UTAH APPELLATE COURTS

JUN 10 2010

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 LORI ANN BUSCHE,)
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 Petitioner/Appellee,) APPELLANT’S BRIEF
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 v.)
)
) Trial Court No. 044400503
 MATTHIAS BUSCHE,)
)
 Respondent/Appellant.) Appellate Court No. 20080388
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)

ORAL ARGUMENT IS REQUESTED IN THIS MATTER
PUBLISHED OPINION IS REQUESTED IN THIS MATTER

LIST OF PARTIES IN THE COURT BELOW

The following is a complete list of all the parties in the proceedings before the
Fourth District Court, State of Utah, Utah County, Orem Department:

The Honorable Claudia Laycock, Judge, Presiding.

Lori Ann Busche, Petitioner/Appellee.

Mathias Busche, Respondent/Appellant.

Counsel for Appellee, Douglas Thayer.

Counsel for Appellant, Rosemond Blakelock

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. § 78A-4-103-(2)(h).

STATEMENT OF ISSUE AND STANDARD OF APPELLATE REVIEW

The appellant (“Matthias Busche”) asserts the following issues on appeal:

1. Did the Court abuse its discretion when it refused to reduce the child support obligation of Matthias Busche based on a substantial change in circumstances regarding his income? The trial court’s ruling regarding its determination of alimony and child support is reviewed by the Appellate Court under an abuse of discretion standard of review. See Howell v. Howell, 806 P.2d 1209, 1211 (Utah App. 1991).
2. Did the Court err in concluding as a matter of law that Matthias Busche was voluntarily underemployed? Did the Court err when it admitted into evidence and relied substantively on Tom Black’s written affidavit and spoken deposition testimony, when the other party failed to make a proper pretrial disclosure regarding such evidence, and when Tom Black failed to appear in person to testify at trial and be cross examined? Additionally, did the Court err in concluding as a matter of law that the term “voluntarily unemployed” includes instances where a parent is terminated for cause? The trial court’s ruling regarding its statutory interpretation of “voluntary underemployment” is reviewed by the Appellate Court

under a de novo standard of review. “Conclusions of law . . . are reviewed for correctness and given no special deference on appeal.” Howell, 806 P.2d at 1211 (citing Bountiful v. Riley, 784 P.2d 1174, 1175 (Utah 1989); Smith v. Smith, 793 P.2d 407, 409 (Utah App. 1990)).

3. Did the Court err when it applied the pre-2007 Amended Statute to determine how much income to impute to Matthias? The trial court’s ruling is reviewed by the Appellate Court under a plain error standard. See Marchand v. Marchand, 147 P.3d 538 (Ut. App. 2006).
4. Did the Court err in refusing to reduce or eliminate Matthias’s alimony obligation based on a change of income? The trial court’s ruling regarding its determination on alimony is reviewed by the Appellate Court under an abuse of discretion standard of review. See Howell v. Howell, 806 P.2d 1209, 1211 (Utah App. 1991).
5. The trial court’s ruling regarding attorney’s fees is reviewed by the Appellate Court under an abuse of discretion standard of review. “[T]he decision to award attorney fees . . . [is] within the sound discretion of the trial court.” Whitehead v. Whitehead, 836 P.2d 814, 816 (Utah App. 1992) (quoting Crouse v. Crouse, 817 P.2d 836, 840 (Utah App. 1991)).

DETERMINATIVE STATUTES AND RULES

Utah Code Ann. § 30-3-5(8)(g)(i)

Utah Code Ann. § 30-3-5(8)(a)

Utah Code Ann. § 30-3-5(6)

Utah Code Ann § 78-45-7.2(7)(a)

This section was amended in 2007, effective July 1, 2007, and renumbered in 2008 as § 78B-12-210(9)(a)

Utah Code Ann § 78-45-7.2(7)(b)

This section was amended in 2007, effective July 1, 2007, and renumbered in 2008 as § 78B-12-210(9)(b)

Utah Code Ann. § 78-45-7.5(7)(a)

This section was amended in 2007, effective July 1, 2007, and renumbered in 2008 as § 78B-12-203(7)(a)

Utah Code Ann. § 78-45-7.5(7)(b)

This section was amended in 2007, effective July 1, 2007, and renumbered in 2008 as § 78B-12-203(7)(b)

Utah R. Civ. P. 26(a)(4)

Utah R. Civ. P. 37(f)

STATEMENT OF THE CASE

Appellant Matthias Busche filed a Petition to Modify seeking a reduction or elimination of alimony pursuant to Utah Code Ann. § 30-3-5(8)(g)(i), and a reduction in child support pursuant to Utah Code Ann § 78-45-7.2(7)(a)&(b) based on a substantial change in circumstances regarding his income. After a bench trial was held on July 7,

2007 the trial judge denied Matthias's Petition to Modify and ordered that the amounts of child support and alimony remain the same. Furthermore, at that time, the trial judge did not award attorney fees but instead ordered the attorneys to schedule a hearing at a future date to discuss the issue of attorney fees further. The hearing was subsequently held on November 1, 2007 where the trial judge ordered Matthias to pay a large portion of Lori's attorney fees in the amount of \$20,000. On March 19, 2008, the trial court entered the Order.

STATEMENT OF FACTS

Appellant ("Matthias Busche") and appellee ("Lori Ann Busche") were married in June 1995. They later divorced on January 7, 2005. (Court of Appeals Record 1034 (herein after "R. 1034"), Trial Transcript, p. 20:21). The divorce decree ordered Matthias to pay \$1,545.00 per month as alimony for 9 ½ years based on a monthly salary of \$7,067.00. (R. 0081-82, Divorce Decree, ¶ 12). The decree also ordered Matthias to pay \$1,766.00 per month as child support for the five children of the marriage based on the same monthly salary. (R. 0084, Divorce Decree, ¶ 6). Lori's monthly salary was imputed at minimum wage for a total of \$892.00 per month. (*Id.* at ¶ 6).

Appellant Matthias Busche filed a Petition for Modification seeking a reduction or elimination of alimony and a reduction in child support on June 20, 2005 because of his substantial change in circumstances regarding his income. (R. 0101, Verified Petition to Modify Decree of Divorce). At the time of the divorce, Matthias was working for Tahitian Noni International ("TNI"), an entity of Morinda, Inc., (R. 1034, Trial

Transcript, p. 20:13-19), and received \$84,800.00 annually (\$7,067.00 monthly) from this employment. (*Id.* at 21:1-4). At trial, Exhibit 11, Financial Declaration dated May 31, 2007, which contained a recent pay stub, verified his monthly income had been reduced to \$4,583.33 gross (R. 1036, Exhibit 11, Financial Declaration dated May 31, 2007).

In March, 2004, Matthias's supervisor, Tom Black, issued a written warning for his behavior at the office stating that any further violations "may result in disciplinary action up to and including termination." The violations mentioned included "sharing your personal life with employees or talking about inappropriate subjects with employees," spending too much time "interacting with a female distributor," and speaking to "an employee concerning your personal life which involved topics of a sexual nature." (R. 1036, Exhibit 16, Performance Counseling Notice). On December 28, 2004, following a performance evaluation, Tom Black sent Matthias a memo that included, among others, the following statements:

- A. "Your performance has been below expectations; i.e. your time and contribution is not accounted for."
- B. "We agreed that from now on, you will be sensitive to your work peers by not burdening them with your personal challenges. They need your support."
- C. "In order to help you be successful, I want to meet with you every 6 weeks until no longer necessary to discuss the improvements of your performance, and adjust and/or clarify the goals and expectations for the next 6 weeks."
- D. "After we both reflect further upon this matter, let us meet and establish a plan for the coming year."

(R. 1036, Exhibit 16, Tom Black Memorandum).

In response to the above mentioned memorandum, Matthias sent Tom Black an email stating:

I am in agreement with you on this and have no problem with what you have stated and planned in regards to my performance. As I mentioned on the phone to you earlier this morning, I have felt the same about myself and have full intentions to be again as dedicated and available as I have been in the past and beyond and be the leader I am expected to be in my position.

I will also give the restructuring of our department some thought and we can talk about it when we are back together in the office.

(R. 1036, Exhibit 16, Email to Tom Black).

Matthias's employment with Morinda, Inc. was discharged on January 28, 2005, before the first six-week review between Matthias and Tom Black ever took place. (R. 1036, Exhibit 16, Personal Action Notice dated January 28, 2005). Matthias signed a document entitled "Release of All Claims" in which he agreed to release all claims against Morinda, Inc.—for wages, profits, damages, attorney fees, etc.—in exchange for twenty two weeks' salary (\$35,876.94)¹ plus 6 months of COBRA premiums (\$6,180.00). (R. 1036, Exhibit 1, Release of All Claims). Furthermore, the parties covenanted not to disparage or speak ill of the other. (*Id.* at ¶ H). Despite the discharge and severance agreement, Matthias continued to work for Morinda, Inc. during March and April 2005. (R. 1003, Findings of Fact and Amended Decree of Divorce, ¶ 16; R. 1034, Trial Transcript, p. 25:10-18).

On April 13, 2005, Matthias was contracted by Morinda, Inc. to provide services

¹ Lori later received one-half of this \$35,876.94 severance payment in accordance with paragraph 12 of the Divorce Decree.

to TNI for an indefinite period of time for which he received \$5,000 per month. (R. 1036, Exhibit 2, Morinda Letter dated April 13, 2005; R. 1034, Trial Transcript, p. 25:19-25; 26:1-5). Matthias worked for Morinda, Inc. in this capacity for approximately one year—until early 2006 when Morinda, Inc. did not renew his contract. (R. 1034, Trial Transcript, p. 27:9-12, 24-25; 28:1-4). Matthias was not given any documentation that he had been fired for cause or terminated and it was not his desire to quit working for Morinda, Inc.² (*Id.* at 29:1-7). After Matthias's contract was not renewed with Morinda, Inc., he sent out 30-40 resumes. (R. 0997, Findings of Fact and Amended Decree of Divorce, ¶ 21; R. 1034, Trial Transcript, p. 34:23-25, 35:1-13). Matthias was eventually hired by Supernaturals, also known as SISEL International, LLC, in October 2006 at a salary of \$55,000.00 per year (\$4,583.33 per month) and received no bonuses.³ (R. 0995-96, Findings of Fact and Amended Decree of Divorce, ¶ 22-23; R. 1036, Exhibit 3, Supernaturals Letter; R. 1036, Exhibit 4, Paystub dated October 20, 2006; R. 1036, Exhibit 8, Paystub dated March 18, 2007; R. 1034, Trial Transcript, p. 30:21-23).

In 2006, Matthias declared a total gross income of \$25,929.00 on his 2006 U.S. tax return and an adjusted gross income of \$11,915.00—after deducting \$14,014.00 for alimony payments. (R. 1011, Findings of Fact and Amended Decree of Divorce, ¶ 25; R. 1036, Exhibit 6, Matthias's 2006 Tax Return; R. 1034, Trial Transcript, p. 32:17-25,

² The trial court judge found that Matthias was terminated for cause in January 2005 and that his contract was not renewed in early 2006 also for cause. However, the judge's findings were based on Tom Black's deposition and affidavit that was to be used only for impeachment purposes; i.e. not for its truth. Furthermore, the deposition reflects that Tom Black was uncertain as to the reason for Matthias's discharge in January 2005 and the nonrenewal of his contract in early 2006. This issue will be discussed more fully in the argument section of this brief.

³ At trial, Matthias testified that he was still worked for Supernaturals and still received the same rate of pay. (R. 1034, Trial Transcript, p. 30:5-12).

33:1-9, 34:4-22). By comparison, Matthias declared a total gross income of \$86,011.00 on his 2005 U.S. tax return and an adjusted gross income of \$63,256.00—after deducting \$22,755.00 for alimony payments. (R. 1011, Findings of Fact and Amended Decree of Divorce, ¶ 24; R. 1036, Exhibit 5, Matthias's 2005 Tax Return; R. 1034, Trial Transcript, p. 31:18-25, 32:1-10).

At a bench trial on July 7, 2007, the parties presented their case before the Honorable Judge Claudia Laycock of the Utah Fourth District Court. Lori's counsel argued that the level of income Matthias earned while working for Morinda, Inc. (\$84,800.00 per year) should be used (i.e., imputed to Matthias under Utah Code Ann. § 78-45-7.5(7)(a)) to calculate his child support and alimony obligations. Lori's counsel sought to prove that Matthias was fired from Morinda, Inc. for cause to establish that he was voluntarily underemployed—a necessary finding to impute income to a parent.

Lori's counsel subpoenaed Matthias's supervisor at Morinda, Tom Black, to testify at trial. However, Tom Black never appeared at trial as he was on vacation in Vancouver, Canada. In Tom Black's absence, Lori's counsel sought to admit into evidence Tom Black's deposition and attached affidavit, recorded nearly a year earlier. Matthias's counsel objected to the admittance of these items into evidence based on Utah R. Civ. P. 26(a)(4) because she was not notified by Lori's counsel that Tom Black would be unavailable for cross-examination at trial and that the deposition and affidavit would be admitted in his absence. (R. 1034, Trial Transcript, p. 121:2-5; 123:14-25, 124:1-8; 127:7-18; 130:9-25, 131:1-23). The trial judge sustained Matthias's counsel's objection

and stated that she needed a chance to cross-examine Tom Black. (R. 1034, Trial Transcript, p. 135-36; 137:1-2). Accordingly, Lori's counsel offered the deposition and affidavit solely for impeachment purposes, which is permissible under Rule 26(a)(4). (R. 1034, Trial Transcript p. 137:3-25, 138:1-4, 139:3-4; 141:24-25, 142:1-25, 143:1-2). Following the trial judge's ruling on the matter, portions of the deposition were read into the record. (R. 1034, Trial Transcript, p. 145:16-25, 146-50, 151:1-4). After the reading of the deposition, Lori's counsel strangely sought to admit into evidence Tom Black's affidavit that was attached to the deposition—even though the judge just a few minutes prior concluded that both the deposition and affidavit could come in solely for impeachment purposes. (R. 1034, Trial Transcript, p. 151:7-25). Surprisingly, the judge then admitted it into evidence as "Exhibit 22." R. 1034, (R. 1034, Trial Transcript, p. 152:2-13). Matthias's counsel reported that she was missing the affidavit and was never provided a copy. (R. 1034, Trial Transcript, p. 152:22-25, 153:1-3).

SUMMARY OF ARGUMENTS

The trial court abused its discretion by refusing to reduce Matthias's child support and either eliminate or reduce his alimony obligations. The trial court excluded from trial all evidence that Matthias had been terminated for cause, yet subsequently considered the evidence and concluded that he was voluntarily underemployed. The only information the trial court had legitimately before it was Matthias's uncontested claim that he was now employed at a substantially lower pay than previously, and this should have compelled the trial court to conclude that a substantial change of material circumstances

had occurred justifying elimination of alimony and reduction of child support.

The trial court incorrectly construed the term “voluntarily underemployed” to include instances of termination for causes unrelated to an effort to shirk support obligations, in order to justify an imputation of income based on Matthias’s previous highest salary. It should instead have concluded that “voluntary underemployment” only occurs when an obligor attempts to shirk support obligations, not when they lose their jobs for poor performance or violations of company policies. Even if the term “voluntary underemployment” should include termination for cause, however, the trial court nevertheless failed in its obligations to consider all the relevant factors in determining the proper amount of income to impute to Matthias. The trial court committed plain error by not applying the most-current amended statute, which mandated consideration of “employment opportunities” available to Matthias. In fact, the trial court gave no consideration whatsoever to the economic realities facing Matthias, and instead erroneously started and concluded its analysis with the fact that Matthias had once earned a higher salary.

Even if the trial court did not err by the above-listed actions, the result in this case constitutes inequity and injustice. Divorce proceedings are proceedings in equity, and equitable principles require a fundamentally fair outcome. The result in this case, however, unconscionably impoverishes Matthias, requiring him to pay fully three quarters of his income to his ex wife and does not leave him enough money upon which to subsist himself. Not only does the trial court’s order here violate equitable principles, but it also

violates statutory and case law in that it requires Matthias to pay more than he is able, thus exceeding the maximum alimony allowed by law.

Finally, the trial court abused its discretion by improperly awarding Lori substantial attorney fees, in violation of case law prohibiting such awards where the obligor is unable to pay. The trial court itself found that the award would have “catastrophic consequences” for Matthias, and that Matthias did not pursue his Petition to Modify in bad faith. Further, the trial court gave no consideration at all to Lori’s need for the fees, or their reasonableness. Thus, the trial court considered none of the factors required by law to order attorney fees. Without such considerations, the trial court’s attorney fee award appears punitive in nature, and this court should determine the award to be an abuse of the trial court’s discretion.

ARGUMENT

I.

THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO REDUCE MATTHIAS’S CHILD SUPPORT OBLIGATION BASED ON A CHANGE OF INCOME

Under Utah law, “[a] parent . . . may at any time petition the court to adjust the amount of a child support order if there has been a substantial change in circumstances.” Utah Code Ann § 78-45-7.2(7)(a) (2007) (renumbered 2008). A substantial change in circumstances may include (1) “material changes of 30% or more in the income of a parent,” or (2) “material changes in the ability of a parent to earn.” *Id.* § 78-45-7.2(7)(b). The parties do not dispute that Matthias’s actual income changed more than 30% from the

income he received at the time of the divorce decree.

The dispute arises because at trial on Matthias's petition to modify the decree, the trial court imputed to Matthias the income he received at the time of the divorce decree, and refused to rely upon his actual income at the time of the attempted modification. A court may impute income to a parent to determine his child support and alimony obligations. See id. § 78-45-7.5(7)(a). However, the court may not impute income to a parent for the purpose of determining his child support obligation "unless the parent stipulated to the amount imputed . . . or, in contested cases, a hearing is held and a finding made that the parent is voluntarily unemployed or underemployed."⁴ Id.; see also Hill v. Hill, 869 P.2d 963, 965 (Utah App. 1994). Subsection (b) outlines factors that should be taken into account when calculating the amount of income to impute to a parent:

If income is imputed to a parent the income shall be based upon employment potential and probable earnings as derived from work history⁵, occupation qualifications, and prevailing earnings for persons of similar backgrounds in the community, or the median earning for persons in the same occupation in the same geographical area as found in the statistics maintained by the Bureau of Labor Statistics.

Id. § 78-45-7.5(7)(b)

⁴ This statute was amended in 2007 (effective July 1, 2007—6 days before trial was held in this case). The amended statute reads: "Income may not be imputed to a parent unless the parent stipulates to the amount imputed, the parent defaults, or, in contested cases, a hearing is held and the judge in a judicial proceeding . . . enters findings of fact as to the evidentiary basis for the imputation. Utah Code Ann. § 78-45-7.5(7)(a) (as amended 2007). (The 2008 amendment renumbered this section as § 78B-12-203(7)(a)).

⁵ As indicated in the footnote above, this section was amended in 2007 (effective July 1, 2007) and now includes the phrase "employment opportunities" in addition to work history, occupational qualifications, etc. See Utah Code Ann. § 78-45-7.5(7)(b) (as amended 2007) (The 2008 amendment renumbered this section as § 78B-12-203(7)(b)).

II.

THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO REDUCE MATTHIAS'S CHILD SUPPORT OBLIGATION BASED ON A CHANGE OF INCOME

The trial judge erred in concluding as a matter of law that Matthias was voluntarily underemployed because (1) she relied improperly upon Tom Black's deposition and affidavit to reach this conclusion and (2) she misconstrued the term "voluntarily underemployed" to include instances where a parent is terminated from employment for cause.

First, without Tom Black's deposition and affidavit, the trial court could not have reasonably concluded that Matthias was terminated from his employment with Marinda for cause. Absent that inadmissible substantive evidence, the only evidence in the record regarding Matthias's current income and employment was Matthias's own evidence that he had been laid off from full-time employment and that he was now earning substantially less money as an independent contractor. In other words, Tom Black's deposition and affidavit provided the trial court with the only suggestion that Matthias's employment circumstances resulted from any sort of malfeasance on Matthias's part.

It is undisputed in the record that Lori's counsel did not provide the notice required to use Tom Black's deposition testimony as substantive evidence at trial. Further, Judge Laycock sustained Matthias's objection to admission of the evidence. Thus, no argument can be made that the evidence should have been considered in determining the issue of voluntary underemployment, yet Judge Laycock curiously arrived at the conclusion of

voluntary underemployment nevertheless. The only way the trial court could have arrived at this conclusion is by improperly considering Tom Black's deposition testimony and affidavit. Those pieces of evidence were admitted as impeachment evidence only; but it is one thing to use the evidence to attack Matthias's credibility, and another thing entirely to say that, not only was Matthias not credible, but he had in fact been fired. The admission of the deposition and the affidavit, as well as the judge's considering them as substantive, rather than impeachment, evidence, constitute reversible error. See State v. Rimmasch, 775 P.2d 388, 408 (Utah 1989) (finding reversible error occurred in bench trial when the only evidence corroborating victim's testimony was erroneously admitted).

The trial court in this case seems to have made an implied finding of termination for cause. "The trial court's decision to impute income may . . . be affirmed if the failure to have made the missing findings can be viewed as harmless error. One method is to show that 'the undisputed evidence clearly establishes the factor or factors on which findings are missing.'" Hall v. Hall, 858 P.2d 1018, 1025 (Utah App. 1993) (quoting Allred v. Allred, 797 P.2d 1108, 1111 (Utah 1990)) (emphasis added). "A finding may be implied if it is clear from the record, and therefore apparent upon review, that the finding was actually made as part of the tribunal's decision." Adams v. Board of Review, 821 P.2d 1, 5 (Utah App. 1991). Thus, if record evidence clearly supports the implied finding of termination for cause, this Court could reasonably affirm the lower court. "Findings may not be implied, however, when the 'ambiguity of the facts' makes such an assumption unreasonable." Hall, 858 P.2d at 1025 (quoting State v. Ramirez, 817 P.2d

774, 788 (Utah 1991)).

The trial court unreasonably impliedly found termination for cause because it relied only upon evidence that the trial court itself deemed inadmissible for substantive purposes. The trial court did not consider all the appropriate factors in determining underemployment:

A finding that appellant was voluntarily underemployed cannot properly be implied in this case. Although the trial court found that appellant is currently earning less than he was previously, that isolated finding does not answer the critical question of whether the drop in earnings was voluntary. Rather, appellant's current earnings, as compared to his historical income, is merely one element in the matrix of factual issues affecting the ultimate finding of whether appellant is underemployed. Many critical questions are left unanswered: What are appellant's abilities? Is appellant's current salary below the prevailing market for a person with his abilities? Are there any job openings for a person with appellant's abilities? At a minimum, the trial court must determine appellant's employment capacity and earnings potential-- which it failed to do even in its determination of the amount to impute under section (7)(b)-- before it could logically conclude that he is, in fact, underemployed. Inasmuch as there are no subsidiary findings showing that the trial court actually found that a person with appellant's abilities could be earning more in the relevant market, we cannot imply a finding that appellant is underemployed. We accordingly reverse the trial court's determination that appellant is underemployed and remand for evaluation of that issue and the entry of appropriate findings.

Hall, 858 P.2d at 1026 (emphasis added).

The trial court thus considered entirely the wrong factors, not just the wrong evidence, in making its voluntary underemployment determination. No admissible substantive evidence supported the conclusion of termination for cause. However, even if it did, the trial court should not have included such evidence in its analysis. It should have considered the factors required by Hall. But the trial court engaged in no such analysis. Had it done so, it likely would have concluded that Matthias was not even underemployed, voluntarily or involuntarily, because he was in fact employed at the highest attainable level given current market conditions. Both Hall and section 78B-12-203(7)(b) dictate that market conditions, not the obligor's historical highest salary, serve as the benchmarks for determining full employment.

Second, even assuming that Matthias was terminated for cause, the trial court erred by interpreting the term "voluntarily underemployed" to include termination for causes unrelated to alimony and child support avoidance. This is a case of first impression in Utah, as a search of Utah case law shows no appellate guidance interpreting this term. However, the case of In re J.R.T. v. Martinez, a Colorado Supreme Court case, is particularly illuminating and apposite here. See generally 70 P.3d 474 (Colo. 2003); see also Salby, 126 P.3d 291 (Colo. App. 2005).

In Martinez, the Colorado Supreme Court considered whether termination from employment for violation of the employer's sexual harassment policies constituted "voluntary underemployment" for alimony and child support purposes. See 70 P.3d at 480. In that case, the divorce court had set Martinez's child support obligation based

upon a salary of \$4,510 per month. See id. at 475. Shortly thereafter, Martinez violated his company's sexual harassment policy, and was terminated from employment. See id. Martinez then obtained similar, though less well-compensated, employment earning \$2,648 per month. See id. Martinez then lost that job for violations of policies regarding the handling of bank deposits, and took a job earning \$2,167 per month. See id. Martinez moved the divorce court to modify his child support obligations based upon the substantially lower income, and the trial court denied the motion on the basis that his lower income constituted voluntary underemployment. See id. at 475-476. The Colorado Court of Appeals reversed the trial court, and was in turn affirmed by the Colorado Supreme Court. See id. at 475.

The Colorado Supreme Court stated its guiding principles in determinations of voluntary underemployment:

The income imputation inquiry must start with whether the parent is shirking a child support obligation. Is the parent unreasonably foregoing higher paying employment that he or she could obtain? If not, the child support obligation calculation commences with actual gross income. If the parent is shirking a child support obligation, the trial court must determine what the parent can reasonably earn and contribute to the child's support.

....

We hold that the trial courts must examine all relevant factors bearing on whether the parent is shirking his or her child support obligation by unreasonably foregoing higher paying employment that he or she could obtain, and, if the parent is, the trial courts must determine what he or she can reasonably earn and contribute to the child's support. If the trial courts do not find that the parent is shirking his or her child support obligation by unreasonably foregoing higher paying

employment, they should calculate the amount of child support starting from actual gross income only.

Id. at 476, 480. In other words, the inquiry does not turn on whether the obligor parent is at fault for the termination, in a general sense, but whether the termination is an effort to subvert his support obligations. If not, then the trial court must consider only the obligor parent's actual income, not what the parent could earn.

The Colorado Supreme Court reached this result by analyzing the purposes and principles underlying the statutory child support guidelines:

Ability to pay is generally calibrated on the basis of actual gross income, unless the facts of the case indicate that the parent is voluntarily unemployed or underemployed. Certainly, at the very least, the statute requires that a parent have the ability to earn a higher income but refuse to do so before income can be imputed to him or her. Indeed, the ALI recommends imputing income that can be potentially earned only when the parent is believed to be concealing income or to be shirking in his or her efforts to earn income:

“Imputation is used when the obligor is believed to be concealing income or to be shirking in his efforts to earn income.

Imputation is troubling when the obligor is charged with obligations that he may not be able to pay, even with the best of efforts. Failure to pay child support may have serious legal consequences for the obligor; thus, the court should exercise caution when considering imputation of earnings to a support obligor suspected of shirking gainful employment.”

When a parent declines to pursue higher paying employment in order to shirk child support obligations, imputing income to the parent serves the goal of requiring parents to support their

children to the extent of their reasonable ability to pay. On the other hand, the automatic imputation of income at the level of pay the parent earned before being fired would prevent the court from examining the present circumstances of the parent's incoming earning ability, would not result in like treatment for similarly situated parents, and would not necessarily take into account the best interests of the child. Likewise, a per se rule of income imputation based on termination for misconduct might promote quick settlements, but could clearly result in judicial orders that set child support at unattainable or unrealistic levels for a parent who intends to pay but can never achieve the ordered amount.

Id. at 479-480 (emphasis in original). Under the Colorado Supreme Court's analysis, imputation of income should occur only when a parent has the ability to earn higher income, but has refused to pursue said higher income "in order to shirk child support obligations." Id. at 480. In making such a determination, the trial court would need to look at all relevant factors, including:

firing and post-firing conduct; the amount of time the parent spent looking for a job of equal caliber before accepting a lower-paying job; whether the parent refused an offer of employment at a higher salary; whether the parent sought a job in the field in which he or she has experience and training; the availability of jobs for a person with the parent's level of education, training, and skills; the prevailing wage rates in the region; the parent's prior employment experience and history; and the parent's history of child support payment.

Id.

This case is indistinguishable from Martinez, both in terms of termination from employment resulting in subsequent lower compensation, and the underlying reasons for the termination in the first place—at least under the theory that Judge Laycock determined Matthias to be voluntarily underemployed—misconduct involving violation of company

policies. Nevertheless, in both this case and Martinez, it was undisputed that the obligor parent attempted to obtain comparable employment but could not do so. Both obligor parents obtained employment at substantially lower salaries, resulting in an inability to meet the support obligations originally ordered pursuant to the previous level of employment. Under the Colorado Supreme Court's reasoning, Matthias could not be held to be voluntarily underemployed, because the underemployment was not his own choice in an effort to shirk his obligations, he diligently sought comparable employment at similar wages, and ultimately was forced to accept employment at the highest available rate. The trial court's analysis in this case, however, focused entirely on whether Matthias's termination resulted from voluntary acts. The trial court thus inappropriately injected a general notion of fault into its "voluntary underemployment" analysis. It did not engage in any inquiry into whether Matthias's lower income was the result of an effort to shirk his support obligations. In fact, such a finding would be contrary to the trial court's actual findings, because the trial court found that Matthias's lower income was the result of improper behavior toward other employees, not the result of an effort to shirk support.

Injecting such a notion of fault into the voluntary underemployment analysis would result in absurd consequences, such as in the case where a person is terminated for cause because of incompetence. Some people just are not good at their jobs, and it is only a matter of time before they are fired. The trial court's decision in this case, however, would not excuse an incompetent worker for losing her job, determining instead that she

was at fault and in control of the consequences of her own actions. Or to take the trial court's reasoning further, a self-employed obligor parent who runs her business to the ground through poor business judgement would also be at fault, in a general sense, for her under- or un-employment, and ought to have her income imputed at the historically highest amount. Both of these scenarios demonstrate the inherent unfairness of the trial court's decision in this case.

This Court should adopt the recent view of the Colorado Supreme Court as persuasive authority, and determine that the trial court in this case erred by construing the term "voluntary underemployment" to include underemployment resulting from termination for cause. The Martinez analysis comports squarely with the decision in Hall requiring the trial court to consider a variety of factors such as employment capacity and earning potential before deciding whether someone is even underemployed.

Family support laws should not be imposed in such a manner as to require obligors to hold onto their jobs more securely than normal workers living within the normal vicissitudes of the job market. Workers lose their jobs every day for a variety of reasons, and Utah appellate courts should not hold obligor parents to a higher standard of job security than other parents trying to provide for their families. All workers face certain economic realities, whether they have support obligations or not, and Utah courts should not superimpose on top of that reality a legal fiction that workers have total or even limited control over their employment fortunes. Otherwise, Utah courts would have created a special class of workers, held to a higher standard of competence and subordination, than the rest of the labor force. In effect, Utah courts would have imposed

involuntary servitude upon all obligor parents. Accordingly, Appellant urges this Court to determine that the trial court abused its discretion by imputing to him his historically highest income for purposes of child support and alimony.

A. Even if the Trial Court did not err in concluding that Matthias was voluntarily underemployed, the Trial Court erred in calculating the amount of income to impute to Matthias

As alluded to above, the trial court used a flawed method of imputing income to Matthias, even if Matthias was in fact voluntarily underemployed. “[I]f . . . the trial court finds that appellant was voluntarily underemployed, it must then make findings as to prevailing earnings for persons of backgrounds similar to that of appellant, as required by section (7)(b), in determining the amount of income to impute.” Hall v. Hall, 858 P.2d 1018, 1027 (Utah App. 1993). “At a minimum, the trial court must undertake some effort to evaluate the employment market for [like workers] in general, and then make its best effort to adjust for appellant’s unique skills.” Id. at 1026-27.

Instead of considering the economic realities facing Matthias, however, the trial court started and finished its analysis at Matthias’s prior income at a higher rate. The premise that Matthias once earned a certain income does not lead to the logical conclusion that he therefore could earn that much now. Trial courts properly impute income to *rectify* fictions created by dishonest obligor parents. Trial courts should not impute income to *create* fictions that belie realities faced by unfortunate obligors.

The only evidence presented by Lori to counter Matthias’s claims of change in income dealt with the reasons for his termination. She presented no evidence that

Matthias's skills, education, experience or expertise opened to him comparable employment opportunities to his prior, more remunerative position. On the other hand, Matthias presented evidence regarding his search for comparable employment, such as a significant number of applications made and other employment opportunities available to him. He presented evidence that the lower paying position that he ultimately accepted constituted the best position available to him under current market conditions.

Lori did not present a case to the trial court relevant to the appropriate statutory factors to consider when imputing income. Even without Matthias's evidence, the trial court could not have imputed evidence to Matthias based on the evidence presented by Lori. But for Matthias's evidence, the trial court had before it no evidence regarding the economic realities facing Matthias. That fact alone renders the trial court's imputation of income to Matthias reversible. Nevertheless, the trial court did have before it ample evidence from Matthias regarding the economic realities he faced in his search for employment, and the trial court should have considered that evidence in its analysis, but did not do so. If this Court determines the trial court did not err in determining Matthias to be voluntarily underemployed, it should nevertheless reverse the trial court's actual imputation of income as based on flawed analysis, and remand for the trial court to consider the Hall and section 7(b) factors in light of the evidence already presented.

III.

THE TRIAL COURT ERRED WHEN IT APPLIED THE PRE-2007 AMENDED STATUTE TO DETERMINE HOW MUCH INCOME TO IMPUTE TO MATTHIAS

Did the Court err when it applied the pre-2007 Amended Statute to determine how much income to impute to Matthias?

In rendering its Memorandum Decision, the trial court ostensibly relied on Utah Code section 78-45-7.5(7), quoting the following:

(b) If income is imputed to a parent, the income shall be based upon employment potential and probable earnings as derived from work history, occupation qualifications, and prevailing earnings for persons of similar backgrounds in the community, or the median earnings for persons in the same occupation in the same geographical area as found in the statistics maintained by the Bureau of Labor Statistics.

Memorandum Decision p.9. (See R. 0977). This statute provides the evidentiary framework for determining the specific amount to impute to an obligor parent after the trial court has already determined imputation to be appropriate. Matthias disputes the propriety of imputation in the first place, as argued above. However, even if this Court determines the trial court did not err in imputing income, it must nevertheless reverse the trial court's specific calculation of income to impute because the Utah Legislature amended the above-quoted statute, relied upon by the trial court, prior to the trial court's decision.

In 2007, mere weeks before the trial court's 15 August 2007 Memorandum Decision, an amended version of section 78-45-7.5(7) went into effect. The Utah Legislature amended section 7.5, effective 1 July 2007. The Legislature subsequently renumbered section 7.5 in 2008 as section 78B-12-203(7)(b) without making any substantive changes. The 2007 amendment, in effect at the time of the trial court's Memorandum Decision, reads in relevant part as follows:

(b) If income is imputed to a parent, the income shall be based upon employment potential and probable earnings as derived from employment opportunities, work history, occupation qualifications, and prevailing earnings for persons of similar backgrounds in the community, or the median earnings for persons in the same occupation in the same geographical area as found in the statistics maintained by the Bureau of Labor Statistics.

Utah Code § 78-45-7.5(7)(b) (2007) (emphasis added) (renumbered without change in 2008 as Utah Code § 78B-12-203(7)(b)).

As indicated by the first emphasis above, the outlined method for determining imputed income constitutes mandatory findings in any imputation analysis. The word “shall” divests the trial court of any discretion and requires the trial court to engage in the evidentiary analysis described by the statute.

As indicated by the second emphasis, the trial court must, without discretion to do otherwise, consider the obligor parent’s “employment opportunities” when setting an amount to impute to the parent. The trial court’s memorandum decision makes no mention whatsoever of Matthias’s employment opportunities when he took the lower paying position. The trial court thus failed to make a necessary finding in reaching an appropriate amount of income to impute to Matthias. This cannot be a discretionary omission by the trial court, as section 7.5(7)(b) mandates the trial court to consider employment opportunities.

This Court must engage in a plain error analysis of Matthias’s claim in this regard, given the procedural history of the claimed error. Neither Matthias nor Lori urged the trial court to use the outdated statute. Rather, the trial court relied upon the

outdated statute *sua sponte*, a full six weeks after the amended statute became effective. No party could have anticipated this obvious error, and because the trial court rendered its ruling in a written Memorandum Decision, Matthias could not immediately object to the error, leaving him only to appeal.

“As a general rule, appellate courts will not consider an issue, including a constitutional argument, raised for the first time on appeal unless the trial court committed plain error or the case involves exceptional circumstances.” Marchand v. Marchand, 2006 UT App. 429, ¶8, 147 P.3d 538 (quotations and citation omitted). An appellant “must establish that (i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant.” State v. Dean, 2004 UT 63, ¶15.

A. The trial court committed error by applying the wrong version of the statute.

This Court must first determine which statute applied at the time of the trial court’s Memorandum Decision. “As a general rule, when adjudicating a dispute [Utah appellate courts] apply the version of the statute that was in effect ‘at the time of the events giving rise to [the] suit.’ . . . unless an exception to the general rule applies in this case.” Harvey v. Cedar Hills City, 2010 UT 2, ¶12 (footnote and citation omitted). The Utah Supreme Court has recognized exceptions to this general rule, however.

“First, we will give retroactive effect to statutory amendments that merely ‘clarify the meaning of an earlier

enactment.’ Second, a statute may be given retroactive effect if it changed prior law in ways that are merely procedural. A change will be considered procedural if it ‘merely “pertains to . . . the practice and procedure or the legal machinery by which the substantive law is determined or made effective.”’ We have often stated that retroactive application is permissible if the amended version of the statute ‘[does] not enlarge, eliminate, or destroy vested or contractual rights.’ In contrast, we have characterized the substantive law as “the positive law which creates, defines and regulates the rights and duties of the parties.”

Id. at ¶14 (footnotes and citations omitted).

The amended statute in dispute here, Utah Code section 78-45-7.5(7)(b) (2007), stating the that trial court shall consider an obligor parent’s “employment opportunities” when calculating an income to impute, could not be said to alter the rights of the parties. This amendment can more fairly be characterized as a procedural amendment clarifying how a trial court is to determine rights that preexisted the amendment. As a procedural amendment, section 78-45-7.5(7)(b) as amended in 2007 should be applied retroactively to Matthias’s petition to modify the decree of divorce. Accordingly, the trial court committed error by not applying the amended version of the statute.

B. The error should have been obvious to the trial court.

The trial court had simply to open the current version of the code when writing its Memorandum Decision, and it would have noticed that the legislature had made a change to the statute the court relied upon. That change mandated a specific type of supplemental analysis directly applicable to the trial court’s decision. The trial court would have known immediately that the changes went into effect weeks before, but after the parties pleaded and prepared their respective cases. The trial court had before it

sufficient evidence, presented by Matthias, to take into account the added factor of “employment opportunities” when determining the extent of Matthias’s underemployment, if any. In other words, nothing about the presentation of the evidence would have rendered this factor obscure or inapplicable. Further, it is axiomatic that courts always have an ongoing obligation to review and apply the most current law on any subject, or make a determination that an older law applies. The trial court failed in that obligation. The trial court should have discovered this obvious error and applied the correct law, but it did not.

C. The error was harmful.

The trial court’s error prejudiced Matthias, because any analysis that takes into account Matthias’s employment opportunities would have concluded that he already had taken the highest compensated position available to him. Even assuming, *arguendo*, that Matthias in fact had underemployed himself through his own fault, the next step in the trial court’s analysis should have included a discussion of just how much income to impute. As the cases cited above make clear, that calculation consists of determining the highest amount of income presently available to the obligor parent, and imputing that amount of income. In this case, any such analysis would have led to the inevitable conclusion that Matthias had already availed himself of the highest paying job he could,

and thus the only amount the trial court could properly impute to him was the amount he already earned.⁶

Thus, the trial court imputed to Matthias the wrong amount of income, which resulted both in the continuation of substantial alimony and a significantly higher amount of child support. The correct calculation by the trial court would have resulted in the court granting Matthias the relief he requested. The trial court's erroneous calculation thus deprived Matthias of relief to which he was entitled, and one cannot imagine a more harmful error.

The trial court committed error by applying the wrong statute for determining the extent of underemployment. This error should have been obvious to the trial court, in that any court that reviewed the statute currently in effect would have noticed the change and reasoned accordingly. This error resulted in a ruling that obliged Matthias to pay thousands upon thousands of dollars beyond his financial capacity. The trial court thus committed plain error when it applied the wrong statute, and this Court should accordingly reverse the trial court's determination of Matthias's income for purposes of calculating alimony and child support.

IV.

THE TRIAL COURT ERRED IN REFUSING TO REDUCE OR ELIMINATE MATTHIAS'S ALIMONY OBLIGATION BASED ON A CHANGE OF INCOME

A. The trial court's analysis ignored the appropriate factors.

⁶ Of course, this further demonstrates the trial court's initial error in determining Matthias to be underemployed in the first place. One can't be underemployed when employed at the highest compensated rate available.

“Trial courts in Utah have ‘continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances not foreseeable at the time of the divorce.’” Young v. Young, 2009 UT App 3, ¶9, 201 P.3d 3014 (quoting Utah Code Ann. § 30-3-5(8)(g)(i) (Supp.2008), and citing Bolliger v. Bolliger, 2000 UT App 47, ¶11, 997 P.2d 903) (footnote omitted).

Lori did not dispute below that Matthias’s circumstances had changed substantially. The parties all agreed that Matthias’s employment had been terminated, and that he took a substantially lower paying job. In other words, there lies no contest regarding whether Matthias had established a substantial material change in circumstances. The only question below and on appeal regards whether such a change justifies a modification of alimony. Lori contends, and the trial court concluded, that the changes in circumstances do not justify modifying alimony on grounds that Matthias’s

⁷ This Court addressed what is meant by the term “contemplated by the decree of divorce” in Durfee v. Durfee:

The fact that the parties may have anticipated [a substantial material change in circumstances] in their own minds or in their discussions does not mean that the decree itself contemplates the change. In order for a material change in circumstances to be contemplated in a divorce decree there must be evidence, preferably in the form of a provision within the decree itself, that the trial court anticipated the specific change.

796 P.2d 713, 716 (Utah Ct. App.1990) (alteration in original). “Accordingly, if both the divorce decree and the record are bereft of any reference to the changed circumstance at issue in the petition to modify, then the subsequent changed circumstance was not contemplated in the original divorce decree.” Bolliger v. Bolliger, 997 P.2d 903, ¶13 (Utah Ct. App 2000) (citing Durfee, 796 P.2d at 716).

own fault contributed to the change in circumstances, and that he thus voluntarily underemployed himself such that the trial court should impute a higher level of income. The trial court's refusal to reduce or terminate alimony rests on the same analysis as its refusal to reduce child support.

Matthias urges this Court to reverse the trial court's imputation of income for alimony for the same reasons it should reverse the trial court's imputation for child support purposes. If this Court determines the trial court erred in imputing income for child support, then the trial court also erred in imputing income for alimony. The facts and circumstances in both cases are the same.

If this Court determines that the trial court erred by imputing income, then it should remand the matter back to the trial court for further proceedings to reconsider whether to eliminate alimony based on Matthias's inability to pay, a consideration wholly neglected by the trial court pursuant to its imputation analysis, or to reduce alimony based on the current circumstances of the parties. Either way, the trial court must take into account Matthias's ability to pay, see Jones v. Jones, 700 P.2d 1072, 1075 (Utah 1985) (requiring trial courts to consider the obligor's ability to pay), without clouding the issue with matters of fault and historical highwater marks in income.

B. The trial court's alimony determinations require Matthias to pay substantially more than he can afford, fundamentally inequitable, and constitute involuntary servitude.

The trial court erred when it refused to reduce Matthias' alimony and child support payments because it is fundamentally inequitable to require him to relinquish nearly three quarters of his income for family support. This Court has stated "that the primary

purpose of . . . an alimony award ““is to achieve a fair, just, and equitable result between the parties.”” Riley v. Riley, 2006 UT App 214, ¶27, 138 P.2d 84 (citing Haumont v. Haumont, 793 P.2d 421, 424 (Utah Ct.App.1990) (quoting Pusey v. Pusey, 728 P.2d 117, 119 (Utah 1986))); see also Christensen v. Christensen, 628 P.2d 1297 (Utah 1981) (stating “modification of divorce decrees is a matter of equity”).

The Decree of Divorce required Mr. Busche to pay \$1,766.00 per month for child support and \$1,545.00 per month for alimony. At the time of trial, Matthias earned \$4,583.00 per month. (R. 1036, Exhibit 11, Financial Declaration dated May 31, 2007). The trial court’s order requires that 72% of Matthias’ income go to child support and alimony, leaving him with only \$1272 per month to meet his basic and necessary expenses. The trial court’s order acts as a punishment, despite clear case law stating that “the purpose of alimony is to provide support for the wife and not to inflict punitive damages on the husband. Alimony is not intended as a penalty against the husband nor as a reward to the wife.” Ostermiller v. Ostermiller, 2008 UT App 249, ¶3 n.4, 190 P.3d 13, citing English v. English, 565 P.2d 409, 411 (Utah 1977). Despite the discretion afforded to the trial court in modifying divorce orders, this court order, which leaves Matthias in financial ruin, is so inequitable and fundamentally unfair as to constitute an abuse of discretion. See Howell v. Howell, 806 P.2d 1209, 1211 (Utah App. 1991); Kennedy v. Kennedy, 650 So.2d 1362, 1370 (Miss. 1995) (inequitable to refuse to modify child support when husband’s income was drastically reduced).

Furthermore, because the court order leaves Matthias with insufficient funds to meet his financial obligations, it forces Matthias to find work to supplement his income. This not only constitutes a fundamental injustice; it raises questions of peonage or involuntary servitude. See In re Dennis, 344 NW.2d 128, 275 (Wisc. 1984) (Abrahamson, J. concurring) (certain court orders dealing with child support raise questions of involuntary servitude); Alfred J Sciarrino & Susan K. Duke Alimony: Peonage or Involuntary Servitude? 27 Am. J. Trial Advoc. 67 (2003-2004). Therefore, this Court should reverse the trial court and remand.

V.

THE TRIAL COURT ABUSED ITS DISCRETION IN ATTORNEY FEES TO APELLEE LORI BUSCHE

Attorney fee awards in the petition to modify context rest in the discretion of the trial court. See Wilde v. Wilde, 2001 UT App 318, ¶38, 35 P.3d 341. However, Utah appellate courts will reverse attorney fee awards if “convinced that the award was seriously inequitable or otherwise unjust.” Young v. Young, 2009 UT App 3, ¶21, 201 P.3d 3014 (citing Wilde, 2001 UT App 318 at ¶38). Further, Utah appellate courts will reverse a trial court’s award of attorney fees if the trial court did not make detailed findings regarding the fairness of the fees under the circumstances:

To properly support an award of attorney fees in a modification proceeding, a trial court must be convinced of the reasonableness of the requested attorney fees as well as both the requesting party's need and the other spouse's ability to pay the fees. Failure to address any one of these factors may be fatal to the award.

Id. (emphasis added).

In rendering its attorney fee award, the trial court decidedly was not “convinced of . . . [Matthias’s] ability to pay the fees.” Id. To the contrary, the trial court stated that it was “aware that this decision will have catastrophic financial results for [Matthias].” R. 0968, Memorandum Decision p.18, section VII). By its own findings, the trial court rendered an attorney fee award unavailable. The trial court acknowledged Matthias’s inability to pay attorney fees, yet awarded them anyway, contrary to all prevailing case law and principles of equity and fairness. The trial court committed itself to a decision with “catastrophic” results for Matthias, explicitly signaling to this Court that the trial court’s own ruling was “seriously inequitable or otherwise unjust.” Id. at ¶21 (quotations and citation omitted). This Court cannot affirm the trial court’s award of attorney fees without violating the rules of basic fairness dictated by principles of equity and prevailing case law.

Moreover, the trial court failed to address a required factor in rendering an attorney fee award. A trial court “must be convinced of . . . the requesting party’s need,” and a failure to address that factor is “fatal to the award.” Young, 2009 UT App 3 at ¶21. See also Hoagland v. Hoagland, 852 P.2d 1025, 1028 (Utah App. 1993) (“In using its sound discretion, the trial court must take into account three factors: (1) the financial need of the receiving spouse; (2) the ability of the other spouse to pay; and (3) the reasonableness of the requested fees.” (Emphasis added.)).

The trial court’s Memorandum Decision made no mention whatsoever of Lori’s need for attorney fees. It merely makes a conclusory determination that the fees are

reasonable,⁸ neglects to discuss Lori's need, concedes that Matthias cannot pay, and then awards the fees. Failure to discuss any one of the three enumerated factors is fatal to an attorney fee award; the trial court failed altogether to discuss two of the factors, and substantially failed to discuss all three. Without adequate findings detailing "the steps [the trial court] took in reaching its decision," this court will reverse an award of attorney fees below. (See e.g. Andrus v. Andrus, 2007 UT App 291, ¶19, 169 P.3d 754).

The trial court's award of attorney fees cannot survive appellate review because it results in manifest injustice to Matthias, as the trial court itself concedes, and because the trial court did not consider the relevant factors in deciding the appropriateness of an attorney fee award. Without an appropriate consideration of the relevant attorney fee factors, the trial court's award of attorney fees to Lori appears punitive in nature, rather than restorative as case law requires attorney fee awards to be.

CONCLUSION

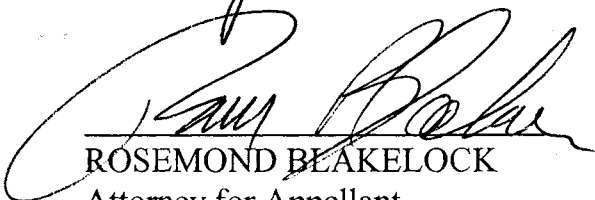
The trial court abused its discretion by refusing to eliminate Matthias's alimony obligations and reduce his child support obligations. It is uncontested that Matthias established a substantial change of material circumstances, and the trial court misapplied the law when it imputed income to him and concluded that he was voluntarily underemployed. Further, principles of law, equity, and fundamental fairness prohibit the result the trial court reached in this case, because the result unconscionably impoverishes

⁸ The trial court's only reference to the reasonableness of the fees is as follows: "The court has reviewed the attorney's billing records and finds that the requested fees are appropriate." (Memorandum Decision p. 17 paragraph 2). The trial court engaged in no discussion of the fees to demonstrate how it reached the conclusion that the "fees are appropriate."

Matthias. Finally, the trial court abused its discretion by awarding attorney fees to Lori without any basis to do so.

Accordingly, Matthias respectfully requests that this Court reverse the trial court's decision to impute income at his historically highest salary. Matthias further asks that this Court remand to the trial court to enter an order of child support consistent with the income Matthias earned at the time of trial. Matthias further requests that this court order the lower court to eliminate alimony, based on Matthias's inability to pay. Matthias further requests that this court eliminate the award of attorneys fees.

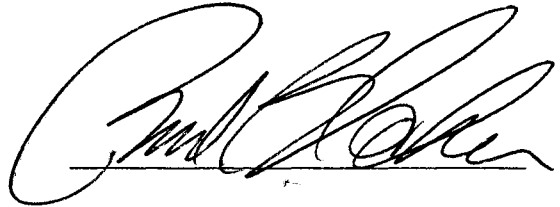
RESPECTFULLY SUBMITTED this 10 day of June, 2010.


ROSEMOND BLAKELOCK
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I mailed two true and correct copies of the foregoing Appellant's Brief, postage prepaid, this 10 day of June, 2010, to the following:

Douglas Thayer
3319 North University Ave.
Provo, Utah 84604

A handwritten signature in black ink, appearing to read "Paul Baker", written over a horizontal line.

APPENDIX A

Trial Court Rulings and Pleadings

Divorce Decree

Verified Petition to Modify Decree of Divorce

Findings of Fact and Amended Decree of Divorce

Memorandum Decision

Marilyn Moody Brown, No. 4803
MOODY BROWN & BROWN
Attorneys for Petitioner
2525 N. Canyon Rd.
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Fax: (801) 356-8400

FILED
Fourth Judicial District Court
of Utah County, State of Utah
1-7-05 ^{dt} Deputy

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

LORI ANN BUSCHE,	:	DECREE OF DIVORCE
Petitioner,	:	
v.	:	
MATTHIAS BUSCHE,	:	Civil No. 04440050 ³ ₂
Respondent.	:	Division No.6

This matter comes before the court for a final entry of the Decree of Divorce. The Stipulation of the parties was previously filed. The Court having reviewed the Stipulation and having previously entered its Findings of Facts and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The bonds of matrimony and the marriage contract heretofore existing by and between the Petitioner and Respondent be, and the same are hereby dissolved, and the Petitioner is hereby awarded a Decree of Divorce from Respondent on the grounds of irreconcilable

differences, said Decree to become absolute and final upon entry by the Court in the Register of Actions.

2. Residency. Petitioner is a bona fide resident of Utah County, State of Utah, and has been for three months immediately prior to the filing of this action.

3. Marriage Statistics. Petitioner and Respondent were married on June 23, 1995, in Bountiful, Utah, and are presently married.

4. Children. There have been five children born as issue of this marriage: Lena A. Busche, born April 9, 1996; Melanie K. Busche, born May 12, 1997; Katrine J. Busche, born September 21, 1998; Anson M. Busche, born November 26, 2000; and, Kristen L. Busche, born March 3, 2003.

5. Custody/Parent Time. The Mother is awarded the permanent care, custody and control of the minor children of the parties, subject to the Father's right to parent time with the children at reasonable times and places as the parties may agree. If the parties cannot agree, visitation will be in accordance with U.C.A. §30-3-35.5 until the children reach five years of age. Thereafter, visitation for the Father will be in accordance with U.C.A. §30-3-35.

a. The base child support award shall be reduced by 25% for each child for time periods during which the child is with the non-custodial parent by order of the court or written agreement of the parties for at least 25 of any 30 consecutive days of extended parent time or 12.5% for each child for time periods during which the child is with the non-custodial

parent by order of the court or by written agreement of the parties for at least 12 of any 30 days of extended parent time. These abatements in the base child support award are conditioned upon the Petitioner's providing daycare during those extended visitation times periods. In the event the Petitioner cannot provide the daycare during the extended visitation, then the abatement of base child support award would be pursuant to statute, which is 50% if the children are with the Respondent 25 out of any 30 consecutive days or 25% for each child if he has the children for 12 out of any 30 days of extended parent time.

b. If the parent entitled to parent time is not available to provide the ongoing care, and the other parent is available and willing so to do, the other parent will have first option to provide care for the children over any third party.

c. Each party will have the first option to provide the care for the children for a period of time in excess of two hours, over any third party, if the parent entitled to parent time is not available to provide the care and the other parent is available and willing so to do. The parent who exercises the option of providing the care, will pick up and return the children at the times designated by the other parent.

d. No unrelated member of the opposite sex may spend the night overnight if the children are present if the parent with whom the children are staying is not married to that person.

e. Neither party will make derogatory comments about the other party or allow any third parties to do so when the children are present. The parties agree that they will always conduct themselves in such a manner as to be conducive to the welfare and best interest of the minor children and shall promote the children's best interest and not with a view toward personal desires of the parties.

f. The parties will live separate and apart and each party agrees not to disturb or molest the other.

g. With regard to the privacy, safety, and security of the parties hereto, each party agrees that no information or photographs of the other party or the minor children shall be displayed on the Internet.

h. Each party shall endeavor to foster feelings of genuine affection between the children and the other party in front of the children and shall encourage the children to know, love, and respect the other party as their natural parent.

i. Travel. For emergency purposes, whenever either parent travels with the children, the following will be provided to the other parent:

i. An itinerary of travel dates, destinations, and places where the parent and/or children can be reached.

ii. The name and telephone number of a third person who would know how to reach the parent who is traveling.

j. Additional Areas of Agreement. Each parent will be entitled to receive complete and full information regarding the medical, dental, or educational records affecting the minor children unless the court finds that such access would seriously endanger the child or a parent.

k. Neither party shall be intoxicated when transporting the children.

l. Each party shall keep the other fully apprised of their current address and phone number within 24 hours of any change.

m. Each party shall promote a healthy, beneficial relationship with the other parent and to not engage in any behavior which would damage the natural flow of love and caring between the child and the other parent.

n. The parties acknowledge that visitation should not interrupt the children's school schedule unless the parties mutually agree.

o. Pickup and Return. The non-custodial parent shall pick up the children at the time specified and return the children at the time specified at the custodial home.

p. Special Events. The custodial parent shall notify the non-custodial parent within 24 hours of receiving notice of all significant school, social, sports, religious, and community functions in which the children are participating or being honored, and the non-custodial parent shall be entitled to attend and participate fully. The non-custodial parent shall have direct access to all school records and reports, including preschool and daycare reports and

medical records. Both parties shall be notified immediately by the other parent in the event of a medical emergency, if possible. Furthermore, the advisory guidelines, as set forth in the U.C.A. §30-3-33, shall be incorporated as part of the parent time and shall become an order of the court (see attached Schedule C).

q. Each parent will have two weeks of uninterrupted time with the children in the summer. Said time may be interrupted with reasonable telephone conversation with the children, provided, however, that if the children are on an extended trip or family reunion and out of town and not reachable by telephone, the parent with the parent time will provide notice to the other parent and make arrangements for the children to speak to the parent as soon as they return to availability of telephone communication

6. Child Support. The Father's gross base pay income is \$84,800 per year with Tahitian Noni International, or \$7,067 per month. In addition, the Respondent has received bonuses in the past at the end of the year. The disposition of these bonuses are included in the alimony paragraph. The Mother is not employed outside the home. For the purpose of determining child support, minimum wage income of \$892 per month has been imputed to the Mother. It is agreed that the Respondent shall pay support to the Petitioner in two installments during the month in the total sum of \$1,766 per month until the child becomes 18 years of age, or until the child's normal and expected date of graduation from high school, whichever occurs

later. Child support is payable one-half on the 5th and one-half on the 20th day of each and every month.

7. Reduction When Child Becomes 18. In accordance with U.C.A. §78-45-7.10, when a child becomes 18 years of age, or has graduated from high school during the child's normal and expected year of graduation, whichever occurs later, the base child support award is automatically reduced to reflect the lower base combined child support obligation shown in the table for the remaining number of children due child support. The award may not be reduced by a per child amount derived from the base child support award originally ordered.

8. Child Care Expenses. In accordance with U.C.A. §78-45-7.16, each parent shall equally share the reasonable work-related child care expenses for the minor children.

a. If an actual expense for child care is incurred, a parent shall begin paying his share on a monthly basis immediately upon presentation of proof of the child care expense, but if the child care expense ceases to be incurred, that parent may suspend making monthly payment of that expense while it is not being incurred without obtaining a modification of the child support order.

b. A parent who incurs child care expense shall provide written verification of the cost and identity of a child care provider to the other parent upon initial engagement of a provider and thereafter on the request of the other parent. The Father will pay his share of the child care within 10 days of receipt of verification that expenses were incurred.

c. The parent shall notify the other parent of any change of child care provider or the monthly expense of child care within 30 calendar days of the date of the change. A parent incurring child care expenses shall be denied the right to receive credit for the expenses or to recover the other parent's share of the expenses if the parent incurring the expenses fails to notify the other parent within said 30 days.

9. Automatic Transfer. The parties agree that rather than payment of child support to the Office of Recovery Services, the Father will cause to be made an automatic withdrawal payable to the obligee from Father's bank account to Mother's bank account, one-half on the 5th day of each month and a like amount on the 20th day of each month.

10. Income Withholding. If at any time the automatic transfer doesn't occur, the Mother is entitled to immediate and automatic withholding income as a means of collecting child support, pursuant to Sections 30-3-5.1 and 62A-11-101 et. seq., Utah Code Annotated, as amended. The Father will pay all processing fees associated with said withholding.

11. Modification. This order is subject to child support modification in accordance with U.C.A. §78-45-7.2(7).

12. Alimony. The Petitioner is awarded a sum of \$1,545 per month as alimony from the Respondent, commencing November 1, 2004, and continuing for a period of 9½ years, or until the death of either party, the Petitioner's remarriage, or cohabitation with another person, whichever occurs first. Said support is payable one-half on the 5th and one-half on the 20th day

of each month. Alimony is tax deductible to the payor and taxable to the payee. In the past, the Respondent has received additional bonuses and income in excess of his base pay. As additional alimony, the parties will divide equally all gross bonuses or other income received by Respondent in excess of his present base pay of \$84,800 per year (gross amount minus medicare and FICA). When the Respondent receives a bonus, or other income, he will provide documentation of the income and the FICA and Medicare deductions withheld when he remits payment to Petitioner which will be done within 5 days of receiving the income. When the Petitioner is no longer entitled to alimony and if there are children residing in the home who are still entitled to support, then the child support should be automatically recalculated, utilizing the total gross income from the parties' year-to-date incomes from their paystub or the total income received for the prior tax year, whichever is greater.

13. Real Property. During the course of the marriage, the parties acquired real property located at 62 East 1300 North, American Fork, Utah. The Petitioner is awarded all right, title, and interest in and to said real property, subject to an equitable lien in favor of Respondent for his one-half share. The Respondent waives any right, title, or interest he may have in said real property, subject to the payment of his equitable lien, as provided in the Decree of Divorce. The Petitioner shall accept and assume exclusive responsibility for any and all debt, obligations, and mortgages, arising out of the purchase or ownership of said real property. As of March 27, 2004, there is an outstanding mortgage on the property with balance of \$136,378 and a

month payment of \$1,106.71. The fair market value of the home is \$263,000, and after the mortgage amount has been subtracted from the fair market value, the Respondent's one-half equity, which is due him from his interest in the home, is \$63,811. The Respondent will receive an additional \$3,000 for property settlement, giving him a total equity in the home of \$66,811. His equitable lien will not accumulate interest. This amount shall be immediately due and payable on the first occurrence of one of the following events: The Petitioner's remarriage, cohabitation with another person, her rental of the home, moving from the home, or the youngest child reaching the age of 18 or graduating from high school, whichever occurs last. The Respondent shall execute a Quit Claim Deed to transfer all his right, title, and interest in and to said real property to Petitioner. The Respondent is awarded an equity lien against said property. Each party will pay half ($\frac{1}{2}$) of the real property taxes for 2004.

14. Personal Property. During the course of the marriage relationship, the parties have acquired personal property. Said personal property of the parties has been divided as to the written stipulation of the parties:

- a. To the Petitioner: Blue Water Resort Membership, together with all obligations and liabilities for annual dues and fees.
- b. To the Respondent: The Delta Sky Miles account balance.
- c. Each party is awarded their own personal property and effects and that property which is now in their individual possession or under their individual control.

15. Debts. The parties acquired debts during the marriage. Each party is responsible to pay any other debt he or she individually incurred after the date of separation:

a. To the Petitioner. The obligation on Wells Fargo home mortgage which has an outstanding balance of approximately \$136,378; and one-half of the Wells Fargo Premium Credit Card, Account No. 5490 9624 0094 8888 in the amount of \$5,128, or \$2,564.50 each.

b. To the Respondent. The obligation to Wells Fargo Bank on the Ford Explorer and one-half of the total Wells Fargo Premium Credit Card, Account No. 5490 9624 0094 8888 in the amount of \$5,128, or \$2,564.50 each.

c. Creditors. The parties understand that for joint debts upon the entering of the Decree of Divorce of joint debtors, the claim of a creditor remains unchanged unless otherwise provided by the contract, or until a new contract is entered into between the creditors and the debtors individually.

d. Notification to Creditors. The parties are ordered to notify their respective creditors for joint debts regarding the court's division of debts, obligations, or liabilities, and regarding the parties' separate current addresses.

e. Delinquency in Payments. If either party is obligated on a joint-secured debt, the payment of that debt must remain current. In the event that a payment is not paid in a timely manner, the secured asset must be placed immediately on the market for sale in

order to protect the joint debtors. A party who makes payment on a delinquent debt in order to protect his or her credit rating, may seek reimbursement of the payment of that debt in addition to interest and attorney's fees from the other party.

16. Medical/Dental Expenses. In accordance with U.C.A. §78-45-7.15, insurance for the medical and dental expenses of the minor children shall be provided by the party who can ~~obtain the best coverage at the most reasonable cost. The Respondent is currently providing said~~ insurance.

a. Each parent shall share equally the out-of-pocket costs of the premium actually paid by a parent for the children's portion of insurance. The children's portion of the premium is a per capita share of the premium actually paid. The premium expenses for the children shall be calculated by dividing the premium amount by the number of persons covered under the policy and multiplying the result by the number of children in the instant case.

b. Each parent shall share equally all reasonable and necessary uninsured medical, dental, orthodontia, eye care, prescriptions, deductibles, and copayments, incurred for the dependent children and actually paid by the parents.

c. The parent ordered to maintain insurance shall provide verification of coverage to the other parent upon initial enrollment of the dependent children, and thereafter on or before January 2, of each calendar year. The parent shall notify the other parent of any change of insurance carrier, premium, or benefits within 30 calendar days of the date he or she first knew

or should have known of the change.

d. The parent who incurs medical and dental expenses shall provide written verification of the cost and payment of medical and dental expenses to the other parent within 30 days of payment. The other parent will remit payment within 10 days of receipt of the verification. If neither party is able to secure said insurance at a reasonable cost, each party ~~should be responsible for the payment of one-half of all reasonable and necessary medical and~~ dental expenses for the minor children as indicated.

17. Life Insurance. The Respondent is ordered to maintain in full force and effect a life insurance policy on his life in the face amount of \$100,000, until such time as the last of the parties' minor children reaches the age of eighteen (18) or graduates from high school, whichever occurs later. The policy will be maintained with the parties as co-owners of the policy. The Respondent will maintain said life insurance policy in the amount of \$100,000 with the children named as beneficiary to 50% of the proceeds and Petitioner named as beneficiary to 50% of the proceeds (as long as she is entitled to alimony. If she is not entitled to alimony, the children will be named solely as beneficiaries on said life insurance policy). Each party will pay one-half of the premium for the \$100,000 policy.

a. If the Petitioner desires more coverage on Respondent, the Respondent will apply for said increased policy, and the Petitioner will pay any additional cost for the policy

above \$100,000. As long as there are minor children, the Respondent will leave his equity in the home in trust for the children.

b. The Respondent shall continue to carry all insurance available to him under his group policy through his place of employment, for the benefit of the minor children until they reach the age of majority, with the children named as sole and equal beneficiaries.

~~Furthermore, the Respondent shall name the children as beneficiaries of his estate in the event he~~
should die prior to the youngest child reaching 18 years of age. The Petitioner shall receive Respondent's Social Security benefits, which will equal or exceed the amount of child support for the children as a result of the Respondent's death, should it occur prior to the emancipation of the children.

18. Retirement and Savings.

a. There is a Traditional IRA with Edward Jones in the name of Petitioner which was purchased with premarital funds and should be awarded to Petitioner.

b. The Petitioner is the owner of four (4) Coverdell education IRAs for the four oldest minor children. Said accounts shall remain her sole and separate property.

c. The Respondent has a 401K account known as the Morinda Inc. Profit Sharing Plan. 50% of said plan should be awarded to the Petitioner and 50% of said plan should be awarded to the Respondent. A Qualified Domestic Relations Order shall be issued and

prepared by Petitioner's attorney to divide the retirement account and the value determined as of the date the Decree of Divorce was entered.

d. There is a Roth IRA account with Edward Jones in the name of the Respondent, \$4,000 of which was purchased by the Petitioner with premarital funds and is awarded to Petitioner. The Respondent shall instruct Edward Jones to transfer \$4,000 from his Roth IRA into the Petitioner's Edward Jones account.

e. Each party has a Roth IRA with approximately equal value of \$7,700. The Petitioner is awarded her Roth IRA. The Respondent is awarded the remaining balance of his Roth IRA, subsequent to the transfer of \$4,000 to the Petitioner, as described in paragraph d above.

19. Dependency Exemptions. The Respondent may claim the children as dependency exemptions as long as he is current on his child support obligation or until further order of the court. The issue of dependency exemption will be reviewed if either child support or alimony is modified.

20. Tax Returns. The parties will file a joint tax return for 2004. They will equally divide any state and federal tax refund for 2004. Any tax liability of the parties for tax year 2004 or prior shall be the responsibility of the Respondent.

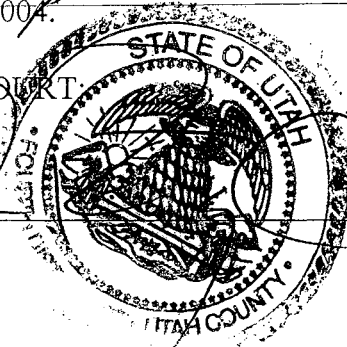
21. Effective Date of Divorce. The effective date of the divorce should be after January 1, 2005, in order to allow the parties to file a joint tax return. Commencing with the year 2005, each party will file his or her separate federal and state tax returns.

22. Attorney's Fees and Costs. Each party will pay his or her own attorney's fees and court costs.

DATED this 6 day of Jan, 2004.

BY THE COURT

JUDGE



Approved as to form:

A handwritten signature in cursive script, appearing to read "James H. Faust".


JAMES H. FAUST
Attorney for Respondent

NOTICE TO RESPONDENT'S ATTORNEY

TO: JAMES H. FAUST

PLEASE TAKE NOTICE that the undersigned, attorney for Petitioner, will submit the above and foregoing Decree of Divorce to the Fourth District Court for signature, upon the expiration of five (5) days from the date of this Notice, plus three (3) days for mailing, unless written objection is filed prior to that time, pursuant to Rule 4-504 of the Rules of Judicial Administration.

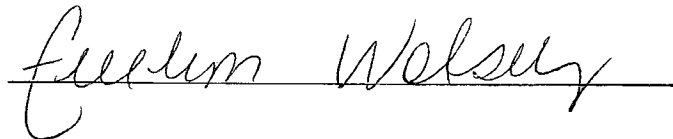
Dated this 13 day of December, 2004.


MARILYN MOODY BROWN
Attorney for Petitioner

CERTIFICATE OF MAILING

I hereby certify that on this 13 day of December, 2004, I mailed a true and correct copy of the foregoing Decree of Divorce, postage prepaid, to the following:

James H. Faust
Attorney at Law
5806 S 900 E
Salt Lake City, UT 84121



December 13, 2004

6-30-05
Dorothy
TB

MARY C. CORPORON, #734
JARROD H. JENNINGS, #8431
Attorneys for Respondent
CORPORON, WILLIAMS & BRADFORD, P.C.
808 East South Temple
Salt Lake City, Utah 84102
Telephone: 801-328-1162
Facsimile: 801-328-9565

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH

LORI ANN BUSCHE,

Petitioner,

vs.

MATTHIAS BUSCHE,

Respondent.

:
: **VERIFIED PETITION TO MODIFY**
: **DECREE OF DIVORCE**
:

: Civil No. 044400503
:

: Commissioner Thomas Patton
:

COMES NOW THE Respondent, Matthias Busche, by and through counsel, Mary C. Corporon, and Jarrod H. Jennings, Corporon, Williams & Bradford, P.C., and hereby petitions the court for an order modifying the decree of divorce herein.

In support of this petition, Respondent alleges as follows:

1. The parties were divorced in the above-entitled action on January 7, 2005.
2. Pursuant to ¶¶ 12, 6 of the decree of divorce, Respondent was ordered to pay

Petitioner the sum of \$1,545.00 per month in alimony, and \$1,766.00 per month in child support.

3. Since the entry of said decree, there has been a substantial and material change in circumstances with regard to the Respondent's income for purposes of paying child support and alimony. Specifically, Respondent through no fault of his own has been laid off by his former employer and is now an independent contractor. His income has been reduced to approximately \$5,000.00 gross pay per month.

4. This change of income was unforeseen and unexpected and has had a material effect on the Respondent's ability to pay alimony and child support to Petitioner, the Respondent requests this court modify the Decree and re-establish child support and alimony payments, if any at all, consistent with his actual ability to earn.

5. Said modification should be retroactive to the date of the actual change in Respondent's income given it that is an equitable solution and the Respondent is only recently become unemployed.

5. Respondent should receive his court costs and attorney's fees in the event this matter is contested.

WHEREFORE, Respondent prays that the court award judgment as follows:

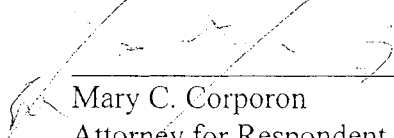
1. That the court find that it has jurisdiction in this matter over the subject matter and the parties to this action.

2. That the court enter an order modifying the decree and otherwise granting the motions of the Respondents.

3. That the court grant Respondent such other and further relief as to the court seems proper.

Dated this 15 day of JUNE 2005.

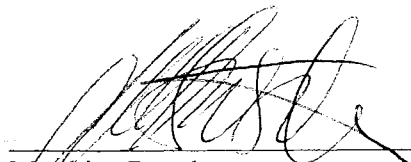
CORPORON, WILLIAMS & BRADFORD



Mary C. Corporon
Attorney for Respondent

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

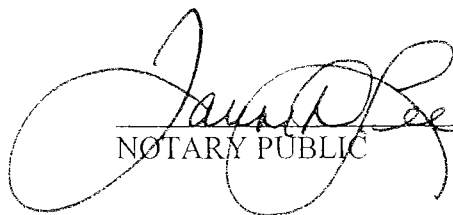
Matthias Busche, being first duly sworn upon oath, deposes and states as follows: That he is the Respondent to the above-captioned matter; that he has read the foregoing, including attachments, and that he understands the contents thereof. and that the same is true of his own personal knowledge, except as to those matters stated upon information and belief, and as to those matters, he believes the same to be true.



Matthias Busche
Respondent

ON THE 15 day of June 2005, personally appeared before me, the undersigned notary, Matthias Busche, the signer of the foregoing, who duly acknowledged to me that he signed the same voluntarily and for its stated purpose.



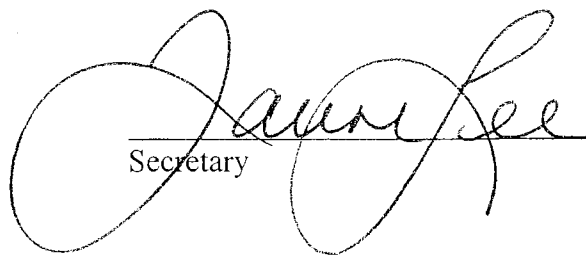


NOTARY PUBLIC

CERTIFICATE OF SERVICE

I hereby certify that on the 16 day of June 2005, I caused a true and correct copy of the foregoing to be ☒ mailed, postage prepaid, [] hand-delivered, [] sent via facsimile to:

Douglas Thayer, Esq.
3319 North University Avenue
Provo, Utah 84606


Secretary

FILED

MAR 19 2008

4TH DISTRICT
STATE OF UTAH
JUDICIAL CLERK

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

LORI ANN BUSCHE,

Petitioner,

vs.

MATTHIAS BUSCHE,

Respondent.

**FINDINGS OF FACT AND
AMENDED DECREE OF DIVORCE**

CASE NO. 044400503 DA

Judge Claudia Laycock

On June 7, 2007 this matter came before the court for trial on the petitioner's and the respondent's petitions to modify. Petitioner was present and represented by Douglas B. Thayer, while the respondent was present and represented by Rosemond G. Blakelock. After reviewing the testimony of the witnesses, examining the written documents, and memoranda, and after hearing the closing arguments of the attorneys, the court now enters its Findings of Fact and its Decree of Divorce.

FINDINGS OF FACT

1. The parties were married on June 23, 1995. The petitioner filed her petition for divorce on March 12, 2004.
2. The parties were later divorced. This was achieved through a stipulation of the parties and their attorneys. Judge James R. Taylor signed the final documents on January 7, 2005.

3. In paragraph 12 of the divorce decree the respondent was ordered to pay \$1,545.00 per month as alimony--based upon an annual salary of \$84,800.00 (gross amount minus medicare and FICA)--for 9 ½ years. The decree also ordered the parties to split equally all bonuses or other income received by the respondent in excess of his base annual salary of \$84,800.00.¹

4. In paragraph 6 of the divorce decree the respondent was ordered to pay \$1,766.00 per month as child support--based upon a monthly salary of \$7,067.00--for the five children of the marriage. The respondent was employed by Tahitian Noni (Morinda, Inc.) at the time of the decree. The petitioner's monthly salary was imputed at minimum wage, \$892.00 per month, as she was not employed outside the home.

5. The age range of the five children at the time of the divorce was 22 months to 8 years of age. All of the children are still younger than 18 years of age.

6. The respondent filed his Petition to Modify on June 20, 2005--just 5 ½ months after the divorce decree was signed. He requested modification of alimony and child support, alleging that "through no fault of his own [he] has been laid off by his former employer and is now an independent contractor. His income has been reduced to approximately \$5,000.00 gross pay per

¹More specifically, paragraph 6 states (in part):

In the past, the Respondent has received additional bonuses and income in excess of his base pay. As additional alimony, the parties will divide equally all gross bonuses or other income received by Respondent in excess of his present base pay of \$84,800.00 per year (gross amount minus medicare and FICA). When the Respondent receives a bonus, or other income, he will provide the documentation of the income and the FICA and Medicare deductions withheld when he remits payment to Petitioner which will be done within 5 days of receiving the income.

month. This change of income was unforeseen and unexpected and has had a material effect on the Respondent's ability to pay alimony and child support”

7. The petitioner filed her Petition to Modify Decree of Divorce on December 21, 2006. She requested clarification of paragraph 12 of the decree, because the respondent “has been untruthful in his declaration of his income which constitutes a substantial change in circumstances such that the decree of divorce should be clarified.” She sought an “order of this Court modifying the Decree of Divorce by ordering that Respondent provide copies of his tax returns each year on or before April 30th of each year in order to determine his income and any bonuses received.”

8. Respondent now lives part-time in Bountiful with his parents. He also lives part-time with his girl friend, to whom he does not pay room or board. He has helped to pay for some remodeling of her home.

9. On March 24, 2004 the respondent's supervisor, Tom Black, prepared a “Performance Counseling Notice” which also constituted a written warning. The respondent was warned that further violations “may result in disciplinary action up to and including termination.” The violations mentioned involved “sharing your personal life with employees or talking about inappropriate subjects with employees,” spending too much time “interacting with a female distributor,” and speaking to “an employee concerning your personal life which involved topics of a sexual nature.” The respondent signed his acceptance of the written warning on March 29, 2004. See exhibit 16, “Performance Counseling Notice.”

10. On December 28, 2004 Tom Black wrote a performance evaluation after a conversation with the respondent. Among others, it contained the following statements:

A. "Your performance has been below expectations; i.e. your time and contribution is not accounted for."

B. "We agreed that from now on, you will be sensitive to your work peers by not burdening them with your personal challenges. They need your support."

C. "In order to help you be successful, I want to meet with you every 6 weeks until no longer necessary to discuss the improvements of your performance, and adjust and/or clarify the goals and expectations for the next 6 weeks."

D. "After we both reflect further upon this matter, let us meet and establish a plan for the coming year."

See exhibit 16, "Memorandum."

11. The respondent corresponded later by email with Tom Black, acknowledged receipt of the memo, and stated his "full intentions to be again as dedicated and available as I have been in the past and beyond and be the leader I am expected to be in my position." See exhibit 16, entitled "lucetom@earthlink.netMailAccount."

12. On a document entitled "Personnel Action Notice" and dated January 28, 2005, the respondent's employment with Morinda, Inc. was terminated and labeled a "discharge." No six-week review or interview between the respondent and Tom Black ever took place. See exhibit 16.

13. In an affidavit dated August 22, 2006, Tom Black stated: "Matthias was terminated from a management position at TNI due to his inability to effectively manage employees in his department. This decision was difficult because of other skills Matthias has." See exhibit 22.

14. On February 1, 2005 the respondent signed a document entitled, "Release of All Claims," in which he acknowledged that he would receive 22 weeks' salary (\$35,876.94) from Morinda, Inc., plus \$6,180.00 for 6 months of COBRA premiums. In return, the respondent agreed to release all claims for wages, profits, damages, court costs, attorneys' fees, etc. See exhibit 1.

15. Under paragraph 12 of the decree, the petitioner later received one-half of the \$35,876.94 severance pay. Commissioner Patton deemed the severance pay to be a "bonus" under paragraph 12.

16. Despite this document and agreement, the respondent continued to work for Morinda, Inc. during March and April 2005. A letter from Morinda, Inc., dated April 13, 2005, states that "Matthias Busche has been contracted to provide services to Tahitian Noni International for an indefinite period for the consideration of \$5000.00 per month. Minimum expected time for project is approximately one year." He later worked for Tahitian Noni Café USA, Inc, which was located at the same premises. See exhibits 2 and 22.

17. In June or July 2005 the respondent moved from his apartment in Orem to a condominium in Saratoga Springs. He testified that the rent was about the same, but the condo was halfway to Salt Lake City and was in a "quieter" location.

18. This contract employment with Morinda, Inc. was terminated in January 2006, and he began to look for other jobs. See exhibit 22.

19. With regard to this termination, Tom Black stated (in the same affidavit—see exhibit 22):

As an independent contractor for TNI and for TNI Café USA, Matthias had an open-ended schedule, being able to work at his own designated hours inside and outside the TNI offices. Even so, there were times when Matthias was difficult to reach and seemed consumed by things outside the office. As a result, in January 2006, the management of TNI Café USA asked me to terminate the independent contractor relationship with Matthias.

20. In a deposition of Tom Black held on October 30, 2006—a little more than 2 months after the affidavit was prepared—Mr. Black was less certain as to the reasons for the respondent's termination from his management position at Tahitian Noni, although he admitted that he "created" the affidavit mentioned above and that there was nothing in it that was inaccurate.

A. Tom Black had no memory as to whether there had been an intervening event (between December 28, 2004 and February 1, 2005) which was the cause of the respondent's termination. "There may have been," but he did not have any specific memory of such an event.

B. He was "not necessarily" confident that the termination was a reflection on the respondent's performance after December 28, 2004.

C. He could not recall whether the respondent's termination might have been related to the "structure" of his department or "other considerations for people's skill levels" or whether it might have been for a reduction in force.

D. He also said that there were no layoffs at that time and that the respondent's termination was not a layoff.

E. Tom Black was the person who told the respondent that his contracting services were being terminated in January 2006.

F. The two departments for whom the respondent did contract work did not have “enough work for Matthias.” Black could not recall if that was the only reason the respondent’s employment as a consultant was terminated.

G. He was also told that the respondent was difficult to reach and seemed consumed by things outside his office.²

(See deposition, pp. 40-50.)

21. During his subsequent period of unemployment, the respondent sent out 30-40 resumes.

22. On Monday, October 2, 2006 he began working for SupraNaturals at an annual salary of \$55,000.00, which amounts to a monthly salary of \$4,583.33. See exhibits 3, 4 and 8.

23. The respondent receives no bonuses at SupraNaturals.

24. On his 2005 U.S. tax return he declared an adjusted gross income of \$63,256.00, after deducting the \$22,755.00 that he declared in alimony payments. That would have given him a total gross income of \$86,011.00 for this court’s purposes. He received an income tax refund of \$3,816.00 from the federal government and \$240.00 from the state government. See exhibit 5.

25. On his 2006 U.S. tax return he declared an adjusted gross income of \$11,915.00, after deducting the \$14,014.00 that he declared in alimony payments. That would have given him a total gross income of \$25,929.00 for this court’s purposes. He received an income tax refund of \$940.00 from the federal government and \$522.00 from the state government. See exhibit 6.

²No objection was made to this hearsay testimony.

26. Exhibit 8 is a earnings statement from SISEL International LLC/SupraNaturals for the pay period ending March 18, 2007. During a two-week pay period, the respondent grosses \$2,115.38, minus \$351.08 in taxes and FICA and \$6.68 in dental and vision premiums. The sum of \$876.01 is deposited into his checking account and the Office of Recovery Services garnishes \$881.61 for alimony and child support.

27. Exhibit 11, tab N is another earnings statement from SISEL for the pay period ending May 13, 2007. The amount deposited into his checking account is less (\$773.56), due to a \$138.46 deduction for a medical insurance premium. According to the respondent's bank statements, this reduction began with the April 6, 2006 paycheck deposit. See exhibit 11, tab M.

STIPULATIONS OF THE PARTIES

The parties reached two stipulations before the commencement of the trial which the court note makes orders of this court:

28. By April 30th of each year, the parties will exchange verification of their income for the previous tax year, including their tax returns, W-2 and 1099 tax forms, and any other schedules and documents submitted to the IRS as part of their tax returns. This satisfied the request stated in the petitioner's petition to modify.

29. The parties allowed representatives of Tahitian Noni and the Office of Recovery Services to leave the courtroom. The parties further stipulated that the business records from each entity would be received into evidence without further foundation.

ISSUES TRIED TO THE COURT

30.. The respondent's request for a reduction of child support

31. The respondent's request for either a reduction in or an elimination of alimony;

and

32. The petitioner's claims for attorney's fees, including the respondent's claims for fees for past hearings before Commissioner Patton and fees under U.C.A. 30-3-5(6) for claims without merit which were made in bad faith.

33. This matter comes before the court upon the respondent's Petition to Modify, in which he claims a change of circumstances justifying a reduction of his court-ordered child support and a reduction or elimination of the alimony award benefitting the petitioner.

I. Applicable Statutes

35. The following statutes are determinative to the court's decision in this matter.

1. U.C.A. 30-3-5(3): The court has continuing jurisdiction to make subsequent changes or new orders for the custody of the children and their support, maintenance, health, and dental care . . . as is reasonable and necessary.

2. U.C.A. 78-45-7.2(7):

(a) A parent . . . may at any time petition the court to adjust the amount of a child support order if there has been a substantial change in circumstances.

(b) For purposes of Subsection (7)(a), a substantial change in circumstances may include:

. . .

(iii) material changes of 30% or more in the income of a parent;

(ix) material changes in the ability of a parent to earn.

© Upon receiving a petition under Subsection (7)(a), the court shall, taking into account the best interests of the child, determine whether a substantial change has occurred. If it has, the court shall then determine whether the change results in a difference of 15% or more between the amount of child support ordered and the amount that would be required under the guidelines.

If there is such a difference and the difference is not of a temporary nature, the court shall adjust the amount of child support ordered to that which is provided for in the guidelines.

3. U.C.A. 80-30-5(8)(g)(i): The court has continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances not foreseeable at the time of the divorce.

4. U.C.A. 78-45-7.5(7):

(a) Income may not be imputed to a parent unless the parent stipulated to the amount imputed, the party defaults, or, in contested cases, a hearing is held and a finding made that the parent is voluntarily unemployed or underemployed.

(b) If income is imputed to a parent, the income shall be based upon employment potential and probable earnings as derived from work history, occupation qualifications, and prevailing earnings for persons of similar backgrounds in the community, or the median earning for persons in the same occupation in the same geographical area as found in the statistics maintained by the Bureau of Labor Statistics.

II. The Central Issue

36. At the heart of this petition to modify is the respondent's claim that he, through no fault of his own, lost his highly remunerative job, thereby losing his ability to pay the previously court-ordered child support and alimony. The petitioner's corresponding claim is that the respondent did, indeed, cause his own demise at Tahitian Noni and would still be making more than \$84,000.00 per year—but for his own actions. The court must then decide whether the respondent's new salary of \$55,000.00 per year (a monthly salary of \$4,583.33) constitutes a material change of circumstances or whether he is voluntarily underemployed, due to his own actions at his former employment.

III. The January 28, 2005 Discharge from Tahitian Noni

37. All testimony regarding the respondent's two terminations from Tahitian Noni came—in one form or the other—from the respondent, Tom Black, and business records from Tahitian Noni. Because the respondent testified, the court was able to observe his demeanor, hear his testimony, and reach conclusions as to his credibility. On the other hand, Tom Black was not present, having left the country for a planned vacation—despite having been served a subpoena. After hearing arguments from the parties regarding the admissibility of his recorded testimony, the affidavit (exhibit 22) and deposition testimony of Tom Black were received by the court. Therefore, the court can only determine Tom Black's credibility by analyzing his affidavit and deposition testimony in the light of the respondent's testimony and the business records from Tahitian Noni.

38. The respondent's original testimony was that he was "laid off" by Tahitian Noni due to a "cost reduction." He then stated that he was not really fired, and that he kept working for Tahitian Noni—albeit at a new and lower salary on a month-to-month contract. When that contract work ended, he was either fired or terminated.

39. Upon cross-examination and presentation of the documents found in exhibit 16, the respondent admitted that he had received the warnings contained in Tom Black's March 24, 2004 "Performance Counseling Notice," including the notice that further violations could result in termination of employment. Apparently, the respondent's work habits were still a problem when Tom Black wrote the December 28, 2004 performance evaluation. He criticized the respondent: "Your performance has been below

expectations; i.e. your time and contribution is not accounted for.” He also noted that the respondent was still “burdening” his “work peers” with his “personal challenges.”

40. The respondent also admitted during cross-examination that he had written the December 28, 2004 email message to Tom Black, promising his “full intentions to be again as dedicated and available as I have been in the past and beyond and be the leader I am expected to be in my position.” During re-cross-examination, he admitted that he was originally terminated from Tahitian Noni, signed all of the release documents, and then was rehired as an independent contractor.

41. The respondent’s reluctance to admit that he really was terminated by Tahitian Noni damages his credibility immensely. The business records from Tahitian Noni clearly demonstrate a pattern of misbehavior by the respondent that the respondent refused to change.

42. Although Tom Black’s written affidavit and spoken deposition testimony differ in some respects, the court finds that his affidavit and testimony are quite damning with respect to the respondent’s termination of employment at Tahitian Noni. In his August 22, 2006 affidavit, Tom Black stated, without equivocation, that the respondent had been terminated from his “management position at TNI due to his inability to effectively manage employees in his department.”

43. Tom Black’s testimony at the October 30, 2006 deposition was not quite as unequivocal. After first claiming that he could not remember whether the January 2005 termination was related to the “structure” of the respondent’s department or whether it was a reduction in force, Tom Black later admitted that the respondent’s termination was not a layoff and that there had been no other layoffs at that time. He could not remember

whether there had been an intervening event (between December 28, 2004 and February 1, 2005) which was the cause of the termination, and he was “not necessarily” confident that the termination was a reflection on the respondent’s performance after December 28, 2004.

44. Although the court did not have the opportunity to view Tom Black’s testimony in court and, thereby, assess his credibility, it appears that his deposition testimony was expressed in terms aimed to damage the respondent as little as possible. This would be consistent with the terms of the Release of Claims signed by the respondent and an agent of Morinda, Inc. on January 28, 2005. Paragraph H states: “Mr. Busche covenants never to disparage or speak ill of Morinda. Morinda covenants never to disparage or speak ill of Mr. Busche.” (See exhibit 2 and 16.) The court finds his affidavit and those portions of his deposition testimony, which are consistent with the affidavit, more credible than those portions which conflict and attempt to exonerate the respondent from responsibility for his January 28, 2005 termination from Tahitian Noni.

45. In addition, regardless of Tom Black’s affidavit and deposition testimony, the documents from the respondent’s personnel file at Tahitian Noni speak for themselves and tell a story of ongoing problems with the respondent’s behavior and work habits. Ten months prior to the 2005 termination, the respondent received a written warning from his supervisor, Tom Black. The respondent had been sharing his personal life with employees, talking about inappropriate subjects with fellow employees, spending too much time “interacting with a female distributor,” and speaking to another employee regarding his personal life, including “topics of a sexual nature.” This performance evaluation warned the respondent that further violations could result in termination.

46. Exactly one month before the January 28, 2005 termination, Tom Black evaluated the respondent again, noting that his “performance has been below expectations” with regard to unaccounted time and contributions. The respondent was also chastised for “burdening” his work peers with his “personal challenges.” Tom Black and the respondent agreed that they would meet every six weeks “until no longer necessary to discuss the improvements of [his] performance.”

47. That anticipated meeting never occurred, as the respondent was terminated from his supervisory position one month after the December 28, 2004 memorandum was written. The “Personnel Action Notice” made it clear that this was a “discharge”—not a layoff or a reduction in force. Although Tom Black would not admit that there was an intervening event which caused the termination, clearly the respondent did something which took the Tahitian Noni management past any efforts to rehabilitate the respondent and his work habits.

48. The court finds that the respondent was responsible for his termination on January 28, 2005 from his well-paying management job at Tahitian Noni. His failure to comply with the warnings given him by upper management through Tom Black resulted in his discharge.

IV. The January 2006 Discharge from Contract Employment with Tahitian Noni

49. Despite the January 28, 2005 discharge from Tahitian Noni, the respondent continued to work for the corporation as a contract employee, making \$5,000.00 per month. He testified that he never lost a day’s work in the transition from his management position to the contract job. Apparently, the same problems continued during this contract work, resulting in his termination in January 2006. In the same affidavit

mentioned above, Tom Black stated that “there were times when Matthias was difficult to reach and seemed consumed by things outside the office.” In his deposition testimony, he again attempted to soften the impact by stating that the two departments for whom the respondent did contract work did not have enough work for him. He also mentioned the information from the affidavit noted earlier in this paragraph.

50. Again, Tom Black testified that the affidavit was accurate, as he was the person who created it. The court notes, as before, that he attempted to exonerate the respondent in his deposition testimony—except for noting the information about the respondent being difficult to reach and seeming consumed by things outside the office. Again, this would be consistent with the terms of the Release of Claims signed by the respondent and an agent of Morinda, Inc. on January 28, 2005.

51. The court finds that the respondent was also responsible for his termination from his contract job in January 2006.

V. Voluntary Underemployment

52. As stated above, the court must decide whether the respondent’s new salary of \$55,000.00 per year (a monthly salary of \$4,583.33) constitutes a material change of circumstances or whether he is voluntarily underemployed, due to his own actions at his former employment. The court finds that the defendant, because of his actions which lead to his discharge from Tahitian Noni on January 28, 2005, is underemployed.

53. The respondent’s less remunerative salary is a direct result of his refusal to accept the warnings from his supervisor at Tahitian Noni to change his behavior and work habits. The March 24, 2004 “Performance Counseling Notice” should have placed him on notice that his employment was in jeopardy, but he ignored the gravity of that

document, which was also considered a written warning. The December 28, 2004 performance evaluation addressed some of the same issues, which indicates to this court that the respondent had made an insufficient effort to change his behavior. The ultimate discharge on January 28, 2005 is further indication that something happened which made discharge the only option for the upper management at Tahitian Noni. Indeed, the respondent was terminated one year later from his contract employment for some of the same problems.

54. The court notes that this divorce action was filed by the petitioner on March 12, 2004, just twelve days before Tom Black wrote the March 24, 2004 "Performance Counseling Notice," which placed the respondent on notice that his job was on the line. Knowing that his marriage was at an end and that his job was at risk, the respondent continued to burden his fellow employees with the details of his personal life. The parties' final stipulation was filed on January 5, 2005, and Judge Taylor signed the divorce decree on January 7, 2005. This was shortly after the December 28, 2004 performance evaluation had been given to the respondent. He agreed to the child support and alimony amounts, knowing that his job was in jeopardy. He was discharged from his management job at Tahitian Noni just 21 days after the decree was signed. Even had the court's analysis brought it to a consideration of a material change of circumstances, the court would have had difficulty in finding that the respondent's lesser salary was unforeseen at the time of the divorce. Perhaps the petitioner was unaware of the precarious nature of the respondent's employment, but the respondent certainly was more than aware and, yet, did not change his behavior and work habits enough to keep his job.

55. Again, the court finds that the respondent is voluntarily underemployed, because of his actions which lead to his discharge from Tahitian Noni on January 28, 2005 and his second discharge in January 2006. Correspondingly, there has been no material change of circumstances. The respondent's Petition to Modify is denied, and, therefore, the court declines to modify the respondent's child support and alimony.

VI. Attorney's Fees for Previous Hearings

56. Counsel for the petitioner attempted to incorporate into this trial the petitioner's request for attorney's fees for previous hearings at which the petitioner prevailed. The dates of those hearings are: April 17, 2000; August 29, 2005; April 4, 2006 and December 13, 2006. After discussing the issue, the court ordered the petitioner's attorney to submit affidavits of attorney's fees for three of the named hearings.

57. April 17, 2000: The order on that hearing was signed on June 1, 2007 and the affidavit for has already been submitted. There is no action to take on this hearing.

58. August 29, 2005: This was an order-to-show-cause hearing for which the order was signed by Judge Schofield on December 20, 2006. Attorney's fees were reserved at that time. The petitioner requests fees in the amount of \$3,324.71; supporting documentation for that request was submitted after the trial. The court has reviewed the attorney's billing records and finds that the requested fees are appropriate. The court awards judgment in favor of the petitioner in the amount of \$3,324.71 for this hearing. (See exhibit A of Douglas B. Thayer's Affidavit of Attorney's Fees, filed June 15, 2007.)

59. April 4, 2006: This is an order-to-show-cause hearing for which no order has ever been prepared and submitted to the court for its signature. According to the

minute entry from that hearing, Commissioner Patton reserved the issue of attorney's fees. The petitioner requests fees in the amount of \$1,976.72; supporting documentation for that request was submitted after the trial. Without an order from that hearing, the court can neither approve nor disapprove the requested fees. The court leaves this issue open for further discussion between the attorneys and the court.

60. December 13, 2006: This was a hearing on an objection to an earlier ruling from Commissioner Patton. No attorney's fees were ordered, and it appears that the petitioner is not asking for attorney's fees for that hearing.

61. These were the only hearings listed by the petitioner's attorney at trial, although his affidavit lists fees for other hearings, as well as his fees for the entire case. Due to this discrepancy in what was discussed at trial and what has been submitted post-trial, the court will set this matter for a short hearing on attorney's fees, so that the court may hear arguments regarding the requested fees for the various hearings and for the entire case.

VII. Attorney's Fees Under U.C.A. 30-3-5(6)

62. The petitioner argued that she should be awarded her attorney's fees under U.C.A. 30-3-5(6) for claims without merit which were made in bad faith. Although it is clear that the petitioner has prevailed in this matter and has been able to persuade the court that the respondent is voluntarily underemployed, the court does not find that the respondent's arguments were made in bad faith. As can be seen by the court's careful analysis of the facts, this decision was a close call in many respects. Indeed, while the court is quite comfortable in its decision, it is also aware that this decision will have catastrophic financial results for the respondent. On the other hand, it may inspire him to

look for more highly remunerative employment or to build his separate freelance business. At any rate, the court does not find that the respondent's petition was filed, tried, and argued in bad faith. The court awards no attorney's fees under U.C.A. 30-3-5(6).

VIII. Alimony and Child Support Unpaid

63. As indicated by the court during the trial, the matter of unpaid alimony and child support was not before the court through either of the petitions to modify, nor had any order-to-show-cause documents been filed by the petitioner. The court will leave it to the attorneys to look at the numbers submitted by ORS and the petitioner and to attempt to determine any arrearages owed by the respondent. The parties may then submit a stipulated order for the court's signature.

CONCLUSIONS OF LAW

64. The court grants the petitioner's Petition to Modify, as stipulated by the parties. Again, the court finds that the respondent is voluntarily underemployed, because of his actions which lead to his discharge from Tahitian Noni on January 28, 2005 and his second discharge in January 2006. Correspondingly, there has been no material change of circumstances. The respondent's Petition to Modify is denied, and, therefore, the court declines to modify the respondent's child support and alimony. The court denies the respondent's Petition to Modify and leaves the amounts of child support and alimony ordered by the decree in place. The court orders the attorneys to submit a stipulated order for the court's signature as to arrearages owed by the respondent for child support and alimony. The court awards no attorney's fees under U.C.A. 30-3-5(6). The court orders

the attorneys to jointly call the court's lead clerk for a date for further discussion of attorney's fees.

SUBSEQUENT NOVEMBER 1, 2007 HEARING ON ATTORNEY'S FEES

65. Counsel for both parties were present, along with the Petitioner. The Respondent was not present.

66. The issue of awarding attorney's fees is a discretionary decision with the court. Both the decision to award attorney's fees and the amount of such fees is within the trial court's discretion. A few other factors, can be considered, including the difficulty of the litigation, the efficiency of the attorneys presenting the case, the reasonableness of the attorney's fees, etc.

67. I have two very experienced attorneys here with a great deal of expertise on each side.

68. With regard to difficulty of the litigation, I didn't see this as a particularly difficult case for either side. I don't think that as far as litigation difficulties there was anything here that was truly difficult on either side.

69. I do have some concerns as to the reasonableness of the fees as to the efficiency of the attorneys in presenting the case and preparation. As well, I find it very hard to believe that attorney's fees in excess of \$51,000 are necessary for an estate of this size between these two people.

70. For what I saw before me at trial I had a difficult time believing that fees in excess of \$51,000 were appropriate. I just don't find it reasonable that every single stone was turned over. There were a great number of exhibits that were never presented to the

court and frankly all of the work that went into those credit cards and the analysis of how he spent every dime was not helpful to the court.

71. I find that Mr. Thayer's fee is probably a little bit above the norm. I think that most of the other attorneys whose affidavits I see in the domestic are billing between a \$180 to \$200 and he's at \$200 but I don't find that the extra twenty dollars is above and beyond belief.

72. The Petitioner did succeed. And I find that the result attained was in her favor.

73. We are all agreed that she has a need. She's been a stay-at-home mom and is still a stay-at-home mom. So her imputed income would be at \$892.

74. As to the reasonableness of the attorney's fees I find them excessive. I was amazed to find there was a claim over \$20,000 for one order to show cause hearing. It seemed a great deal of other preparation was being put into it.

75. As to the Respondent's ability to pay, as I have indicated, his current income is \$55,000 and in my ruling I imputed to him the salary of \$84,800. Nevertheless, in reality what he has now is an obligation to pay \$1,545 per month in alimony, \$1,766 in child support for a total of \$3,311. His monthly gross if you take \$55,000 and divide it by 12, are a few cents over \$4,583 and you subtract the \$3,311 from that and that only leaves him with a gross amount of \$1,272.


76. I also note from Ms. Blakelock's representation is that the sum total of Respondent's attorney's fees, from all of his attorneys including hers, was a fifth of Petitioner's, which would put it around \$10,000. Whatever it was it was a lot less than what was incurred by the Petitioner.

77. I find that the Respondent's equity in the marital home is not ongoing income and I agree with Ms. Blakelock that it is not appropriate to take the \$66,000 in equity Respondent is entitled to be used for his payment of Petitioner's attorney's fees. So I am not going to consider Respondent's equity in the marital home.

78. Nevertheless, I will award some attorney's fees. Petitioner did prevail. I believe that some award is appropriate despite my concerns about the reasonableness of the fees and Respondent's admitted financial straits due to my decision at trial.

79. In addition to the judgment of \$3,324.71 previously awarded for Petitioner's attorney's fees for the August 29, 2005 order to show cause hearing, the court awards an additional \$16,675.29. Therefore, the court awards a total judgment of \$20,000.00 to the Petitioner for attorney's fees. In addition, after reviewing the ORS documentation, the court finds that the total arrearage balance owed by the Respondent as of December 1, 2007 is \$33,547.16.

DATED this 19th day of March, ²⁰⁰⁸2007.


CLAUDIA LAYCOCK
Fourth District Court Judge

Approved as to form:

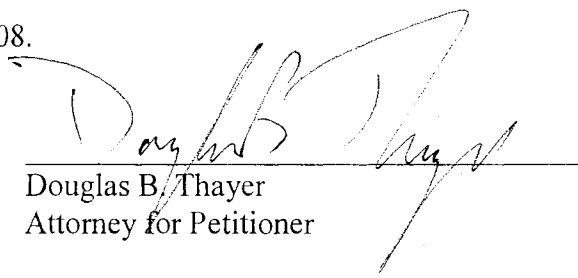
Rose Blakelock
Attorney for Respondent

NOTICE OF INTENT TO SUBMIT

TO THE RESPONDENT AND HIS COUNSEL, ROSEMOND G. BLAKELOCK:

You will please take notice that the undersigned attorney for the Petitioner will submit the foregoing proposed **Findings of Fact and Amended Decree of Divorce** for signature upon the expiration of five (5) days from the date of this notice, plus three (3) days for mailing, unless written objection is filed prior to that time.

Dated this 15th day of January, 2008.



Douglas B. Thayer
Attorney for Petitioner

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 15th day of January, 2008, she caused a true and correct copy of the foregoing **Findings of Fact and Amended Decree of Divorce** to be mailed, postage prepaid, to the following:

Rosemond G. Blakelock
75 South 300 West
Provo, Utah 84601



Sent Via:

☐ Hand-Delivery

☐ Facsimile

☒ Mailed (postage prepaid)

FILED
AUG 15 2007
4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

LORI ANN BUSCHE,		MEMORANDUM DECISION
	Petitioner,	
vs.		CASE NO. 044400503 DA
MATTHIAS BUSCHE,		DATE: August 15, 2007
	Respondent.	Judge Claudia Laycock
		Division 3

On June 7, 2007 this matter came before the court for trial on the petitioner's and the respondent's petitions to modify. Petitioner was present and represented by Douglas B. Thayer, while the respondent was present and represented by Rosemond G. Blakelock. After reviewing the testimony of the witnesses (the parties), the written documents, and the pretrial memoranda, and after reviewing the closing arguments of the attorneys, the court now enters its Memorandum Decision.

FINDINGS OF FACT

1. The parties were married on June 23, 1995. The petitioner filed her petition for divorce on March 12, 2004.
2. The parties were later divorced. This was achieved through a stipulation of the parties and their attorneys. Judge James R. Taylor signed the final documents on January 7, 2005.
3. In paragraph 12 of the divorce decree the respondent was ordered to pay \$1,545.00 per month as alimony--based upon an annual salary of \$84,800.00 (gross amount minus medicare

and FICA)—for 9 ½ years. The decree also ordered the parties to split equally all bonuses or other income received by the respondent in excess of his base annual salary of \$84,800.00.¹

4. In paragraph 6 of the divorce decree the respondent was ordered to pay \$1,766.00 per month as child support—based upon a monthly salary of \$7,067.00—for the five children of the marriage. The respondent was employed by Tahitian Noni (Morinda, Inc.) at the time of the decree. The petitioner's monthly salary was imputed at minimum wage, \$892.00 per month, as she was not employed outside the home.

5. The age range of the five children at the time of the divorce was 22 months to 8 years of age. All of the children are still younger than 18 years of age.

6. The respondent filed his Petition to Modify on June 20, 2005—just 5 ½ months after the divorce decree was signed. He requested modification of alimony and child support, alleging that “through no fault of his own [he] has been laid off by his former employer and is now an independent contractor. His income has been reduced to approximately \$5,000.00 gross pay per month. This change of income was unforeseen and unexpected and has had a material effect on the Respondent's ability to pay alimony and child support . . . ”

7. The petitioner filed her Petition to Modify Decree of Divorce on December 21,

¹More specifically, paragraph 6 states (in part):

In the past, the Respondent has received additional bonuses and income in excess of his base pay. As additional alimony, the parties will divide equally all gross bonuses or other income received by Respondent in excess of his present base pay of \$84,800.00 per year (gross amount minus medicare and FICA). When the Respondent receives a bonus, or other income, he will provide the documentation of the income and the FICA and Medicare deductions withheld when he remits payment to Petitioner which will be done within 5 days of receiving the income.

2006. She requested clarification of paragraph 12 of the decree, because the respondent "has been untruthful in his declaration of his income which constitutes a substantial change in circumstances such that the decree of divorce should be clarified." She sought an "order of this Court modifying the Decree of Divorce by ordering that Respondent provide copies of his tax returns each year on or before April 30th of each year in order to determine his income and any bonuses received."

8. Respondent now lives part-time in Bountiful with his parents. He also lives part-time with his girl friend, to whom he does not pay room or board. He has helped to pay for some remodeling of her home.

9. On March 24, 2004 the respondent's supervisor, Tom Black, prepared a "Performance Counseling Notice" which also constituted a written warning. The respondent was warned that further violations "may result in disciplinary action up to and including termination." The violations mentioned involved "sharing your personal life with employees or talking about inappropriate subjects with employees," spending too much time "interacting with a female distributor," and speaking to "an employee concerning your personal life which involved topics of a sexual nature." The respondent signed his acceptance of the written warning on March 29, 2004. See exhibit 16, "Performance Counseling Notice."

10. On December 28, 2004 Tom Black wrote a performance evaluation after a conversation with the respondent. Among others, it contained the following statements:

A. "Your performance has been below expectations; i.e. your time and contribution is not accounted for."

B. "We agreed that from now on, you will be sensitive to your work peers by not burdening them with your personal challenges. They need your support."

C. "In order to help you be successful, I want to meet with you every 6 weeks until no longer necessary to discuss the improvements of your performance, and adjust and/or clarify the goals and expectations for the next 6 weeks."

D. "After we both reflect further upon this matter, let us meet and establish a plan for the coming year."

See exhibit 16, "Memorandum."

11. The respondent corresponded later by email with Tom Black, acknowledged receipt of the memo, and stated his "full intentions to be again as dedicated and available as I have been in the past and beyond and be the leader I am expected to be in my position." See exhibit 16, entitled "lucetom@earthlink.netMailAccount."

12. On a document entitled "Personnel Action Notice" and dated January 28, 2005, the respondent's employment with Morinda, Inc. was terminated and labeled a "discharge." No six-week review or interview between the respondent and Tom Black ever took place. See exhibit 16.

13. In an affidavit dated August 22, 2006, Tom Black stated: "Matthias was terminated from a management position at TNI due to his inability to effectively manage employees in his department. This decision was difficult because of other skills Matthias has." See exhibit 22.

14. On February 1, 2005 the respondent signed a document entitled, "Release of All Claims," in which he acknowledged that he would receive 22 weeks' salary (\$35,876.94) from Morinda, Inc., plus \$6,180.00 for 6 months of COBRA premiums. In return, the respondent

agreed to release all claims for wages, profits, damages, court costs, attorneys' fees, etc. See exhibit 1.

15. Under paragraph 12 of the decree, the petitioner later received one-half of the \$35,876.94 severance pay. Commissioner Patton deemed the severance pay to be a "bonus" under paragraph 12.

16. Despite this document and agreement, the respondent continued to work for Morinda, Inc. during March and April 2005. A letter from Morinda, Inc., dated April 13, 2005, states that "Matthias Busche has been contracted to provide services to Tahitian Noni International for an indefinite period for the consideration of \$5000.00 per month. Minimum expected time for project is approximately one year." He later worked for Tahitian Noni Café USA, Inc, which was located at the same premises. See exhibits 2 and 22.

17. In June or July 2005 the respondent moved from his apartment in Orem to a condominium in Saratoga Springs. He testified that the rent was about the same, but the condo was halfway to Salt Lake City and was in a "quieter" location.

18. This contract employment with Morinda, Inc. was terminated in January 2006, and he began to look for other jobs. See exhibit 22.

19. With regard to this termination, Tom Black stated (in the same affidavit—see exhibit 22):

As an independent contractor for TNI and for TNI Café USA, Matthias had an open-ended schedule, being able to work at his own designated hours

inside and outside the TNI offices. Even so, there were times when Matthias was difficult to reach and seemed consumed by things outside the office. As a result, in January 2006, the management of TNI Café USA asked me to terminate the independent contractor relationship with Matthias.

20. In a deposition of Tom Black held on October 30, 2006—a little more than 2 months after the affidavit was prepared—Mr. Black was less certain as to the reasons for the respondent's termination from his management position at Tahitian Noni, although he admitted that he "created" the affidavit mentioned above and that there was nothing in it that was inaccurate.

A. Tom Black had no memory as to whether there had been an intervening event (between December 28, 2004 and February 1, 2005) which was the cause of the respondent's termination. "There may have been," but he did not have any specific memory of such an event.

B. He was "not necessarily" confident that the termination was a reflection on the respondent's performance after December 28, 2004.

C. He could not recall whether the respondent's termination might have been related to the "structure" of his department or "other considerations for people's skill levels" or whether it might have been for a reduction in force.

D. He also said that there were no layoffs at that time and that the respondent's termination was not a layoff.

E. Tom Black was the person who told the respondent that his contracting services were being terminated in January 2006.

F. The two departments for whom the respondent did contract work did not have "enough work for Matthias." Black could not recall if that was the only reason the respondent's employment as a consultant was terminated.

G. He was also told that the respondent was difficult to reach and seemed consumed by things outside his office.²

(See deposition, pp. 40-50.)

²No objection was made to this hearsay testimony.

21. During his subsequent period of unemployment, the respondent sent out 30-40 resumes.

22. On Monday, October 2, 2006 he began working for SupraNaturals at an annual salary of \$55,000.00, which amounts to a monthly salary of \$4,583.33. See exhibits 3, 4 and 8.

23. The respondent receives no bonuses at SupraNaturals.

24. On his 2005 U.S. tax return he declared an adjusted gross income of \$63,256.00, after deducting the \$22,755.00 that he declared in alimony payments. That would have given him a total gross income of \$86,011.00 for this court's purposes. He received an income tax refund of \$3,816.00 from the federal government and \$240.00 from the state government. See exhibit 5.

25. On his 2006 U.S. tax return he declared an adjusted gross income of \$11,915.00, after deducting the \$14,014.00 that he declared in alimony payments. That would have given him a total gross income of \$25,929.00 for this court's purposes. He received an income tax refund of \$940.00 from the federal government and \$522.00 from the state government. See exhibit 6.

26. Exhibit 8 is a earnings statement from SISEL International LLC/SupraNaturals for the pay period ending March 18, 2007. During a two-week pay period, the respondent grosses \$2,115.38, minus \$351.08 in taxes and FICA and \$6.68 in dental and vision premiums. The sum of \$876.01 is deposited into his checking account and the Office of Recovery Services garnishes \$881.61 for alimony and child support.

27. Exhibit 11, tab N is another earnings statement from SISEL for the pay period

ending May 13, 2007. The amount deposited into his checking account is less (\$773.56), due to a \$138.46 deduction for a medical insurance premium. According to the respondent's bank statements, this reduction began with the April 6, 2006 paycheck deposit. See exhibit 11, tab M.

STIPULATIONS OF THE PARTIES

The parties reached two stipulations before the commencement of the trial:

1. By April 30th of each year, the parties will exchange verification of their income for the previous tax year, including their tax returns, W-2 and 1099 tax forms, and any other schedules and documents submitted to the IRS as part of their tax returns. This satisfied the request stated in the petitioner's petition to modify.

2. The parties allowed representatives of Tahitian Noni and the Office of Recovery Services to leave the courtroom. The parties further stipulated that the business records from each entity would be received into evidence without further foundation.

ISSUES TRIED TO THE COURT

1. The respondent's request for a reduction of child support
2. The respondent's request for either a reduction in or an elimination of alimony; and
3. The petitioner's claims for attorney's fees, including the respondent's claims for fees for past hearings before Commissioner Patton and fees under U.C.A. 30-3-5(6) for claims without merit which were made in bad faith.

DISCUSSION

This matter comes before the court upon the respondent's Petition to Modify, in which he claims a change of circumstances justifying a reduction of his court-ordered child support and

a reduction or elimination of the alimony award benefitting the petitioner.

I. Applicable Statutes

The following statutes are determinative to the court's decision in this matter.

1. U.C.A. 30-3-5(3): The court has continuing jurisdiction to make subsequent changes or new orders for the custody of the children and their support, maintenance, health, and dental care . . . as is reasonable and necessary.
2. U.C.A. 78-45-7.2(7):
 - (a) A parent . . . may at any time petition the court to adjust the amount of a child support order if there has been a substantial change in circumstances.
 - (b) For purposes of Subsection (7)(a), a substantial change in circumstances may include:
 - . . .
 - (iii) material changes of 30% or more in the income of a parent;
 - (ix) material changes in the ability of a parent to earn.

© Upon receiving a petition under Subsection (7)(a), the court shall, taking into account the best interests of the child, determine whether a substantial change has occurred. If it has, the court shall then determine whether the change results in a difference of 15% or more between the amount of child support ordered and the amount that would be required under the guidelines. If there is such a difference and the difference is not of a temporary nature, the court shall adjust the amount of child support ordered to that which is provided for in the guidelines.
3. U.C.A. 80-30-5(8)(g)(i): The court has continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances not foreseeable at the time of the divorce.
4. U.C.A. 78-45-7.5(7):
 - (a) Income may not be imputed to a parent unless the parent stipulated to the amount imputed, the party defaults, or, in contested cases, a hearing is held and a finding made that the parent is voluntarily unemployed or underemployed.
 - (b) If income is imputed to a parent, the income shall be based upon employment potential and probable earnings as derived from work history, occupation qualifications, and prevailing earnings for persons of similar backgrounds in the community, or the median earning for persons in the same

occupation in the same geographical area as found in the statistics maintained by the Bureau of Labor Statistics.

II. The Central Issue

At the heart of this petition to modify is the respondent's claim that he, through no fault of his own, lost his highly remunerative job, thereby losing his ability to pay the previously court-ordered child support and alimony. The petitioner's corresponding claim is that the respondent did, indeed, cause his own demise at Tahitian Noni and would still be making more than \$84,000.00 per year—but for his own actions. The court must then decide whether the respondent's new salary of \$55,000.00 per year (a monthly salary of \$4,583.33) constitutes a material change of circumstances or whether he is voluntarily underemployed, due to his own actions at his former employment.

III. The January 28, 2005 Discharge from Tahitian Noni

All testimony regarding the respondent's two terminations from Tahitian Noni came—in one form or the other—from the respondent, Tom Black, and business records from Tahitian Noni. Because the respondent testified, the court was able to observe his demeanor, hear his testimony, and reach conclusions as to his credibility. On the other hand, Tom Black was not present, having left the country for a planned vacation—despite having been served a subpoena. After hearing arguments from the parties regarding the admissibility of his recorded testimony, the affidavit (exhibit 22) and deposition testimony of Tom Black were received by the court. Therefore, the court can only determine Tom Black's credibility by analyzing his affidavit and deposition testimony in the light of the respondent's testimony and the business records from

Tahitian Noni.

The respondent's original testimony was that he was "laid off" by Tahitian Noni due to a "cost reduction." He then stated that he was not really fired, and that he kept working for Tahitian Noni—albeit at a new and lower salary on a month-to-month contract. When that contract work ended, he was either fired or terminated.

Upon cross-examination and presentation of the documents found in exhibit 16, the respondent admitted that he had received the warnings contained in Tom Black's March 24, 2004 "Performance Counseling Notice," including the notice that further violations could result in termination of employment. Apparently, the respondent's work habits were still a problem when Tom Black wrote the December 28, 2004 performance evaluation. He criticized the respondent: "Your performance has been below expectations; i.e. your time and contribution is not accounted for." He also noted that the respondent was still "burdening" his "work peers" with his "personal challenges."

The respondent also admitted during cross-examination that he had written the December 28, 2004 email message to Tom Black, promising his "full intentions to be again as dedicated and available as I have been in the past and beyond and be the leader I am expected to be in my position." During re-cross-examination, he admitted that he was originally terminated from Tahitian Noni, signed all of the release documents, and then was rehired as an independent contractor.

The respondent's reluctance to admit that he really was terminated by Tahitian Noni damages his credibility immensely. The business records from Tahitian Noni clearly

demonstrate a pattern of misbehavior by the respondent that the respondent refused to change.

Although Tom Black's written affidavit and spoken deposition testimony differ in some respects, the court finds that his affidavit and testimony are quite damning with respect to the respondent's termination of employment at Tahitian Noni. In his August 22, 2006 affidavit, Tom Black stated, without equivocation, that the respondent had been terminated from his "management position at TNI due to his inability to effectively manage employees in his department."

Tom Black's testimony at the October 30, 2006 deposition was not quite as unequivocal. After first claiming that he could not remember whether the January 2005 termination was related to the "structure" of the respondent's department or whether it was a reduction in force, Tom Black later admitted that the respondent's termination was not a layoff and that there had been no other layoffs at that time. He could not remember whether there had been an intervening event (between December 28, 2004 and February 1, 2005) which was the cause of the termination, and he was "not necessarily" confident that the termination was a reflection on the respondent's performance after December 28, 2004.

Although the court did not have the opportunity to view Tom Black's testimony in court and, thereby, assess his credibility, it appears that his deposition testimony was expressed in terms aimed to damage the respondent as little as possible. This would be consistent with the terms of the Release of Claims signed by the respondent and an agent of Morinda, Inc. on January 28, 2005. Paragraph H states: "Mr. Busche covenants never to disparage or speak ill of Morinda. Morinda covenants never to disparage or speak ill of Mr. Busche." (See exhibit 2 and

16.) The court finds his affidavit and those portions of his deposition testimony, which are consistent with the affidavit, more credible than those portions which conflict and attempt to exonerate the respondent from responsibility for his January 28, 2005 termination from Tahitian Noni.

In addition, regardless of Tom Black's affidavit and deposition testimony, the documents from the respondent's personnel file at Tahitian Noni speak for themselves and tell a story of ongoing problems with the respondent's behavior and work habits. Ten months prior to the 2005 termination, the respondent received a written warning from his supervisor, Tom Black. The respondent had been sharing his personal life with employees, talking about inappropriate subjects with fellow employees, spending too much time "interacting with a female distributor," and speaking to another employee regarding his personal life, including "topics of a sexual nature." This performance evaluation warned the respondent that further violations could result in termination.

Exactly one month before the January 28, 2005 termination, Tom Black evaluated the respondent again, noting that his "performance has been below expectations" with regard to unaccounted time and contributions. The respondent was also chastised for "burdening" his work peers with his "personal challenges." Tom Black and the respondent agreed that they would meet every six weeks "until no longer necessary to discuss the improvements of [his] performance."

That anticipated meeting never occurred, as the respondent was terminated from his supervisory position one month after the December 28, 2004 memorandum was written. The

“Personnel Action Notice” made it clear that this was a “discharge”—not a layoff or a reduction in force. Although Tom Black would not admit that there was an intervening event which caused the termination, clearly the respondent did something which took the Tahitian Noni management past any efforts to rehabilitate the respondent and his work habits.

The court finds that the respondent was responsible for his termination on January 28, 2005 from his well-paying management job at Tahitian Noni. His failure to comply with the warnings given him by upper management through Tom Black resulted in his discharge.

IV. The January 2006 Discharge from Contract Employment with Tahitian Noni

Despite the January 28, 2005 discharge from Tahitian Noni, the respondent continued to work for the corporation as a contract employee, making \$5,000.00 per month. He testified that he never lost a day’s work in the transition from his management position to the contract job. Apparently, the same problems continued during this contract work, resulting in his termination in January 2006. In the same affidavit mentioned above, Tom Black stated that “there were times when Matthias was difficult to reach and seemed consumed by things outside the office.” In his deposition testimony, he again attempted to soften the impact by stating that the two departments for whom the respondent did contract work did not have enough work for him. He also mentioned the information from the affidavit noted earlier in this paragraph.

Again, Tom Black testified that the affidavit was accurate, as he was the person who created it. The court notes, as before, that he attempted to exonerate the respondent in his deposition testimony—except for noting the information about the respondent being difficult to reach and seeming consumed by things outside the office. Again, this would be consistent with

the terms of the Release of Claims signed by the respondent and an agent of Morinda, Inc. on January 28, 2005.

The court finds that the respondent was also responsible for his termination from his contract job in January 2006.

V. Voluntary Underemployment

As stated above, the court must decide whether the respondent's new salary of \$55,000.00 per year (a monthly salary of \$4,583.33) constitutes a material change of circumstances or whether he is voluntarily underemployed, due to his own actions at his former employment. The court finds that the defendant, because of his actions which lead to his discharge from Tahitian Noni on January 28, 2005, is underemployed.

The respondent's less remunerative salary is a direct result of his refusal to accept the warnings from his supervisor at Tahitian Noni to change his behavior and work habits. The March 24, 2004 "Performance Counseling Notice" should have placed him on notice that his employment was in jeopardy, but he ignored the gravity of that document, which was also considered a written warning. The December 28, 2004 performance evaluation addressed some of the same issues, which indicates to this court that the respondent had made an insufficient effort to change his behavior. The ultimate discharge on January 28, 2005 is further indication that something happened which made discharge the only option for the upper management at Tahitian Noni. Indeed, the respondent was terminated one year later from his contract employment for some of the same problems.

The court notes that this divorce action was filed by the petitioner on March 12, 2004,

just twelve days before Tom Black wrote the March 24, 2004 "Performance Counseling Notice," which placed the respondent on notice that his job was on the line. Knowing that his marriage was at an end and that his job was at risk, the respondent continued to burden his fellow employees with the details of his personal life. The parties' final stipulation was filed on January 5, 2005, and Judge Taylor signed the divorce decree on January 7, 2005. This was shortly after the December 28, 2004 performance evaluation had been given to the respondent. He agreed to the child support and alimony amounts, knowing that his job was in jeopardy. He was discharged from his management job at Tahitian Noni just 21 days after the decree was signed. Even had the court's analysis brought it to a consideration of a material change of circumstances, the court would have had difficulty in finding that the respondent's lesser salary was unforeseen at the time of the divorce. Perhaps the petitioner was unaware of the precarious nature of the respondent's employment, but the respondent certainly was more than aware and, yet, did not change his behavior and work habits enough to keep his job.

Again, the court finds that the respondent is voluntarily underemployed, because of his actions which lead to his discharge from Tahitian Noni on January 28, 2005 and his second discharge in January 2006. Correspondingly, there has been no material change of circumstances. The respondent's Petition to Modify is denied, and, therefore, the court declines to modify the respondent's child support and alimony.

VI. Attorney's Fees for Previous Hearings

Counsel for the petitioner attempted to incorporate into this trial the petitioner's request for attorney's fees for previous hearings at which the petitioner prevailed. The dates of those

hearings are: April 17, 2000; August 29, 2005; April 4, 2006 and December 13, 2006. After discussing the issue, the court ordered the petitioner's attorney to submit affidavits of attorney's fees for three of the named hearings.

1. April 17, 2000: The order on that hearing was signed on June 1, 2007 and the affidavit for has already been submitted. There is no action to take on this hearing.

2. August 29, 2005: This was an order-to-show-cause hearing for which the order was signed by Judge Schofield on December 20, 2006. Attorney's fees were reserved at that time. The petitioner requests fees in the amount of \$3,324.71; supporting documentation for that request was submitted after the trial. The court has reviewed the attorney's billing records and finds that the requested fees are appropriate. The court awards judgment in favor of the petitioner in the amount of \$3,324.71 for this hearing. (See exhibit A of Douglas B. Thayer's Affidavit of Attorney's Fees, filed June 15, 2007.)

3. April 4, 2006: This is an order-to-show-cause hearing for which no order has ever been prepared and submitted to the court for its signature. According to the minute entry from that hearing, Commissioner Patton reserved the issue of attorney's fees. The petitioner requests fees in the amount of \$1,976.72; supporting documentation for that request was submitted after the trial. Without an order from that hearing, the court can neither approve nor disapprove the requested fees. The court leaves this issue open for further discussion between the attorneys and the court.

4. December 13, 2006: This was a hearing on an objection to an earlier ruling from Commissioner Patton. No attorney's fees were ordered, and it appears that the petitioner is not

asking for attorney's fees for that hearing.

These were the only hearings listed by the petitioner's attorney at trial, although his affidavit lists fees for other hearings, as well as his fees for the entire case. Due to this discrepancy in what was discussed at trial and what has been submitted post-trial, the court will set this matter for a short hearing on attorney's fees, so that the court may hear arguments regarding the requested fees for the various hearings and for the entire case.

VII. Attorney's Fees Under U.C.A. 30-3-5(6)

The petitioner argued that she should be awarded her attorney's fees under U.C.A. 30-3-5(6) for claims without merit which were made in bad faith. Although it is clear that the petitioner has prevailed in this matter and has been able to persuade the court that the respondent is voluntarily underemployed, the court does not find that the respondent's arguments were made in bad faith. As can be seen by the court's careful analysis of the facts, this decision was a close call in many respects. Indeed, while the court is quite comfortable in its decision, it is also aware that this decision will have catastrophic financial results for the respondent. On the other hand, it may inspire him to look for more highly remunerative employment or to build his separate freelance business. At any rate, the court does not find that the respondent's petition was filed, tried, and argued in bad faith. The court awards no attorney's fees under U.C.A. 30-3-5(6).

VIII. Alimony and Child Support Unpaid

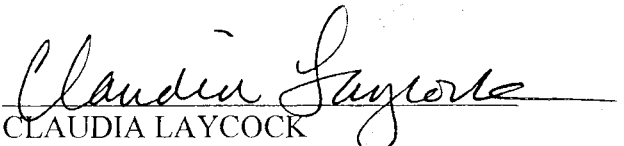
As indicated by the court during the trial, the matter of unpaid alimony and child support was not before the court through either of the petitions to modify, nor had any order-to-show-cause documents been filed by the petitioner. The court will leave it to the attorneys to

look at the numbers submitted by ORS and the petitioner and to attempt to determine any arrearages owed by the respondent. The parties may then submit a stipulated order for the court's signature.

CONCLUSION

The court grants the petitioner's Petition to Modify, as stipulated by the parties. The court denies the respondent's Petition to Modify and leaves the amounts of child support and alimony ordered by the decree in place. The court orders the attorneys to submit a stipulated order for the court's signature as to arrearages owed by the respondent for child support and alimony. The court awards no attorney's fees under U.C.A. 30-3-5(6). The court orders the attorneys to jointly call the court's lead clerk for a date for further discussion of attorney's fees.

DATED this 15th day of August, 2007.


CLAUDIA LAYCOCK
Fourth District Court Judge


Case No. 044400503

MAILING CERTIFICATE

I certify that a true copy of the foregoing ruling was mailed on 16 August 2007 to the following:

Douglas B. Thayer
Andrew V. Wright
Attorneys for Petitioner
HILL, JOHNSON & SCHMUTZ, L.C.
RiverView Plaza ste 300
4844 N 300 W
Provo UT 84604-5663

Rosemond G. Blakelock
Attorney for Respondent
75 S 300 W
Provo UT 84601


Deputy Court Clerk

APPENDIX B

Trial Court Exhibits

Financial Declaration dated May 31, 2007

Performance Counseling Notice

Tom Black Memorandum

Email to Tom Black

Personal Action Notice dated January 28, 2005

Release of All Claims

Morinda Letter dated April 13, 2005

Supernaturals Letter

**In the Fourth Judicial District Court of Utah County
STATE OF UTAH**

LORI ANN BUSCHE,)
Petitioner)
vs.)
MATTHIAS BUSCHE.,)
Respondent)

Case No. 044400503

Financial Declaration

Dated 5-31-07

Husband: Matthias Busche

Address: 1536 South 1175 East

Bountiful, Utah 84010

Soc. Sec. No. 529-31-9941

Occupation: Graphic Designer

Employer: Sisel International

Birth date: _____

NOTE: THIS DECLARATION MUST BE FILED WITH THE DOMESTIC CALENDAR CLERK 5 DAYS PRIOR TO THE PRE-TRIAL HEARING.

FAILURE BY EITHER PARTY TO COMPLETE, PRESENT, AND FILE THIS FORM AS REQUIRED WILL AUTHORIZE THE COURT TO ACCEPT THE STATEMENT OF THE OTHER PARTY AS THE BASIS FOR ITS DECISION.

ANY FALSE STATEMENT MADE HEREON SHALL SUBJECT YOU TO THE PENALTY FOR PERJURY AND MAY BE CONSIDERED A FRAUD UPON THE COURT.

STATEMENT OF INCOME, EXPENSES, ASSETS AND LIABILITIES

(NOTE: To arrive at monthly figures when income is received and deductions are made weekly, multiply by 4.3; if figures are on a bi-weekly basis, multiply by 2.167)

	HUSBAND	WIFE
1. Gross Monthly income from:	\$4,583.00	\$
Salary and wages, including commissions, bonuses		
allowances, and overtime		
pensions and retirement		
social security		
Disability and unemployment insurance		
Public assistance (welfare, AFDC payment, etc.)		
Child support from any prior marriage		
Dividends and interest		
Rents		
All other sources: (specify)		
TOTAL MONTHLY INCOME	\$4,583.00	\$

2. Itemize monthly deductions from gross income:		
State and federal income taxes	341.62	
number of exemptions taken		
social security	261.80	
medical or other insurance (describe fully)	297.69	
medicare tax	61.23	
vision insurance	7.98	
retirement or pension fund		
savings plan		
credit union		
other: (specify)		
TOTAL MONTHLY DEDUCTIONS	\$970.33	\$
3. NET MONTHLY INCOME - TAKE HOME PAY	3,621.67 per month	
Net amount take home with current garnishment amounts for alimony and child support	773.56 every two weeks	
Net amount paid to Petitioner with current garnishment	881.61 every two weeks	

4. Debts and obligations:				
Creditors Name	For	Date Payable	Balance	Monthly Payment
St. Marks Hospital	medical costs	now	3,619.03	100.00
St. Marks Hospital		now	10,827.56	200.00
Chase Visa (0457)	misc. due to no money	q. month	1,899.33	107.00 (50)
United Visa (7187)	misc. living exp.	Q. month	16,893.42	591.00 (308)
Discover (4485)	misc.	Q. month	1,603.50	63.00 (50)
Washington Mutual Visa (2666)	misc	q. month	2,551.74	100.00 (75)
Delta Sky Miles (64009)	misc	q. month	4,768.36	134.30 (20)
Wells Fargo (1743)	misc	q. month	6,770.15	196.00 (68)
Edward Jones (7570)	misc	q. month	13,449.84	429.00 (131)
A t & T universal card (1632)	misc	q. month	10,710.00	367.00 (131)
				(833)
TOTAL			\$73,082.93	\$1,987.30 on charge cards and 300.00 per month on medical debts

Machine-generated OCR, may contain errors.

(D) Cash and Deposit Accounts (banks, savings & loans, credit unions-savings and checking)

I have no cash or savings

(E) Life Insurance: Name of
Company

Policy No.

Face Amount

Cash value, accumulated dividend, or
loan amount

(F) Profit Sharing or Retirement accounts

Value of Interest and amount presently vested

Name:

Name:

(G) Other personal property and Assets (Specify)

(H) Real Estate (Where more than one parcel of real estate owned, attach sheet with identical information for all additional property)

Address: I have no real property except my interest in the marital home

Type of Property:

Original Cost:

Individual Contributions

I) Business Interest (indicate name, share, type of business value less indebtedness)

J) Other Assets (Specify)

6. Total monthly expenses *(Specify which party is the custodial parent and list name and relationship of all members of the household whose expenses are included)

**	Required expenses but those I am unable to afford at this time	amounts actually due and owing at this time
Rent or mortgage payments (residence) I had an apartment but had to give it up	725.00	
Real property taxes (residence)		
Real property insurance (residence)		
Maintenance (residence)		
Food and household supplies		320.00
Utilities including water, electricity, gas and heat - I need these but presently cannot afford an apartment	230.00	
Telephone		100.00
Laundry and cleaning		30.00
Clothing		30.00-
Medical		300 (St. Marks as attached)
Dental		
Insurance (medical and vision insurance deducted above - 305.65) life insurance		18.00
Child care		
Payment of child spousal support re: prior marriage		
School		
Entertainment (include clubs, social obligations, travel, recreation)		100
Incidentals (grooming, tobacco, alcohol, gifts and donations)		150
Transportation (other than automobile)		
Auto expense (gas, oil, repair, insurance) includes 76.50 mo car insurance		300.00
Auto payments		298.44
Installment payment(s). (Insert total and attach itemized schedule if not fully set forth in (d) on the first page hereof)		1,987.30
Other expenses (Insert total and specify on attached schedule)		

TOTAL EXPENSES:

955.00

3,633.74

my present net monthly income (after garnishment) is approximately \$1,663.00.

(Total 4,588.74)

Total child support and alimony set forth in Decree of Divorce is

1,776 for child support and 1,545 for alimony



TOLL-FREE: 1-800-635-3526
ESPAÑOL: 1-800-681-9692



409542-707911810- A3

WWW.STMARKSHOSPITAL.COM/BILL.ASP

Due to privacy laws, when calling please be prepared to provide the patient's date of birth, address, and Social Security Number.

Responsible Party		Account Information	
938 Matthias Busche 1536 S 1175 E Bountiful, UT 84010 	Patient Name:	Matthias Busche	
	Account Number:	9546027584	
	Discharge Date:	07/09/06	
	Total Charges:	4524.91	
	Statement Date:	04/03/07	
	Account Balance:	\$3,619.93	
	Payment Due Date:	04/18/07	
		← PAY THIS AMOUNT NOW	
BILL FOR SERVICES-IMMEDIATE ACTION REQUIRED			

Dear Matthias Busche,

Thank you for selecting us for your medical services. We trust that you found our commitment to patient care to be of the highest standard.

Our records reflect that you were previously contacted regarding the unpaid balance in the amount shown above. We urge you to send payment in full today. We also offer the convenience of accepting payment over the phone by check, credit card, or debit card through our automated payment system at no additional cost.

If you are unable to pay the total balance at this time, please contact us at the toll-free number shown above.

If you have already sent payment in full, thank you.

ST. MARK'S HOSPITAL
National Patient Account Services

Refer to back for additional billing information

Please Detach and Return This Portion With Your Payment

Statement Date 04/03/07

☐ If your address changed, check this box and complete form on back.

Matthias Busche
1536 S 1175 E
Bountiful, UT 84010

Account Number	9546027584
Payment Due Date	04/18/07
Balance Due	\$3,619.93
Payment Amount Enclosed	

We accept payment by credit card, check, or money order. If paying by check, please make check payable to the hospital and include your patient account number on the check to ensure proper credit. You may also pay by phone or online at our web site listed above.

SEND PAYMENT TO ADDRESS BELOW:

ST. MARK'S HOSPITAL
P.O. BOX 538658
ATLANTA, GA 30353

Credit Card Authorization (Please check one)	
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
Credit Card Number	Exp. Date
<input type="text"/>	<input type="text"/>
Cardmember's Signature	\$ Amount
<input type="text"/>	<input type="text"/>

||||| Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

LOUISVILLE, KY 40269



MON-FRI 8AM-5PM EST
TOLL-FREE: 1-800-635-3526
ESPAÑOL: 1-800-681-9692



409542-701806452- R1

WWW.STMARKSHOSPITAL.COM/BILL.ASP

Due to privacy laws, when calling please be prepared to provide the patient's date of birth, address, and Social Security Number.

Responsible Party		Account Information	
807	Matthias Busche	Patient Name:	Matthias Busche
	1536 S 1175 E	Account Number:	9546005124
	Bountiful, UT 84010	Discharge Date:	07/07/06
		Account Balance:	\$10,827.56
		Partial Pymt Amt:	\$200.00
		Current Amount Due:	\$200.00
		Statement Date:	04/09/07
PAY THIS AMOUNT			
REMINDER OF PARTIAL PAYMENTS			

Dear Matthias Busche,

We would like to remind you that the next payment on this account is due on the date shown below. Please send payment for the current amount due. To ensure your payment is received each month by the date agreed upon, please mail your payment at least ten (10) days before the due date. For your convenience, we also accept payment over the phone by check, credit card, or debit card through our automated payment system at no additional cost.

If you have already sent payment, thank you.

ST. MARK'S HOSPITAL
National Patient Account Services

Refer to back for additional billing information

Please Detach and Return This Portion With Your Payment

Statement Date 04/09/07

☐ If your address changed, check this box and complete form on back.

Matthias Busche
1536 S 1175 E
Bountiful, UT 84010

Account Number	9546005124
Payment Due Date	04/25/07
Balance Due	\$200.00
Payment Amount Enclosed	

We accept payment by credit card, check, or money order. If paying by check, please make check payable to the hospital and include your patient account number on the check to ensure proper credit. You may also pay by phone or online at our web site listed above.

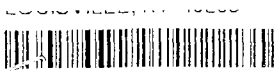
SEND PAYMENT TO ADDRESS BELOW:

ST. MARK'S HOSPITAL
P.O. BOX 538658
ATLANTA, GA 30353



Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

Credit Card Authorization (Please check one)			
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Credit Card Number		Exp. Date	
<div style="border: 1px solid black; height: 20px; width: 100%;"></div>		<div style="border: 1px solid black; height: 20px; width: 100%;"></div>	
Cardmember's Signature		Amount	
<div style="border: 1px solid black; height: 20px; width: 100%;"></div>		<div style="border: 1px solid black; height: 20px; width: 100%;"></div>	



MON-FRI 8AM-5PM SAT 9AM-1PM ET
TOLL-FREE: 1-800-635-3526
ESPAÑOL: 1-800-681-9692



409542-707911810- A3

WWW.STMARKSHOSPITAL.COM/BILL.ASP

Due to privacy laws, when calling please be prepared to provide the patient's date of birth, address, and Social Security Number.

Responsible Party		Account Information	
938 Matthias Busche 1536 S 1175 E Bountiful, UT 84010 	Patient Name:	Matthias Busche	
	Account Number:	9546027584	
	Discharge Date:	07/09/06	
	Total Charges:	4524.91	
	Statement Date:	04/03/07	
	Account Balance:	\$3,619.93	
	Payment Due Date:	04/18/07	
PAY THIS AMOUNT NOW			
BILL FOR SERVICES-IMMEDIATE ACTION REQUIRED			

Dear Matthias Busche,

Thank you for selecting us for your medical services. We trust that you found our commitment to patient care to be of the highest standard.

Our records reflect that you were previously contacted regarding the unpaid balance in the amount shown above. We urge you to send payment in full today. We also offer the convenience of accepting payment over the phone by check, credit card, or debit card through our automated payment system at no additional cost.

If you are unable to pay the total balance at this time, please contact us at the toll-free number shown above.

If you have already sent payment in full, thank you.

ST. MARK'S HOSPITAL
National Patient Account Services

Refer to back for additional billing information

Please Detach and Return This Portion With Your Payment

Statement Date

04/03/07

☐ If your address changed, check this box and complete form on back.

Matthias Busche
1536 S 1175 E
Bountiful, UT 84010

Account Number	9546027584
Payment Due Date	04/18/07
Balance Due	\$3,619.93
Payment Amount Enclosed	

We accept payment by credit card, check, or money order. If paying by check, please make check payable to the hospital and include your patient account number on the check to ensure proper credit. You may also pay by phone or online at our web site listed above.

SEND PAYMENT TO ADDRESS BELOW:

ST. MARK'S HOSPITAL
P.O. BOX 538658
ATLANTA, GA 30353

Credit Card Authorization (Please check one)	
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
Credit Card Number	Exp. Date
<input type="text"/>	<input type="text"/>
Cardmember's Signature	
Machine-generated OCR, may contain errors.	
\$ Amount	

Statement for account number: 5401 6830 2118 0457

New Balance	Payment Due Date	Past Due Amount	Minimum Payment
\$1,899.33	04/29/07	\$0.00	\$107.00



Amount Enclosed

\$

Make your check payable to Chase Card Services.
New address or e-mail? Print on back.

5401683021180457000107000018993300000004

38020 BEA Z 09407 D
MATTHIAS BUSCHE
1536 S 1175 E
BOUNTIFUL UT 84010-2122



CARDMEMBER SERVICE
PO BOX 94014
PALATINE IL 60094-4014



⑆5000 160 28⑆ 20930211804576⑈



Opening/Closing Date: 03/05/07 - 04/04/07
Payment Due Date: 04/29/07
Minimum Payment Due: \$107.00

CUSTOMER SERVICE

In U.S. 1-800-945-2000
Español 1-888-446-3308
TDD 1-800-955-8060
Pay by phone 1-800-436-7958
Outside U.S. call collect
1-302-594-8200

MASTERCARD ACCOUNT SUMMARY Account Number: 5401 6830 2118 0457

Previous Balance	\$1,911.25	Total Credit Line	\$12,100
Payment, Credits	-\$100.00	Available Credit	\$10,200
Purchases, Cash, Debits	+\$39.00	Cash Access Line	\$12,100
Finance Charges	+\$49.08	Available for Cash	\$10,200
New Balance	\$1,899.33		

ACCOUNT INQUIRIES

P.O. Box 15298
Wilmington, DE 19850-5298

PAYMENT ADDRESS

P.O. Box 94014
Palatine, IL 60094-4014

VISIT US AT:

www.chase.com/creditcards

TRANSACTIONS

Trans			Amount
Date	Reference Number	Merchant Name or Transaction Description	Credit Debit

438857523411718700103900016893420000000

00179 BEX Z 06407 C
 MATTHIAS BUSCHE
 1536 S 1175 E
 BOUNTIFUL UT 84010-2122



CARDMEMBER SERVICE
 PO BOX 94014
 PALATINE IL 60094-4014



⑆5000 160 28⑆ 2365 234 1171878⑈



Opening/Closing Date: 02/26/07 - 03/25/07
 Payment Due Date: 04/19/07

CUSTOMER SERVICE

In U.S. 1-800-537-7783
 Español 1-888-446-3308
 TDD 1-800-955-8060
 Pay by phone 1-800-436-7958
 Outside U.S. call collect
 1-847-888-6600

Minimum Payment Due for Credit Access Line
 Past Due Amount
 Total Minimum Payment Due

\$591.00
 \$448.00
 \$1,039.00

ACCOUNT INQUIRIES

P.O. Box 15298
 Wilmington, DE 19850-5298

PAYMENT ADDRESS

P.O. Box 94014
 Palatine, IL 60094-4014

VISA SIGNATURE SUMMARY

Account Number: 4388 5752 3411 7187

Previous Balance	\$16,458.36	Credit Access Line	\$17,600
Purchases, Cash, Debits	+\$51.95	Available Credit	\$706
Finance Charges	+\$383.11	Cash Access Line	\$3,520
New Balance	\$16,893.42	Available for Cash	\$0

VISIT US AT:

www.chase.com/united

A late fee is reflected on this billing statement. Your minimum payment reflects 1% of your statement balance, plus any past-due amount, billed interest, and the billed late fee.

The new APR and promotional rate expiration reflected on this statement is a result of a late payment on your account. For your convenience, you can always pay online by accessing our website displayed on this statement.

MILEAGE PLUS MILES EARNED

Miles earned this statement from purchases	13
Total miles earned this statement	13
Total miles transferred to United	13

1-800-421-4655 (Mileage Plus)
 1-800-241-6522 (Reservations)

TRANSACTIONS

Trans Date	Reference Number	Merchant Name or Transaction Description	Amount Credit	Debit
03/18	24351787078103702496080	CIC*Triple Advantage 877-4816825 CA	\$12.95	
03/22		LATE FEE		39.00

FINANCE CHARGES

Category	Daily Periodic Rate 28 days in cycle	Corresp. APR	Average Daily Balance	Finance Charge Due To Periodic Rate	Transaction Fee	Accumulated Fin Charge	FINANCE CHARGES
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Account Statement

March 8 through April 6, 2007
Account Number: 706-3786870
Page 1 of 5



MATTHIAS BUSCHE
1536 S 1175 E
BOUNTIFUL UT 84010-2122

Thank you for banking with Wells Fargo. For assistance, call: (1-800-742-4932), TDD number (for the hearing impaired only): 1-800-877-4833. Or write: WELLS FARGO BANK, N.A., P.O. BOX 6995, PORTLAND, OR 97228-6995.

Wells Fargo Free Checking

Matthias Busche

Account Number: 706-3786870

Activity summary

Balance on 03/07	\$2,841.06
Deposits	2,525.57
Withdrawals	-4,227.32
.....	
Balance on 04/06	\$1,139.31

Before you leave on your next vacation, don't forget to get American Express Travelers Cheques. For more information and to purchase your Travelers Cheques, talk to your local banker. Or sign on to Wells Fargo Online Banking at wellsfargo.com and select "Account Services" then "Order Travelers Cheques".

Continued on next page

Activity detail

Deposits

Date	Description	\$ Amount
03/09	Sisle Internatio Payroll 070309 638009687344Yxg Busche,Matthias	876.00
03/23	Sisle Internatio Payroll 070323 609006464955Yxg Busche,Matthias	876.01
04/06	Sisle Internatio Payroll 070406 749006142207Yxg Busche,Matthias	773.56
Total deposits		\$2,525.57

Withdrawals

Other withdrawals

Date	Description	\$ Amount
03/09	POS Purchase -03/08 Mach ID 000000 Costco Whse #00Costco Whslehi Ut 2301 ?MCC=5300 124002971DA	95.59
03/09	Check Crd Purchase 03/07 Smith Auto Company Spanish Fork Ut 486830XXXXXX2301 068740000984152 ?MCC=5511 124002971DA	46.94
03/09	Check Crd Purchase 03/07 Mike'S Combo Shop Q39 Spanish Fork Ut 486830XXXXXX2301 068740000652720 ?MCC=5542 124002971DA	35.00
03/09	POS Purchase -03/08 Mach ID 000000 Costco Gas #007Costco Gaslehi Ut 2301 ?MCC=5542 124002971DA	14.31
03/12	POS Purchase -03/10 Mach ID 000000 CNS Cingular Pocns Cingulsalt Lake Citut 2301 ?MCC=4814 124002971DA	242.90
03/12	Check Crd Purchase 03/10 Siegfried'S Delicates Salt Lake Cit Ut 486830XXXXXX2301 070740002514384 ?MCC=5441 124002971DA	75.95
03/12	Check Crd Purchase 03/11 Fedex Kinko'S #2403 Salt Lake Cit Ut 486830XXXXXX2301 071740003559332 ?MCC=7338 124002971DA	4.74
03/13	POS Purchase -03/12 Mach ID 000000 Costco Whse #00Costco Whssalt Lake Citut 2301 ?MCC=5300 124002971DA	285.54
03/13	WF Credit Card Auto Pay 070312 90154161541743 Busche,Matthias	199.00
03/13	POS Purchase -03/12 Mach ID 000000 Costco Gas #001Costco Gassalt Lake Citut 2301 ?MCC=5542 124002971DA	32.57
03/13	Check Crd Purchase 03/11 Supersonic Car Wash In Salt Lake Cit Ut 486830XXXXXX2301 072740000801961 ?MCC=7542 124002971DA	6.00
03/14	Check Crd Purchase 03/12 Aa Alpine Self Stora Salt Lake Cit Ut 486830XXXXXX2301 073740001619372 ?MCC=4225 124002971DA	155.00
03/19	Ford E-Bill 15664790 Matthias Busche	298.44
03/19	Check Crd Purchase 03/16 Mike'S Combo Shop Q39 Spanish Fork Ut 486830XXXXXX2301 077740000597831 ?MCC=5542 124002971DA	38.95
03/19	Check Crd Purchase 03/17 Apl*itunes 866-712-7753Ca 486830XXXXXX2301 077740001585417 ?MCC=5735 124002971DA	4.24
03/21	POS Purchase -03/20 Mach ID 000000 Smiths 3171 Easssmiths 317Salt Lake Citut 2301 ?MCC=5542 124002971DA	38.00
03/23	Online Transfer To H Busche L Ref #IBEQFBX5M4 Complete Advantage Chkng Medreimbursemt	91.33

Continued on next page

March 8 through April 6, 2007
 Account Number: 706-3786870
 Page 3 of 5

Other withdrawals -continued

Date	Description	\$ Amount
03/26	Check Crd Purchase 03/23 Pictureline Salt Lake Cty Ut 486830XXXXXX2301 084740005611584 ?MCC=5946 124002971DA	77.24
03/26	POS Purchase -03/24 Mach ID 000000 Costco Gas #001Costco Gassalt Lake Citut 2301 ?MCC=5542 124002971DA	36.37
03/26	POS Purchase -03/26 Mach ID 000000 Smiths 632 S. 1Smiths 632Payson Ut 2301 ?MCC=5411 124002971DA	32.78
03/26	Check Crd Purchase 03/25 Winger'S Downtown Salt Lake Cit Ut 486830XXXXXX2301 085740004233669 ?MCC=5812 124002971DA	31.86
03/27	Check Crd Purchase 03/26 Apl*itunes 866-712-7753Ca 486830XXXXXX2301 086740000258584 ?MCC=5735 124002971DA	1.05
03/29	MBNA Online Pymt Online Pmt 070329 CKF168868078POS Busche,Matthias	401.00
03/29	Check Crd Purchase 03/28 Lotus Draper Ut 486830XXXXXX2301 088740002128566 ?MCC=5947 124002971DA	25.16
03/30	Check Crd Purchase 03/28 Steve'S Crest Provo Ut 486830XXXXXX2301 089740001992910 ?MCC=5542 124002971DA	40.00
04/02	Chase Epay 070331 XXXXX6780 NA	1,039.00
04/02	American Express Elec Remit 070331061104767Matthias Busche	150.00
04/02	Chase Epay 070331 XXXXX7046 NA	100.00
04/02	Discover E-Payment 070331 601100966028448 Busche Matthias	100.00
04/02	Check Crd Purchase 03/29 Precision Time #43 Orem Ut 486830XXXXXX2301 090740001768965 ?MCC=7631 124002971DA	28.66
04/02	Check Crd Purchase 03/31 Apl*itunes 866-712-7753Ca 486830XXXXXX2301 092740006251147 ?MCC=5735 124002971DA	4.24
04/03	Ucs-Click To Pay Payment J%WKB\$R53Q62Ctp Matthias Busche	365.51
04/03	Wamu/Pvn Paymt Creditcard 070402 402200700496456Matthias Busche	100.00
04/06	WF Bus Bill Pay-Software:Fee 124002971Nd	24.95
04/06	Add On Package Fee	5.00
Total other withdrawals		\$4,227.32

Daily balance summary

Date	\$ Balance	Date	\$ Balance	Date	\$ Balance
03/07	2,841.06	03/19	2,181.89	03/29	2,323.11
03/09	3,525.22	03/21	2,143.89	03/30	2,283.11
03/12	3,201.63	03/23	2,928.57	04/02	861.21
03/13	2,678.52	03/26	2,750.32	04/03	395.70
03/14	2,523.52	03/27	2,749.27	04/06	1,139.31

Continued on next page

March 8 through April 6, 2007
Account Number: 706-3786870
Page 4 of 5

Direct Deposit Advance (Lender - Wells Fargo Bank, N.A.)

Outstanding advance balance as of the beginning of this statement period including Finance Charges	\$0.00
Outstanding advance balance as of the end of this statement period including Finance Charges	\$0.00

Finance Charges incurred on advances taken during this statement period	\$0.00
--	--------

Current advance credit limit	\$500.00
-------------------------------------	-----------------

USE THE DIRECT DEPOSIT ADVANCE SERVICE TO ACCESS UP TO \$500 PRIOR TO RECEIVING YOUR RECURRING DIRECT DEPOSIT INCOME. JUST USE THE ATM, ONLINE OR CALL THE PHONE BANK. SEE THE DIRECT DEPOSIT ADVANCE SERVICE AGREEMENT AND PRODUCT GUIDE FOR COMPLETE DETAILS.

Thank you for banking with Wells Fargo.

1. Use the following worksheet to calculate your overall account balance.
2. Go through your register and mark each check, withdrawal, ATM transaction, payment, deposit or other credit listed on your statement. Be sure that your register shows any interest paid into your account and any service charges, automatic payments or ATM transactions withdrawn from your account during this statement period.
3. Use the chart below, list any deposits, transfers to your account, outstanding checks, ATM withdrawals, ATM payments or any other withdrawals (including any from previous months) which are listed in your register but not shown on your statement.

[illegible]

A The **NEW BALANCE** shown on your statement \$

B Any deposits listed in your register or transfers into your account which are not shown on your statement. \$ _____

+\$ _____

TOTAL _____ \$

C The total outstanding checks and withdrawals from the chart above - \$

This amount should be the same as the current balance shown in your check register

In Case of Errors or Questions About Your Electronic Transfers (Including Direct Deposit Advance or Deposit AdvanceSM Transactions)

Telephone us at the number printed on the front of this statement or write us at Wells Fargo Bank, P.O. Box 6995, Portland, OR 97228-6995 as soon as you can, if you think your statement or receipt is wrong or if you need more information about a transfer on the statement or receipt. We must hear from you no later than 60 days after we sent you the FIRST statement on which the error or problem appeared.

1. Tell us your name and account number (if any).
2. Describe the error or the transfer you are unsure about, and explain as clearly as you can why you believe it is an error or why you need more information.
3. Tell us the dollar amount of the suspected error.

We will investigate your complaint and will correct any error promptly. If we take more than 10 business days to do this, we will credit your account for the amount you think is in error, so that you will have the use of the money during the time it takes us to complete our investigation.

If the error concerns a **Direct Deposit Advance** or **Deposit Advance** transaction, you do not have to pay any amount in question while we are investigating, but you are still obligated to pay the parts of your **Direct Deposit Advance** or **Deposit Advance** transaction that are not in question. While we are investigating your question, we cannot report you as delinquent or take any action to collect the amount you question.

* The **Deposit Advance** service is not available in all states.

To Dispute or Report Inaccuracies in Information We Have
Furnished to a Consumer Reporting Agency About Your
Accounts

You have the right to dispute the accuracy of information that Wells Fargo Bank, N.A. has furnished to a consumer reporting agency by writing to us at Wells Fargo Servicing, P.O. Box 14415, Des Moines, IA 50306-3415. Please describe the specific information that is inaccurate or in dispute and the basis for the dispute along with all supporting documentation. If you believe the information furnished is the result of identity theft, please provide us with an identity theft report.



Are you interested in...

- Purchasing a home? Call us at **1-800-866-0743**
- Getting a student loan? Call us at **1-888-945-5373**
- Optimizing home equity? Call us at **1-866-259-0890**

Account Statement

April 7 through May 7, 2007

Account Number: 706-3786870

Page 1 of 4



MATTHIAS BUSCHE
1536 S 1175 E
BOUNTIFUL UT 84010-2122

Thank you for banking with Wells Fargo. For assistance, call: 1-800-TO-WELLS (1-800-869-3557), TDD number (for the hearing impaired only): 1-800-877-4833. Or write: WELLS FARGO BANK, N.A., P.O. BOX 6995, PORTLAND, OR 97228-6995.

Wells Fargo Free Checking

Matthias Busche

Account Number: 706-3786870

Activity summary

Balance on 04/06	\$1,139.31
Deposits	3,206.89
Withdrawals	-2,934.91
.....	
Balance on 05/07	\$1,411.29

Before you leave on your next vacation, don't forget to get American Express Travelers Cheques. For more information and to purchase your Travelers Cheques, talk to your local banker. Or sign on to Wells Fargo Online Banking at wellsfargo.com and select "Account Services" then "Order Travelers Cheques".

Continued on next page

Activity detail

Deposits

Date	Description	\$ Amount
04/20	Sisle Internatio Payroll 070420 772006429107Yxg Busche,Matthias	773.56
04/24	PC Banking Miscellaneous Fee -Reversal	24.95
04/24	PC Banking Miscellaneous Fee -Reversal	24.95
04/24	ATM Deposit -04/24 Mach ID 9300Z 99 N. Main Spanish Fork Ut 2301	1,400.00
04/24	Transfer From Sav # 000007293124975	65.28
04/30	Online Transfer From H Busche L Ref #IBE5242Mpc Complete Advantage Chkng Childrens April Ins Prem Reimb	144.60
05/04	Sisle Internatio Payroll 070504 559010042979Yxg Busche,Matthias	773.55
Total deposits		\$3,206.89

Withdrawals

Other withdrawals

Date	Description	\$ Amount
04/09	Member's Choice Fbfs Pymt 070406 FBMINS000259017 Buschematthias	66.63
04/10	WF Credit Card Auto Pay 070409 90154161541743 Busche,Matthias	196.00
04/11	Check Crd Purchase 04/09 Hca Local Hospital Vis 615-344-2404Tn 486830XXXXXX2301 101740000374723?MCC=8062 124002971DA	200.00
04/13	Check Crd Purchase 04/11 Aa Alpine Storage-Ro Roy Ut 486830XXXXXX2301 103740001457506?MCC=4225 124002971DA	155.00
04/16	POS Purchase -04/15 Mach ID 000000 Costco Gas #001Costco Gassalt Lake Citut 2301 ?MCC=5542 124002971DA	43.47
04/16	Check Crd Purchase 04/14 Apl*itunes 866-712-7753Ca 486830XXXXXX2301 105740001372318 ?MCC=5735 124002971DA	4.24
04/18	Ford E-Bill 16046730 Matthias Busche	298.44
04/18	Check Crd Purchase 04/17 Apl*itunes 866-712-7753Ca 486830XXXXXX2301 108740001285477 ?MCC=5735 124002971DA	11.66
04/23	Online Transfer To H Busche L Ref #IBE7X58546 Complete Advantage Chkng Medreimbusmnt	33.00
04/24	Add On Package Fee	5.00
04/30	Check Crd Purchase 04/26 Hca Local Hospital Vis 615-344-2404Tn 486830XXXXXX2301 119740003511968?MCC=8062 124002971DA	200.00
04/30	Check Crd Purchase 04/28 Apl*itunes 866-712-7753Ca 486830XXXXXX2301 119740001798671 ?MCC=5735 124002971DA	4.24
05/01	Bill Pay Service Fee On 05-01	6.95
05/03	POS Purchase -05/02 Mach ID 000000 Dillard'S # 930Dillard'S Murray Ut 2301 ?MCC=5311 124002971DA	143.98
05/04	Check Crd Purchase 05/02 Olympus Hills Sinclair Salt Lake Cit Ut 486830XXXXXX2301 124740003409264?MCC=5542 124002971DA	50.00
05/04	Check Crd Purchase 05/03 Thanksgiving Point Mus Lehi Ut 486830XXXXXX2301 124740003077106?MCC=7991 124002971DA	39.50
05/07	WF Bus Bill Pay-Software:Fee 124002971Nd	24.95
05/07	Chase Epay 070506 XXXXX5542 NA	576.00

Continued on next page

Other withdrawals -continued

Date	Description	\$ Amount
05/07	American Express Elec Remit 070505061712309Matthias Busche	304.24
05/07	Chase Epay 070506 XXXXX5621 NA	213.00
05/07	POS Purchase -05/06 Mach ID 000000 Costco Whse #00Costco Whsmurray Ut 2301 ?MCC=5300 124002971DA	134.08
05/07	Member's Choice Fbfs Pymt 070504 FBMINs000307325 Buschematthias	66.63
05/07	Check Crd Purchase 05/06 Apl*itunes 866-712-7753Ca 486830XXXXXX2301 127740002110444 ?MCC=5735 124002971DA	48.76
05/07	POS Purchase -05/06 Mach ID 000000 Costco Gas #007Costco Gasmurray Ut 2301 ?MCC=5542 124002971DA	35.26
05/07	Discover E-Payment 070506 601100966028448 Busche Matthias	31.00
05/07	Check Crd Purchase 05/05 Clean Express Salt Lake Cit Ut 486830XXXXXX2301 126740001889493 ?MCC=7216 124002971DA	21.63
05/07	Check Crd Purchase 05/04 Spring Wireless #220 Spanish Fork Ut 486830XXXXXX2301 126740005874712 ?MCC=4812 124002971DA	21.25
Total other withdrawals		\$2,934.91

Daily balance summary

Date	\$ Balance	Date	\$ Balance	Date	\$ Balance
04/06	1,139.31	04/16	473.97	04/30	2,354.97
04/09	1,072.68	04/18	163.87	05/01	2,348.02
04/10	876.68	04/20	937.43	05/03	2,204.04
04/11	676.68	04/23	904.43	05/04	2,888.09
04/13	521.68	04/24	2,414.61	05/07	1,411.29

Direct Deposit Advance (Lender - Wells Fargo Bank, N.A.)

Outstanding advance balance as of the beginning of this statement period including Finance Charges	\$0.00
Outstanding advance balance as of the end of this statement period including Finance Charges	\$0.00

Finance Charges incurred on advances taken during this statement period \$0.00

Current advance credit limit \$500.00

USE THE DIRECT DEPOSIT ADVANCE SERVICE TO RECEIVE UP TO \$500 OF YOUR RECURRING DIRECT DEPOSIT INCOME. JUST USE THE ATM, ONLINE OR CALL THE PHONE BANK. SEE THE DIRECT DEPOSIT ADVANCE SERVICE AGREEMENT AND PRODUCT GUIDE FOR COMPLETE DETAILS.

Thank you for banking with Wells Fargo.

Account Statement

March 8 through April 6, 2007
Account Number: 706-3786870
Page 1 of 5



MATTHIAS BUSCHE
1536 S 1175 E
BOUNTIFUL UT 84010-2122

Thank you for banking with Wells Fargo. For assistance, call: (1-800-742-4932), TDD number (for the hearing impaired only): 1-800-877-4833. Or write: WELLS FARGO BANK, N.A., P.O. BOX 6995, PORTLAND, OR 97228-6995.

Wells Fargo Free Checking

Matthias Busche
Account Number: 706-3786870

Activity summary

Balance on 03/07	\$2,841.06
Deposits	2,525.57
Withdrawals	-4,227.32
.....	
Balance on 04/06	\$1,139.31

Before you leave on your next vacation, don't forget to get American Express Travelers Cheques. For more information and to purchase your Travelers Cheques, talk to your local banker. Or sign on to Wells Fargo Online Banking at wellsfargo.com and select "Account Services" then "Order Travelers Cheques".

Continued on next page

Activity detail

Deposits

Date	Description	\$ Amount
03/09	Sisle Internatio Payroll 070309 638009687344Yxg Busche,Matthias	876.00
03/23	Sisle Internatio Payroll 070323 609006464955Yxg Busche,Matthias	876.01
04/06	Sisle Internatio Payroll 070406 749006142207Yxg Busche,Matthias	773.56
Total deposits		\$2,525.57

Withdrawals

Other withdrawals

Date	Description	\$ Amount
03/09	POS Purchase -03/08 Mach ID 000000 Costco Whse #00Costco Whslehi Ut 2301 ?MCC=5300 124002971DA	95.59
03/09	Check Crd Purchase 03/07 Smith Auto Company Spanish Fork Ut 486830XXXXXX2301 068740000984152 ?MCC=5511 124002971DA	46.94
03/09	Check Crd Purchase 03/07 Mike'S Combo Shop Q39 Spanish Fork Ut 486830XXXXXX2301 068740000652720 ?MCC=5542 124002971DA	35.00
03/09	POS Purchase -03/08 Mach ID 000000 Costco Gas #007Costco Gaslehi Ut 2301 ?MCC=5542 124002971DA	14.31
03/12	POS Purchase -03/10 Mach ID 000000 CNS Cingular Pocns Cingulsalt Lake Citut 2301 ?MCC=4814 124002971DA	242.90
03/12	Check Crd Purchase 03/10 Siegfried'S Delicates Salt Lake Cit Ut 486830XXXXXX2301 070740002514384 ?MCC=5441 124002971DA	75.95
03/12	Check Crd Purchase 03/11 Fedex Kinko'S #2403 Salt Lake Cit Ut 486830XXXXXX2301 071740003559332 ?MCC=7338 124002971DA	4.74
03/13	POS Purchase -03/12 Mach ID 000000 Costco Whse #00Costco Whssalt Lake Citut 2301 ?MCC=5300 124002971DA	285.54
03/13	WF Credit Card Auto Pay 070312 90154161541743 Busche,Matthias	199.00
03/13	POS Purchase -03/12 Mach ID 000000 Costco Gas #001Costco Gassalt Lake Citut 2301 ?MCC=5542 124002971DA	32.57
03/13	Check Crd Purchase 03/11 Supersonic Car Wash In Salt Lake Cit Ut 486830XXXXXX2301 072740000801961 ?MCC=7542 124002971DA	6.00
03/14	Check Crd Purchase 03/12 Aa Alpine Self Stora Salt Lake Cit Ut 486830XXXXXX2301 073740001619372 ?MCC=4225 124002971DA	155.00
03/19	Ford E-Bill 15664790 Matthias Busche	298.44
03/19	Check Crd Purchase 03/16 Mike'S Combo Shop Q39 Spanish Fork Ut 486830XXXXXX2301 077740000597831 ?MCC=5542 124002971DA	38.95
03/19	Check Crd Purchase 03/17 Apl*itunes 866-712-7753Ca 486830XXXXXX2301 077740001585417 ?MCC=5735 124002971DA	4.24
03/21	POS Purchase -03/20 Mach ID 000000 Smiths 3171 Eassmiths 317Salt Lake Citut 2301 ?MCC=5542 124002971DA	38.00
03/23	Online Transfer To H Busche L Ref #IBEQFBX5M4 Complete Advantage Chkng Medreimbursemt	91.33

Continued on next page

Other withdrawals -continued

Date	Description	\$ Amount
03/26	Check Crd Purchase 03/23 Pictureline Salt Lake Cty Ut 486830XXXXXX2301 084740005611584 ?MCC=5946 124002971DA	77.24
03/26	POS Purchase -03/24 Mach ID 000000 Costco Gas #001Costco Gassalt Lake Citut 2301 ?MCC=5542 124002971DA	36.37
03/26	POS Purchase -03/26 Mach ID 000000 Smiths 632 S. 1Smiths 632Payson Ut 2301 ?MCC=5411 124002971DA	32.78
03/26	Check Crd Purchase 03/25 Winger'S Downtown Salt Lake Cit Ut 486830XXXXXX2301 085740004233669 ?MCC=5812 124002971DA	31.86
03/27	Check Crd Purchase 03/26 Apl*itunes 866-712-7753Ca 486830XXXXXX2301 086740000258584 ?MCC=5735 124002971DA	1.05
03/29	MBNA Online Pymt Online Pmt 070329 CKF168868078POS Busche,Matthias	401.00
03/29	Check Crd Purchase 03/28 Lotus Draper Ut 486830XXXXXX2301 088740002128566 ?MCC=5947 124002971DA	25.16
03/30	Check Crd Purchase 03/28 Steve'S Crest Provo Ut 486830XXXXXX2301 089740001992910 ?MCC=5542 124002971DA	40.00
04/02	Chase Epay 070331 XXXXX6780 NA	1,039.00
04/02	American Express Elec Remit 070331061104767 Matthias Busche	150.00
04/02	Chase Epay 070331 XXXXX7046 NA	100.00
04/02	Discover E-Payment 070331 601100966028448 Busche Matthias	100.00
04/02	Check Crd Purchase 03/29 Precision Time #43 Orem Ut 486830XXXXXX2301 090740001768965 ?MCC=7631 124002971DA	28.66
04/02	Check Crd Purchase 03/31 Apl*itunes 866-712-7753Ca 486830XXXXXX2301 092740006251147 ?MCC=5735 124002971DA	4.24
04/03	Ucs-Click To Pay Payment J%WKB\$R53Q62Ctp Matthias Busche	365.51
04/03	Wamu/Pvn Paymt Creditcard 070402 402200700496456 Matthias Busche	100.00
04/06	WF Bus Bill Pay-Software:Fee 124002971Nd	24.95
04/06	Add On Package Fee	5.00
Total other withdrawals		\$4,227.32

Daily balance summary

Date	\$ Balance	Date	\$ Balance	Date	\$ Balance
03/07	2,841.06	03/19	2,181.89	03/29	2,323.11
03/09	3,525.22	03/21	2,143.89	03/30	2,283.11
03/12	3,201.63	03/23	2,928.57	04/02	861.21
03/13	2,678.52	03/26	2,750.32	04/03	395.70
03/14	2,523.52	03/27	2,749.27	04/06	1,139.31

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Direct Deposit Advance (Lender - Wells Fargo Bank, N.A.)

Outstanding advance balance as of the beginning of this statement period including Finance Charges	\$0.00
Outstanding advance balance as of the end of this statement period including Finance Charges	\$0.00

Finance Charges incurred on advances taken during this statement period	\$0.00
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Current advance credit limit	\$500.00
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USE THE DIRECT DEPOSIT ADVANCE SERVICE TO ACCESS UP TO \$500 PRIOR TO RECEIVING YOUR RECURRING DIRECT DEPOSIT INCOME. JUST USE THE ATM, ONLINE OR CALL THE PHONE BANK. SEE THE DIRECT DEPOSIT ADVANCE SERVICE AGREEMENT AND PRODUCT GUIDE FOR COMPLETE DETAILS.

Thank you for banking with Wells Fargo.

1. Use the following worksheet to calculate your overall account balance.
2. Go through your register and mark each check, withdrawal, ATM transaction, payment, deposit or other credit listed on your statement. Be sure that your register shows any interest paid into your account and any service charges, automatic payments or ATM transactions withdrawn from your account during this statement period.
3. Use the chart below, list any deposits, transfers to your account, outstanding checks, ATM withdrawals, ATM payments or any other withdrawals (including any from previous months) which are listed in your register but not shown on your statement.

[illegible]

A The NEW BALANCE shown on your statement \$

B Any deposits listed in your register or transfers into your account which are not shown on your statement. \$ _____

+\$ _____
TOTAL \$

▶ CALCULATE THE SUBTOTAL ***** \$ _____
(Add Parts A and B)

C The total outstanding checks and withdrawals from the chart above - \$

This amount should be the same as the current balance shown in your check register _____ \$

In Case of Errors or Questions About Your Electronic Transfers (Including Direct Deposit Advance or Deposit AdvanceSM Transactions)

Telephone us at the number printed on the front of this statement or write us at Wells Fargo Bank, P.O. Box 6995, Portland, OR 97228-6995 as soon as you can, if you think your statement or receipt is wrong or if you need more information about a transfer on the statement or receipt. We must hear from you no later than 60 days after we sent you the FIRST statement on which the error or problem appeared.

1. Tell us your name and account number (if any).
2. Describe the error or the transfer you are unsure about, and explain as clearly as you can why you believe it is an error or why you need more information.
3. Tell us the dollar amount of the suspected error.

We will investigate your complaint and will correct any error promptly. If we take more than 10 business days to do this, we will credit your account for the amount you think is in error, so that you will have the use of the money during the time it takes us to complete our investigation.

If the error concerns a **Direct Deposit Advance** or **Deposit Advance** transaction, you do not have to pay any amount in question while we are investigating, but you are still obligated to pay the parts of your **Direct Deposit Advance** or **Deposit Advance** transaction that are not in question. While we are investigating your question, we cannot report you as delinquent or take any action to collect the amount you question.

* The Deposit Advance service is not available in all states.

To Dispute or Report Inaccuracies in Information We Have
Furnished to a Consumer Reporting Agency About Your
Accounts

You have the right to dispute the accuracy of information that Wells Fargo Bank, N.A. has furnished to a consumer reporting agency by writing to us at Wells Fargo Servicing, P.O. Box 14415, Des Moines, IA 50306-3415. Please describe the specific information that is inaccurate or in dispute and the basis for the dispute along with all supporting documentation. If you believe the information furnished is the result of identity theft, please provide us with an identity theft report.



Are you interested in...

- Purchasing a home? Call us at 1-800-866-0743
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February 8 through March 7, 2007
Account Number: 706-3786870
Page 1 of 5



MATTHIAS BUSCHE
1536 S 1175 E
BOUNTIFUL UT 84010-2122

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Wells Fargo Free Checking

Matthias Busche

Account Number: 706-3786870

Activity summary

Balance on 02/07	\$7,253.06
Deposits	1,752.00
Withdrawals	-6,164.00
.....	
Balance on 03/07	\$2,841.06

Before you leave on your next vacation, don't forget to get American Express Travelers Cheques. For more information and to purchase your Travelers Cheques, talk to your local banker. Or sign on to Wells Fargo Online Banking at wellsfargo.com and select "Account Services" then "Order Travelers Cheques".

Continued on next page

Activity detail

Deposits

Date	Description	\$ Amount
02/09	Sisle Internatio Payroll 070209 629005966994Yxg Busche,Matthias	878.63
02/23	Sisle Internatio Payroll 070223 789009390913Yxg Busche,Matthias	873.37
Total deposits		\$1,752.00

Withdrawals

Other withdrawals

Date	Description	\$ Amount
02/12	Check Crd Purchase 02/09 Apl*itunes 866-712-7753Ca 486830XXXXXX2301 042740002941433 ?MCC=5735 124002971DA	72.88
02/12	Check Crd Purchase 02/10 The Old Spaghetti Fact Salt Lake Cty Ut 486830XXXXXX2301 043740002864607 ?MCC=5812 124002971DA	67.26
02/12	Check Crd Purchase 02/09 Apl*itunes 866-712-7753Ca 486830XXXXXX2301 042740002942654 ?MCC=5735 124002971DA	1.05
02/13	WF Credit Card Auto Pay 070212 90154161541743 Busche,Matthias	218.00
02/13	POS Purchase -02/13 Mach ID 000000 Wal-Mart #5167 Wal-Mart #Payson Ut 2301 ?MCC=5411 124002971DA	36.14
02/14	POS Purchase -02/13 Mach ID 000000 Samsclub #6685 Samsclub #Provo Ut 2301 ?MCC=5300 124002971DA	97.50
02/14	Check Crd Purchase 02/12 Chevron 00205168 Salem Ut 486830XXXXXX2301 045740001914976 ?MCC=5542 124002971DA	34.54
02/14	POS Purchase -02/14 Mach ID 000000 Diamond Grill Diamond Grsalem Ut 2301 ?MCC=5814 124002971DA	7.49
02/15	Check Crd Purchase 02/13 Subway 00279232 Payson Ut 486830XXXXXX2301 046740001246848 ?MCC=5814 124002971DA	6.52
02/16	American Express Elec Remit 070216065611067 Matthias Busche	200.00
02/16	Discover E-Payment 070216 601100966028448 Busche Matthias	50.00
02/16	POS Purchase -02/15 Mach ID 000000 Wal-Mart #2511 Wal-Mart #American For Ut 2301 ?MCC=5411 124002971DA	47.20
02/16	POS Purchase -02/15 Mach ID 000000 Wal-Mart #2511 Wal-Mart #American For Ut 2301 ?MCC=5411 124002971DA	10.54
02/16	Check Crd Purchase 02/15 Penrod'S Car Wash Salem Ut 486830XXXXXX2301 047740001774022 ?MCC=7542 124002971DA	7.00
02/20	Citi-Click 2 Pay Payment CT5C9R@W6GL0Ctp Matthias Busche	1,255.96
02/20	Ucs-Click To Pay Payment Dwrk%B536Q8Ctp Matthias Busche	704.88
02/20	Chase Epay 070216 000000336562510 NA	435.00
02/20	POS Purchase -02/18 Mach ID 000000 Costco Whse #00Costco Whsalt Lake Citut 2301 ?MCC=5300 124002971DA	322.11
02/20	Ford E-Bill 15285347 Matthias Busche	298.44
02/20	Wamu/Pvn Paymt Creditcard 070219 219200706216068 Matthias Busche	200.00
02/20	Chase Epay 070216 000000336567971 NA	58.00

Continued on next page

Other withdrawals -continued

Date	Description	\$ Amount
02/20	POS Purchase -02/17 Mach ID 000000 Albertsons Albertsonssalt Lake Citut 2301 ?MCC=5411 124002971DA	32.34
02/20	Check Crd Purchase 02/15 Carls Jr Af American Fork Ut 486830XXXXXX2301 049740003848446 ?MCC=5814 124002971DA	29.98
02/20	POS Purchase -02/18 Mach ID 000000 Samsclub #6686 Samsclub #Salt Lake Ci Ut 2301 ?MCC=5542 124002971DA	27.07
02/20	Check Crd Purchase 02/17 Supersonic 33Rd South Salt Lake Cy Ut 486830XXXXXX2301 050701710529254 ?MCC=7542 124002971DA	9.00
02/20	Check Crd Purchase 02/17 Apl*itunes 866-712-7753Ca 486830XXXXXX2301 049740000556060 ?MCC=5735 124002971DA	4.24
02/22	POS Purchase -02/21 Mach ID 000000 Costco Gas #007Costco Gaslehi Ut 2301 ?MCC=5542 124002971DA	30.02
02/22	POS Purchase -02/21 Mach ID 000000 Sou The Home Desou The Holindon Ut 2301 ?MCC=5200 124002971DA	5.30
02/23	Check Crd Purchase 02/21 Panda Express 00010520 American Fork Ut 486830XXXXXX2301 054740000767288 ?MCC=5814 124002971DA	25.07
02/26	Online Transfer To H Busche L Ref #IBEBT3C6Tp Complete Advantage Chkng Daycarefebmar	55.00
02/26	Check Crd Purchase 02/23 Market Street Broiler 801-5838808Ut 486830XXXXXX2301 056740000778357 ?MCC=5812 124002971DA	70.22
02/26	Check Crd Purchase 02/25 Noodles & Co #702 Salt Lake Cit Ut 486830XXXXXX2301 057740004119692 ?MCC=5814 124002971DA	33.09
02/26	POS Purchase -02/25 Mach ID 000000 Samsclub #6683 Samsclub #Murray Ut 2301 ?MCC=5542 124002971DA	29.74
02/26	Check Crd Purchase 02/24 Cafe Rio Draper Draper Ut 486830XXXXXX2301 057740001007245 ?MCC=5814 124002971DA	17.54
02/27	ATM Withdrawal -02/27 Mach ID 9300Z 99 N. Main Spanish Fork Ut 2301	200.00
02/27	MBNA Online Pymt Online Pmt 070227 CKF168868078POS Busche,Matthias	701.00
02/28	Check Crd Purchase 02/27 Apl*apple Online Store 800-676-2775Ca 486830XXXXXX2301 059740000017824 ?MCC=5734 124002971DA	70.11
02/28	POS Purchase -02/28 Mach ID 000000 Wal-Mart #3589 Wal-Mart #Salt Lake Ci Ut 2301 ?MCC=5411 124002971DA	15.82
02/28	Check Crd Purchase 02/26 Papakelsey'Spizaa&subs Salem Ut 486830XXXXXX2301 059740000896327 ?MCC=5812 124002971DA	8.48
03/01	POS Purchase -02/28 Mach ID 000000 Costco Gas #007Costco Gaslehi Ut 2301 ?MCC=5542 124002971DA	35.73
03/01	POS Purchase -02/28 Mach ID 000000 Sou Best Buy #1Sou Best Bamerican Forkut 2301 ?MCC=5732 124002971DA	11.68
03/02	Check Crd Purchase 02/28 Carls Jr Af American Fork Ut 486830XXXXXX2301 061740000709257 ?MCC=5814 124002971DA	22.63
03/05	Check Crd Purchase 03/01 Art City Trolley Springville Ut 486830XXXXXX2301 063740004020497 ?MCC=5812 124002971DA	96.95
03/05	POS Purchase -03/03 Mach ID 000000 Barnesnoble 110Barnesnobl salt Lake Citut 2301 ?MCC=5942 124002971DA	88.25
03/05	POS Purchase -03/02 Mach ID 000000 Target T1814 Amtarget T18American Forkut 2301 ?MCC=5310 124002971DA	76.36
03/05	Check Crd Purchase 03/03 Tesoro 62091 Q39 Salt Lake Cty Ut 486830XXXXXX2301 064740001185376 ?MCC=5542 124002971DA	34.55

Continued on next page

Other withdrawals -continued

Date	Description	\$ Amount
03/05	Check Crd Purchase 03/04 Mimis Cafe 00000653 Sandy Ut 486830XXXXXX2301 064740001630879 ?MCC=5814 124002971DA	32.61
03/05	POS Purchase -03/05 Mach ID 000000 Cherry Tree Farmcherry Treorem Ut 2301 ?MCC=8011 124002971DA	20.00
03/05	Check Crd Purchase 03/04 Supersonic 33Rd South Salt Lake Cy Ut 486830XXXXXX2301 064701710590340 ?MCC=7542 124002971DA	9.00
03/05	Check Crd Purchase 03/04 Apl*itunes 866-712-7753Ca 486830XXXXXX2301 064740000618313 ?MCC=5735 124002971DA	4.24
03/06	Citi-Click 2 Pay Payment G59@6LCRTWG2Ctp Matthias Busche	68.50
03/06	Check Crd Purchase 03/04 Miniature MARK00309484 South Salt La Ut 486830XXXXXX2301 065740001618679 ?MCC=5542 124002971DA	30.02
03/06	Check Crd Purchase 03/05 Clean Express Salt Lake Cit Ut 486830XXXXXX2301 065740002419511 ?MCC=7216 124002971DA	17.50
03/06	POS Purchase -03/05 Mach ID 000000 Smiths 3215 S. Smiths 321Holliday Ut 2301 ?MCC=5411 124002971DA	15.00
03/07	PC Banking Miscellaneous Fee	24.95
03/07	Farm Bureau Life Ins Pymt MAR06 AB9500024 Matthias Busche	76.50
03/07	Add On Package Fee	5.00
Total other withdrawals		\$6,164.00

Daily balance summary

Date	\$ Balance	Date	\$ Balance	Date	\$ Balance
02/07	7,253.06	02/16	7,275.57	02/28	3,510.53
02/09	8,131.69	02/20	3,898.55	03/01	3,463.12
02/12	7,990.50	02/22	3,863.23	03/02	3,440.49
02/13	7,736.36	02/23	4,711.53	03/05	3,078.53
02/14	7,596.83	02/26	4,505.94	03/06	2,947.51
02/15	7,590.31	02/27	3,604.94	03/07	2,841.06

Direct Deposit Advance (Lender - Wells Fargo Bank, N.A.)

Outstanding advance balance as of the beginning of this statement period including Finance Charges	\$0.00
Outstanding advance balance as of the end of this statement period including Finance Charges	\$0.00

Finance Charges incurred on advances taken during this statement period \$0.00

Current advance credit limit \$500.00

THE DIRECT DEPOSIT ADVANCE SERVICE IS THERE WHEN YOU NEED IT. ADVANCE UP TO \$500 OF YOUR RECURRING DIRECT DEPOSIT INCOME AT THE ATM, ONLINE OR CALL THE PHONE BANK. SEE THE DIRECT DEPOSIT ADVANCE SERVICE AGREEMENT AND PRODUCT GUIDE FOR COMPLETE DETAILS.

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1. Use the following worksheet to calculate your overall account balance.
2. Go through your register and mark each check, withdrawal, ATM transaction, payment, deposit or other credit listed on your statement. Be sure that your register shows any interest paid into your account and any service charges, automatic payments or ATM transactions withdrawn from your account during this statement period.
3. Use the chart below, list any deposits, transfers to your account, outstanding checks, ATM withdrawals, ATM payments or any other withdrawals (including any from previous months) which are listed in your register but not shown on your statement.

▶ ENTER

A The NEW BALANCE shown on your statement \$ _____

▶ ADD

B Any deposits listed in your register or transfers into your account which are not shown on your statement.

\$ _____

\$ _____

\$ _____

+\$ _____

TOTAL \$ _____

▶ CALCULATE THE SUBTOTAL \$ _____
(Add Parts A and B)

▶ SUBTRACT

C The total outstanding checks and withdrawals from the chart above -\$ _____

▶ CALCULATE THE ENDING BALANCE
(Part A + Part B - Part C)
This amount should be the same as the current balance shown in your check register \$ _____

In Case of Errors or Questions About Your Electronic Transfers (Including Direct Deposit Advance or Deposit Advance SM Transactions)

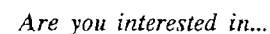
Telephone us at the number printed on the front of this statement or write us at Wells Fargo Bank, P.O. Box 6995, Portland, OR 97228-6995 as soon as you can, if you think your statement or receipt is wrong or if you need more information about a transfer on the statement or receipt. We must hear from you no later than 60 days after we sent you the FIRST statement on which the error or problem appeared.

1. Tell us your name and account number (if any).
2. Describe the error or the transfer you are unsure about, and explain as clearly as you can why you believe it is an error or why you need more information.
3. Tell us the dollar amount of the suspected error.

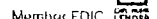
If the error concerns a **Direct Deposit Advance** or **Deposit Advance** transaction, you do not have to pay any amount in question while we are investigating, but you are still obligated to pay the parts of your **Direct Deposit Advance** or **Deposit Advance** transaction that are not in question. While we are investigating your question, we cannot report you as delinquent or take any action to collect the amount you question.

* The Deposit Advance service is not available in all states.

You have the right to dispute the accuracy of information that Wells Fargo Bank, N.A. has furnished to a consumer reporting agency by writing to us at Wells Fargo Servicing, P.O. Box 14415, Des Moines, IA 50306-3415. Please describe the specific information that is inaccurate or in dispute and the basis for the dispute along with all supporting documentation. If you believe the information furnished is the result of identity theft, please provide us with an identity theft report.



- Purchasing a home? Call us at 1-800-866-0743
- Getting a student loan? Call us at 1-888-945-5373
- Optimizing home equity? Call us at 1-866-259-0890



Account Statement

January 9 through February 7, 2007

Account Number: 706-3786870

Page 1 of 4



MATTHIAS BUSCHE
1536 S 1175 E
BOUNTIFUL UT 84010-2122

Thank you for banking with Wells Fargo. For assistance, call: (1-800-742-4932), TDD number (for the hearing impaired only): 1-800-877-4833. Or write: WELLS FARGO BANK, N.A., P.O. BOX 6995, PORTLAND, OR 97228-6995.

Receive, View, and Store Your Statements & Tax Documents Online

It's quicker and more secure to access your official bank statements online than to wait for them to arrive in the mail. And it's FREE.

- Access up to 7 years of your previous account statements
- Use these official bank documents for record-keeping, taxes and more
- Reduce your risk of fraud by decreasing the amount of personal information sent through U.S. Mail
- Reduce your paper clutter and help the environment

To view your account statements and tax documents online, sign up for Wells Fargo Online Banking at wellsfargo.com

Wells Fargo Free Checking

Matthias Busche

Account Number: 706-3786870

Activity summary

Balance on 01/08	\$1,889.75
Deposits	7,869.61
Withdrawals	-2,506.30
.....	
Balance on 02/07	\$7,253.06

Before you leave on your next vacation, don't forget to get American Express Travelers Cheques. For more information and to purchase your Travelers Cheques, talk to your local banker. Or sign on to Wells Fargo Online Banking at wellsfargo.com and select "Account Services" then "Order Travelers Cheques".

Continued on next page

Activity detail**Deposits**

Date	Description	\$ Amount
01/12	ATM Deposit --01/12 Mach ID 9300Z 99 N. Main Spanish Fork Ut 2301	878.63
01/17	Deposit	282.35
01/26	Sisle Internatio Payroll 070126 553005847537Yxg Busche,Matthias	878.63
01/30	WT Fed#00515 Edward D Jones And /Org=hias Busche Srf# 070130000258 Trn#070130017659 Rfb# 070130000258	700.00
02/02	WT Fed#02954 Edward D Jones And /Org=hias Busche Srf# 070202026006 Trn#070202071185 Rfb# 070202026006	5,130.00
Total deposits		\$7,869.61

Withdrawals**Other withdrawals**

Date	Description	\$ Amount
01/09	Chase Epay 070107 000000321643851 NA	500.00
01/09	WF Credit Card Auto Pay 070108 90154161541743 Busche,Matthias	208.00
01/09	Ucs-Click To Pay Payment Dwrk%\$B536Q8Ctp Matthias Busche	200.00
01/09	Chase Epay 070107 000000321643946 NA	100.00
01/09	Citi-Click 2 Pay Payment CT5C9R@W6GL0Ctp Matthias Busche	100.00
01/09	Wamu/Pvn Paymt Creditcard 070108 108200701882923 Matthias Busche	50.00
01/10	Farm Bureau Life Ins Pymt JAN08 AB9500024 Matthias Busche	76.41
01/18	Ford E-Bill 14923068 Matthias Busche	298.44
01/18	POS Purchase --01/17 Mach ID 000000 Costco Gas #007Costco Gaslehi Ut 2301 ?MCC=5542 124002971DA	30.76
01/22	Online Transfer To H Busche L Ref #IBEX7BF6Hj Complete Advantage Chkng Medical Reimb	32.50
01/22	POS Purchase --01/21 Mach ID 000000 Samsclub #6686 Samsclub #Salt Lake Ci Ut 2301 ?MCC=5542 124002971DA	32.60
01/25	POS Purchase --01/24 Mach ID 000000 Costco Gas #004Costco Gassandy City Ut 2301 ?MCC=5542 124002971DA	31.37
01/26	POS Purchase --01/26 Mach ID 000000 CNS Rite Aid Cocns Rite Asalt Lake Citut 2301 ?MCC=5912 124002971DA	12.99
01/29	POS Purchase --01/28 Mach ID 000000 Wal-Mart #3589 Wal-Mart #Salt Lake Ci Ut 2301 ?MCC=5411 124002971DA	226.62
01/29	POS Purchase --01/27 Mach ID 000000 Samsclub #6683 Samsclub #Murray Ut 2301 ?MCC=5542 124002971DA	29.36
01/29	Check Crd Purchase 01/26 Western Urological C Salt Lake Cit Ut 486830XXXXXX2301 028740001684777 ?MCC=8011 124002971DA	20.00
01/30	Wire Trans Svc Charge --Sequence: 070130017659 Srf# 070130000258 Trn#070130017659 Rfb# 070130000258	10.00
01/31	POS Purchase --01/31 Mach ID 000000 Costco Gas #007Costco Gaslehi Ut 2301 ?MCC=5542 124002971DA	29.58
02/01	POS Purchase --01/31 Mach ID 000000 Wildoats Wildoats Salt Lake Citut 2301 ?MCC=5411 124002971DA	45.77

Continued on next page

Other withdrawals -continued

Date	Description	\$ Amount
02/01	POS Purchase -01/31 Mach ID 000000 Costco Whse #00Costco Whssalt Lake Citut 2301 ?MCC=5300 124002971DA	15.98
02/01	Check Crd Purchase 01/31 Willy Wash Car Wash Salt Lake Cit Ut 486830XXXXXX2301 032702910174691?MCC=7542 124002971DA	7.00
02/02	Wire Trans Svc Charge -Sequence: 070202071185 Srf# 070202026006 Trn#070202071185 Rfb# 070202026006	10.00
02/02	Check Crd Purchase 02/01 Soul Expressions Salt Lake Cit Ut 486830XXXXXX2301 033740002718940?MCC=7230 124002971DA	81.00
02/02	Check Crd Purchase 01/31 Cafe Rio Skyline Salt Lake Cit Ut 486830XXXXXX2301 033740001104873?MCC=5814 124002971DA	16.03
02/05	Check Crd Purchase 02/04 Smiths #152 00808626 Salt Lake Cty Ut 486830XXXXXX2301 036740003773653?MCC=5542 124002971DA	33.50
02/07	WF Bus Bill Pay--Software:Fee 124002971Nd	24.95
02/07	POS Purchase -02/06 Mach ID 000000 Compusa Compusacompusa Coorem Ut 2301 ?MCC=5734 124002971DA	202.03
02/07	Farm Bureau Life Ins Pymt FEB06 AB9500024 Matthias Busche	76.41
02/07	Add On Package Fee	5.00
Total other withdrawals		\$2,506.30

Daily balance summary

Date	\$ Balance	Date	\$ Balance	Date	\$ Balance
01/08	1,889.75	01/22	1,422.02	02/01	2,571.98
01/09	731.75	01/25	1,390.65	02/02	7,594.95
01/10	655.34	01/26	2,256.29	02/05	7,561.45
01/12	1,533.97	01/29	1,980.31	02/07	7,253.06
01/17	1,816.32	01/30	2,670.31		
01/18	1,487.12	01/31	2,640.73		

Direct Deposit Advance (Lender - Wells Fargo Bank, N.A.)

Outstanding advance balance as of the beginning of this statement period including Finance Charges	\$0.00
Outstanding advance balance as of the end of this statement period including Finance Charges	\$0.00

Finance Charges incurred on advances taken during this statement period \$0.00

Current advance credit limit \$500.00

USE THE DIRECT DEPOSIT ADVANCE SERVICE TO ACCESS UP TO \$500 PRIOR TO RECEIVING YOUR RECURRING DIRECT DEPOSIT INCOME. JUST USE THE ATM, ONLINE OR CALL THE PHONE BANK. SEE THE DIRECT DEPOSIT ADVANCE SERVICE AGREEMENT AND PRODUCT GUIDE FOR COMPLETE DETAILS.

Thank you for banking with Wells Fargo.

1. Use the following worksheet to calculate your overall account balance.
2. Go through your register and mark each check, withdrawal, ATM transaction, payment, deposit or other credit listed on your statement. Be sure that your register shows any interest paid into your account and any service charges, automatic payments or ATM transactions withdrawn from your account during this statement period.
3. Use the chart below, list any deposits, transfers to your account, outstanding checks, ATM withdrawals, ATM payments or any other withdrawals (including any from previous months) which are listed in your register but not shown on your statement.

ITEMS OUTSTANDING		
NUMBER	AMOUNT	
TOTAL	\$	

§

- Purchasing a home? Call us at 1-800-866-0743
- Getting a student loan? Call us at 1-888-945-5373
- Optimizing home equity? Call us at 1-866-259-0890



SISEL INTERNATIONAL LLC
183 EAST 200 NORTH
SALEM, UT 84653

Period Ending: 05/13/2007
Pay Date: 05/18/2007

Taxable Marital Status: Single
Exemptions/Allowances:
Federal: 9
UT: 9

000000000008

MATTHIAS BUSCHE
1536 SOUTH 1175 EAST
BOUNTIFUL UT 84010

Social Security Number: XXX-XX-9941

arnings	rate	hours	this period	year to date
ular	2115.38		2,115.38	21,153.80
Gross Pay			\$2,115.38	21,153.80

ductions	Statutory		
	Federal Income Tax	-88.44	1,015.67
	Social Security Tax	-121.77	1,271.99
	Medicare Tax	-28.48	297.48
	UT State Income Tax	-70.24	759.28
	Other		
	Checking 1	-773.56	
	Dental W/O Orth	-9.11*	54.26
	Garnishment	-881.61	8,816.10
	Medical 500	-138.46*	553.84
	Vision	-3.71*	29.68
	Net Pay	\$0.00	

* Excluded from federal taxable wages

Your federal taxable wages this period are
\$1,964.10

FOR DOCUMENT AUTHENTICITY - COLORED AREA MUST CHANGE IN TONE GRADUALLY AND EVENLY FROM DARK AT TOP TO LIGHTER AT BOTTOM

SISEL INTERNATIONAL LLC
183 EAST 200 NORTH
SALEM, UT 84653

Advice number: 00000200008
Pay date: 05/18/2007

Deposited to the account of	account number	transit ABA	amount
MATTHIAS BUSCHE	7063786870	1240 0297	\$773.56

THIS IS NOT A CHECK

NON-NEGOTIABLE

SISEL INTERNATIONAL LLC
183 EAST 200 NORTH
SALEM, UT 84653

Period Ending: 04/29/2007
Pay Date: 05/04/2007

Taxable Marital Status: Single
Exemptions/Allowances:
Federal: 9
UT: 9

000000000006

MATTHIAS BUSCHE
1536 SOUTH 1175 EAST
BOUNTIFUL UT 84010

Social Security Number: XXX-XX-9941

arnings	rate	hours	this period	year to date
ular	2115.38		2,115.38	19,038.42
Gross Pay			\$2,115.38	19,038.42

uctions	Statutory		
	Federal Income Tax	-88.44	927.23
	Social Security Tax	-121.78	1,150.22
	Medicare Tax	-28.48	269.00
	UT State Income Tax	-70.24	689.04
	Other		
	Checking 1	-773.55	
	Dental W/O Orth	-9.11*	45.15
	Garnishment	-881.61	7,934.49
	Medical 500	-138.46*	415.38
	Vision	-3.71*	25.97
	Net Pay	\$0.00	

* Excluded from federal taxable wages

Your federal taxable wages this period are
\$1,964.10

SISEL INTERNATIONAL LLC
183 EAST 200 NORTH
SALEM, UT 84653

Advice number: 00000180006
Pay date: 05/04/2007

Deposited to the account of
MATTHIAS BUSCHE

account number transit ABA amount
7063786870 1240 0297 \$773.55

NON-NEGOTIABLE

Earnings Statement



SISEL INTERNATIONAL LLC
183 EAST 200 NORTH
SALEM, UT 84653

Period Ending: 04/15/2007
Pay Date: 04/20/2007

Taxable Marital Status: Single
Exemptions/Allowances:
Federal: 9
UT: 9

00000000007

MATTHIAS BUSCHE
1536 SOUTH 1175 EAST
BOUNTIFUL UT 84010

Social Security Number: XXX-XX-9941

arnings	rate	hours	this period	year to date
ular	2115.38		2,115.38	16,923.04
Gross Pay			\$2,115.38	16,923.04

ductions	Statutory		
	Federal Income Tax	-88.44	838.79
	Social Security Tax	-121.77	1,028.44
	Medicare Tax	-28.48	240.52
	UT State Income Tax	-70.24	618.80
	Other		
	Checking 1	-773.56	
	Dental W/O Orth	-9.11*	36.04
	Garnishment	-881.61	7,052.88
	Medical 500	-138.46*	276.92
	Vision	-3.71*	22.26
	Net Pay	\$0.00	

* Excluded from federal taxable wages

Your federal taxable wages this period are
\$1,964.10

SISEL INTERNATIONAL LLC
183 EAST 200 NORTH
SALEM, UT 84653

Advice number: 00000160007
Pay date: 04/20/2007

Deposited to the account of
MATTHIAS BUSCHE

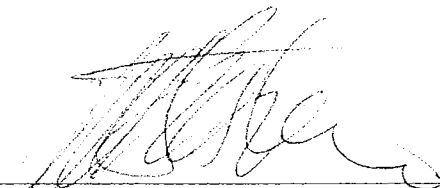
account number	transit ABA	amount
7063786870	1240 0297	\$773.56

NON-NEGOTIABLE

VERIFICATION

I have read the foregoing Financial Declaration and examined it's attachments and they are true and accurate to the best of my knowledge.

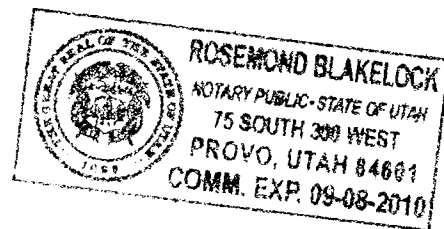
Dated and signed this 21 day of May 2007.



Matthias Busche



NOTARY



Morinda**Performance Counseling Notice****Date:** March 24, 2004**To:** Matthias Busche**Position:** Director Marketing Visual & Creative Services**From:** Tom Black**Position:** Managing Director Creative Services**Historical Background:**

In the past, I have spoken to you about not sharing your personal life with employees or talking about inappropriate subjects with employees. We have also discussed that you spent too much time interacting with a female distributor which was noticed by several employees.

Description of Circumstances:

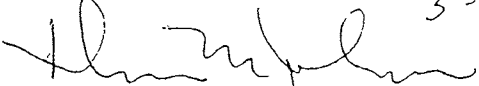
Recently you spoke to an employee concerning your personal life which involved topics of a sexual nature. Although this discussion was not specifically directed towards the employee, the impact of the information severely offended the employee.

Describe Consequences:


Any further violation of this nature may result in disciplinary action up to and including termination.

Outline specific expectations for performance in the future:

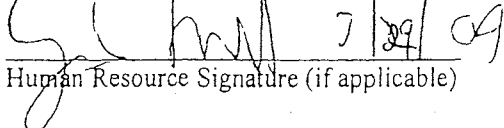
You are expected to keep all of your conversations professional in nature. It is also expected that you will not discuss your personal life with employees.

☐ **Verbal Warning**☒ **Written Warning**

 Manager Signature

 3-29-04
 Date


 Employee Signature

 3-29-04
 Date


 Human Resource Signature (if applicable)

MEMORANDUM

TO: Matthias Busche
FROM: Tom Black
DATE: December 28, 2004
SUBJECT: Performance Evaluation

Matthias,

Following our conversation this morning concerning your performance of the last few months within TNI, I want to highlight the main points of our conversation and the areas that require your immediate improvement.

- 1) Your performance has been below expectations; i.e. your time and contribution is not accounted for. This lack of involvement with TNI has brought on additional stress to your colleagues and peers within the department, and has been noticed beyond the department throughout the company.
- 2) Under your delicate personal circumstances of the last year, your colleagues and peers through the company have lent you support and understanding. However, TNI now needs you to focus on the contribution you can provide by being committed and accountable.
- 3) We agreed that from now on, you will be sensitive to your work peers by not burdening them with your personal challenges. They need your support.
- 4) We need to configure the department and the distribution of responsibilities as we are not as effective as we could be. I first have to know if you are committed to turn the page and perform your duties as expected. If you choose to take on that challenge, I welcome your suggestions about how to reevaluate our department. Particularly, our design and video areas could be stronger.
- 5) In order to help you be successful, I want to meet with you every 6 weeks until no longer necessary to discuss the improvements of your performance, and adjust and/or clarify the goals and expectations for the next 6 weeks.
- 6) My ultimate goal is to help you be successful, and to make our department successful. It is not an easy task as everything we do is scrutinized by everyone in and out of the company. Our visibility within the company and our distributors makes us easy targets for criticism, and for that reason, we must be solid, united and be able to perform to the expectations of the president of TNI. Management style is key to enable us to create such unity, and it is worth discussing further when we next meet.

My philosophy is that people we manage must feel part of a team and both our management style must be that of an open door policy and support to our team rather than one of intimidation. We must both be prepared and available to help our team be successful and be willing to lend a hand. When tasks must be performed that are not being done properly or at all by our department, it is our responsibility to enable the individuals to perform their task successfully by both teaching them how to go about it, and encouraging them. If in spite of this, we still have difficulties with getting tasks done, then you must come to me.

After we both reflect further upon this matter, let us meet and establish a plan for the coming year.

Tom

lucetom@earthlink.net Mail Account

From: Matthias Busche [Matthias_Busche@tni.com]
Sent: Tuesday, December 28, 2004 10:13 AM
To: lucetom@earthlink.net
Cc: Tom Black
Subject: Evaluation

Tom,

Thanks for the memo! I am in agreement with you on this and have no problem with what you have stated and planned in regards to my performance. As I mentioned on the phone to you earlier this morning, I have felt the same about myself and have full intentions to be again as dedicated and available as I have been in the past and beyond and be the leader I am expected to be in my position.

I will also give the restructuring of our department some thought and we can talk about it when we are back together in the office.

Thanks for your patience with me and my personal circumstances! I know that in no other work environment would I have been looked at with such compassion and understanding. I really know how to appreciate that.

MATTHIAS BUSCHE

.....
Director | Visual Communications | Tahitian Noni International
801.234.1212 | matthiasb@tni.com | TahitianNoni.com

From: lucetom@earthlink.net [mailto:lucetom@earthlink.net]
Sent: Tuesday, December 28, 2004 9:42 AM
To: Matthias Busche
Subject:

_____ NOD32 1.959 (20041227) Information _____

This message was checked by NOD32 antivirus system.
<http://www.nod32.com>

MORINDA, INC. PERSONNEL ACTION NOTICE

Employee #: _____ Employee Name: Matthias Busche
 S.S. #: _____ Hire Date: _____ Eff. Date: 1.28.05

CURRENT INFORMATION			
Title:		Salary:	
Grade:		Date of last increase:	
Dept.:	Loc.:		
Supervisor:			
CHANGE TO			
Title:		Eligible for Rehire <input type="checkbox"/>	
Grade:	Rating:	Status <input type="checkbox"/> Full-Time <input type="checkbox"/> Part-Time	
Reason: <input type="checkbox"/> Merit	Pct: %	Type: <input type="checkbox"/> Med. Leave <input type="checkbox"/> Pers. Leave	
<input type="checkbox"/> Promotion	Pct: %	<input checked="" type="checkbox"/> Discharge <input type="checkbox"/> Mil. Leave	
<input type="checkbox"/> Adjustment		<input type="checkbox"/> Resigned	
<input type="checkbox"/> Status Chg.			
<input type="checkbox"/> Transfer		Paytype: <input type="checkbox"/> Hourly <input type="checkbox"/> Salaried	
Next Review Date:		Salary:	
Supervisor:			
Dept.:	Loc.:		
Cost Center Number:			
Will supervise others <input type="checkbox"/> Yes <input type="checkbox"/> No			
Comments: <u>Pay through end of today + 133.59 vac. hours.</u>			

TRANSFERRING FROM

AUTHORIZATION

Supv. _____ Date: _____	Supv. _____ Date: _____
Mgr. _____ Date: _____	Mgr. _____ Date: _____
Dir. _____ Date: _____	Dir. _____ Date: _____
VP _____ Date: _____	VP _____ Date: _____

H.R. [Signature]

Date: 1/28/05

White-Human Resource Yellow-Payroll Pink-Manager

RELEASE OF ALL CLAIMS

The undersigned, **Matthias Busche**, hereby acknowledges that he will receive twenty two weeks salary [the sum of thirty five thousand eight hundred seventy six dollars and ninety four cents (\$35,876.94)], subject to applicable tax and withholding. We will also pay six thousand one hundred eighty dollars (\$6,180) for six months of COBRA premiums which include the cost of family medical and family dental insurance in consideration for the following:

- A. The undersigned does hereby release and forever discharge the "Releasees" hereunder consisting of: Morinda Inc., and its respective officers, subsidiaries, employees, directors, predecessors, successors, insurers, assigns, agents, representatives, and all persons acting by, through, or under them, or any of them, of and from any and all manner of action or actions, cause or causes of action, in law or in equity, suits, debts, liens, contracts, guaranties, agreements, promises, liabilities, claims, demands, injuries, damages, loss, wages, income, profits, employment losses of any other kind of character, attorneys' fees, costs or expenses, of any nature whatsoever, known or unknown, fixed or contingent (hereinafter called "Claims"), which the undersigned now has or may hereafter have against the Releasees, or any of them, by reason of any matter, cause or thing whatsoever to the date hereof including, without limiting the generality of the foregoing, any Claims arising out of, based upon, or relating to the undersigned's employment with Morinda Inc., the undersigned's employment remuneration from Morinda Inc., or the termination of the undersigned's employment by the Releasees or any of them. In giving this Release, the undersigned forever releases and gives up his employment rights and employee status with Morinda Inc.
- B. The undersigned understands and agrees that this is a release of all claims and includes, but is not limited to, claims for lost wages or income, time, profits, expenses incurred, punitive or exemplary damages, court costs or attorneys' fees, claims for interest, claims for mental distress, humiliation, anguish or suffering, claims for damage to reputation, claims for violation of civil, constitutional or statutory rights and claims for both direct and consequential damages of any and all kind or character.
- C. The undersigned further understands and agrees that the occurrences herein described may have caused injuries or damages, or given rise to claims for damages, the existence of which and the consequences of which are now unknown but which may become known in the future. THE UNDERSIGNED NEVERTHELESS INTENDS TO AND DOES RELEASE ALL CLAIMS FOR ALL INJURIES, DAMAGES OR CLAIMS OF WHATEVER TYPE OR NATURE, WHETHER NOW KNOWN OR UNKNOWN, AND WHETHER NOW IN EXISTENCE OR HEREAFTER TO ARISE.
- D. The undersigned represents and warrants that there has been no assignment or other transfer of any interest in any Claim which he may have against the Releasees, or any of them, and the undersigned agrees to indemnify and hold the Releasees, and each of them, harmless from any liability, Claims, demands, damages, costs, expenses and attorneys' fees incurred by the

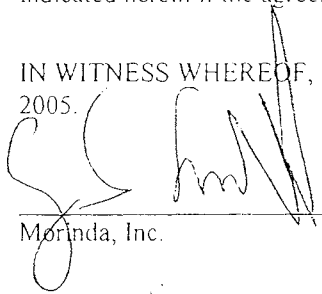
Releasees, or any of them, as a result of any person asserting any such assignment or transfer. It is the intention of the parties that this indemnity does not require payment as a condition precedent to recovery by the Releasees^o against the undersigned under this indemnity.

- E. The undersigned agrees that if he hereafter commences, joins in, or in any manner seeks relief through any suit arising out of, based upon, or relating to any of the Claims released hereunder, or in any manner asserts against the Releasees, or any of them, any of the Claims released hereunder, then the undersigned shall pay to the Releasees, or any of them, in addition to any other damages caused to the Releasees thereby, all attorneys' fees incurred by the Releasees in defending or otherwise responding to said suit or Claim.
- F. The undersigned further understands and agrees that the execution of this Release shall not constitute or be construed as an admission of any liability whatsoever by the Releasees, or any of them, who have consistently taken the position that they have no liability whatsoever to the undersigned.
- G. Except as may be required under compulsion of law, the undersigned agrees that the terms and conditions of this settlement shall remain confidential as between the parties and he shall not disclose them to any other person. Without limiting the generality of the foregoing, the undersigned will not respond to or in any way participate in or contribute to any public discussion, notice or other publicity concerning, or in any way relating to, the execution or the terms and conditions of this settlement which have occurred since and will occur from this date forward.
- H. Mr. Busche covenants never to disparage or speak ill of Morinda. Morinda covenants never to disparage or speak ill of Mr. Busche.
- I. The undersigned agrees that, simultaneous with the execution of this settlement he will return to Morinda and shall not take or copy in any manner, lists of customers and distributors, prices, lists of vendors, product formulation information, and similar confidential materials or information. Furthermore, the undersigned acknowledges that by reason of his position with Morinda, he has been given access to lists of customers and distributors, prices, product formulation information, and similar confidential materials or information respecting Morinda's business affairs. The undersigned represents that he has held all such information confidential and will continue to do so, and that he will not use such information and relationships for any business (which term herein includes an individual, a partnership, firm, corporation or any other entity) without the prior written consent of Morinda.
- J. The undersigned agrees that violating any part of this agreement at any time will produce severe damage and injury to employer. In the event of the breach of, or threatened breach by the undersigned of this agreement, the Morinda shall be entitled to seek injunctive relief, both preliminary and permanent, enjoining and restraining such breach or threatened breach. Such remedies shall be in addition to all other remedies available to Morinda in law or in equity,

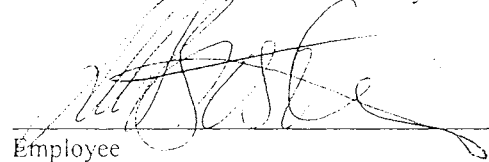
including but not limited to Morinda's right to recover from the undersigned any and all damages that may be sustained as a result of the undersigned's breach

- K. The undersigned has 14 days following the date of his termination which occurred on this 28th day of January, 2005 to consider this release. The undersigned then has 7 days within which to rescind the agreement. At the end of the 7 days the undersigned will then receive the amounts indicated herein if the agreement has not been rescinded.

IN WITNESS WHEREOF, the undersigned has executed this Release this 28th day of January, 2005.



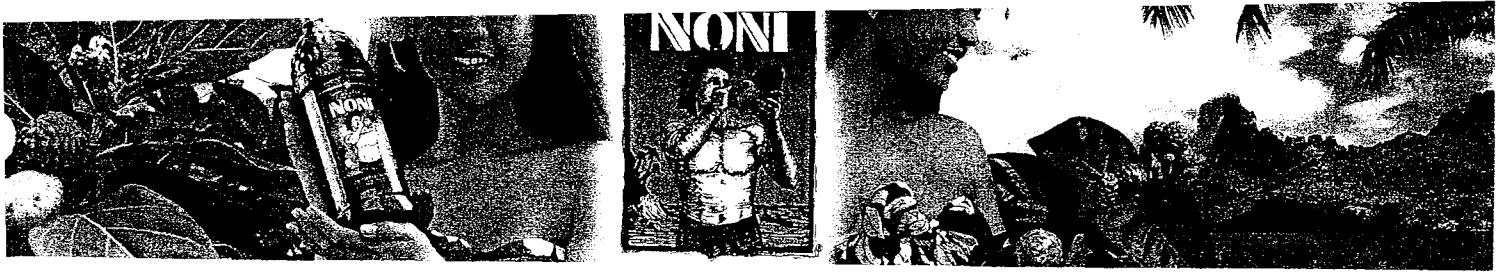
Morinda, Inc.

 2/1/05

Employee

Matthias Busche will be able to
keep the following items : digital camera ^{Canon S4}
ok x : Apple computer
15" Powerbook

~~It is need to let me know it is~~
ok



Tell the story

April 13, 2005

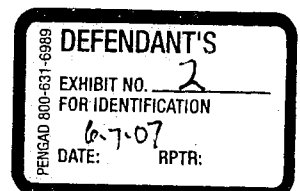
To Whom It May Concern:

Matthias Busche has been contracted to provide services to Tahitian Noni International for an indefinite period for the consideration of \$5000.00 per month. Minimum expected time for project is approximately one year.

Sincerely,

Craig Smith
Director, Human Resources
Morinda Inc/Tahitian Noni International

✓



SupraNaturals L.L.C.

185 East 200 North
P.O. Box 887
Salem UT 84663

September 27, 2006

CONFIDENTIAL

Matthias Busche

Re: Offer of Employment and "Terms"

Dear Mattias,

On behalf of the management team and ownership of SupraNaturals L.L.C., I am pleased to offer you a position as an **Creative Services**. You will be reporting to **Rod Hansen, Chief Operations Officer**.

The terms of this conditional offer of full-time employment are as follows:

All employment with SupraNaturals L.L.C. is on an at-will-basis and employees are subject to termination at any time, with or without reason, with or without cause or notice. Only the CEO of SupraNaturals, L.L.C. may offer employment on any terms other than at-will and any agreement must be in writing and signed by the Human Resources Manager. At the same time, such employees may terminate their employment at any time with or without reason or notice.

Introductory Period - The first 90 days of your employment will be regarded as an introductory employment period.

Beginning wage – Your compensation is **\$55,000** per year. The position carries a status of exempt.

Health Insurance – Health Insurance is after 90 days, effective the first of the next month your date of hire. While you are waiting for health insurance to become effective, SupraNaturals, L.L.C. will not pay your COBRA premium in order to maintain continuous coverage. The premium will vary with the plan you select, the cost is partially paid by SupraNaturals L.L.C., and the remainder of the premium is paid by you through payroll deduction.

Dental Insurance – Dental Insurance is effective after 90 days the first of the next month from your date of hire. The premium will vary with the plan you select.

Paid Vacation/Personal Days – You will receive **5 days paid vacation** accrued immediately upon employment and available after 6 months of continuous employment. After your first year, you will begin to accrue at a rate of 1.538 per pay period.

Paid Holidays – SupraNaturals L.L.C. pays full-time employees for time off for some holidays and you may obtain a list of these holidays from the Human Resources Department. Holiday pay is effective the first of the next month following your date of hire.

Life Insurance – SupraNaturals L.L.C. provides a group life insurance policy.

Pay periods/Pay day – Pay periods are bi-weekly with paychecks being distributed on the Friday morning following the end of the previous pay period (26 pay checks per year).

You will receive a complete benefits package with enrollment forms and plan descriptions at orientation. SupraNaturals L.L.C. reserves the right to change, add to, modify, or eliminate any or all of these employment benefits. You will be eligible for an annual performance review, which generally takes place on or around your anniversary date each year.

SupraNaturals L.L.C. is committed to a safe, drug free work environment and may require urine and/or blood sample testing (or other common tests) of any employee for alcohol and/or drugs without notice, at any time during normal working hours.

The terms of this offer letter constitute the sole and entire offer with respect to your potential employment at SupraNaturals L.L.C. and supersede any prior oral or written promises. There are no other promises, covenants or undertakings other than those expressly set forth in this offer letter. Should you accept this conditional offer of employment, please let me know when your first day will be so that we can make the appropriate arrangements. New employee orientation will be provided. Orientation will cover policies, procedures, benefits, and the duties and job functions of your position.

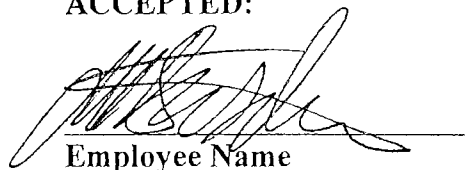
If the above terms are acceptable, SupraNaturals L.L.C. requests that your beginning date of employment be **Monday, October 2nd 2006 at 8am.**

Please forward your acceptance, in writing or by e-mail to hr@supranaturals.com, at your earliest convenience. This offer will be void if received after Friday September 29th 2006. Welcome to our team!

Sincerely,

Cathy Yeates, Human Resource Dept
Salem
SupraNaturals L.L.C.

ACCEPTED:



Employee Name

10-2-06

Date

APPENDIX C

Rules and Statutes

Utah Code Ann. § 30-3-5 (Supp.2008)

Utah Code Ann. § 78A-4-103-(2)(h)

Utah Code Ann. § 78B-12-203(7)(b)

Utah Code Ann § 78-45-7.2 (renumbered in 2008 as § 78B-12-210(9)).

Utah Code Ann. § 78-45-7.5 (2007) (renumbered in 2008 as § 78B-12-203)

Utah R. Civ. P. 26(a)(4)

Utah R. Civ. P. 37(f)

Utah Code

Title 30 Husband and Wife

Chapter 3 Divorce

Section 5 Disposition of property -- Maintenance and health care of parties and children --
Division of debts -- Court to have continuing jurisdiction -- Custody and parent-time --
Determination of alimony -- Nonmeritorious petition for modification.

**30-3-5. Disposition of property -- Maintenance and health care of parties and children -
- Division of debts -- Court to have continuing jurisdiction -- Custody and parent-time --
Determination of alimony -- Nonmeritorious petition for modification.**

(1) When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, debts or obligations, and parties. The court shall include the following in every decree of divorce:

(a) an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children including responsibility for health insurance out-of-pocket expenses such as co-payments, co-insurance, and deductibles;

(b) (i) if coverage is or becomes available at a reasonable cost, an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for the dependent children; and

(ii) a designation of which health, hospital, or dental insurance plan is primary and which health, hospital, or dental insurance plan is secondary in accordance with the provisions of Section 30-3-5.4 which will take effect if at any time a dependent child is covered by both parents' health, hospital, or dental insurance plans;

(c) pursuant to Section 15-4-6.5:

(i) an order specifying which party is responsible for the payment of joint debts, obligations, or liabilities of the parties contracted or incurred during marriage;

(ii) an order requiring the parties to notify respective creditors or obligees, regarding the court's division of debts, obligations, or liabilities and regarding the parties' separate, current addresses; and

(iii) provisions for the enforcement of these orders; and

(d) provisions for income withholding in accordance with Title 62A, Chapter 11, Recovery Services.

(2) The court may include, in an order determining child support, an order assigning financial responsibility for all or a portion of child care expenses incurred on behalf of the dependent children, necessitated by the employment or training of the custodial parent. If the court determines that the circumstances are appropriate and that the dependent children would be adequately cared for, it may include an order allowing the noncustodial parent to provide child care for the dependent children, necessitated by the employment or training of the custodial parent.

(3) The court has continuing jurisdiction to make subsequent changes or new orders for the custody of the children and their support, maintenance, health, and dental care, and for distribution of the property and obligations for debts as is reasonable and necessary.

(4) Child support, custody, visitation, and other matters related to children born to the mother and father after entry of the decree of divorce may be added to the decree by modification.

(5) (a) In determining parent-time rights of parents and visitation rights of grandparents and other members of the immediate family, the court shall consider the best interest of the child.

(b) Upon a specific finding by the court of the need for peace officer enforcement, the court may include in an order establishing a parent-time or visitation schedule a provision, among other things, authorizing any peace officer to enforce a court-ordered parent-time or visitation schedule entered under this chapter.

(6) If a petition for modification of child custody or parent-time provisions of a court

order is made and denied, the court shall order the petitioner to pay the reasonable attorneys' fees expended by the prevailing party in that action, if the court determines that the petition was without merit and not asserted or defended against in good faith.

(7) If a petition alleges noncompliance with a parent-time order by a parent, or a visitation order by a grandparent or other member of the immediate family where a visitation or parent-time right has been previously granted by the court, the court may award to the prevailing party costs, including actual attorney fees and court costs incurred by the prevailing party because of the other party's failure to provide or exercise court-ordered visitation or parent-time.

(8) (a) The court shall consider at least the following factors in determining alimony:

- (i) the financial condition and needs of the recipient spouse;
- (ii) the recipient's earning capacity or ability to produce income;
- (iii) the ability of the payor spouse to provide support;
- (iv) the length of the marriage;
- (v) whether the recipient spouse has custody of minor children requiring support;
- (vi) whether the recipient spouse worked in a business owned or operated by the payor spouse; and
- (vii) whether the recipient spouse directly contributed to any increase in the payor spouse's skill by paying for education received by the payor spouse or allowing the payor spouse to attend school during the marriage.

(b) The court may consider the fault of the parties in determining alimony.

(c) As a general rule, the court should look to the standard of living, existing at the time of separation, in determining alimony in accordance with Subsection (8)(a). However, the court shall consider all relevant facts and equitable principles and may, in its discretion, base alimony on the standard of living that existed at the time of trial. In marriages of short duration, when no children have been conceived or born during the marriage, the court may consider the standard of living that existed at the time of the marriage.

(d) The court may, under appropriate circumstances, attempt to equalize the parties' respective standards of living.

(e) When a marriage of long duration dissolves on the threshold of a major change in the income of one of the spouses due to the collective efforts of both, that change shall be considered in dividing the marital property and in determining the amount of alimony. If one spouse's earning capacity has been greatly enhanced through the efforts of both spouses during the marriage, the court may make a compensating adjustment in dividing the marital property and awarding alimony.

(f) In determining alimony when a marriage of short duration dissolves, and no children have been conceived or born during the marriage, the court may consider restoring each party to the condition which existed at the time of the marriage.

(g) (i) The court has continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances not foreseeable at the time of the divorce.

(ii) The court may not modify alimony or issue a new order for alimony to address needs of the recipient that did not exist at the time the decree was entered, unless the court finds extenuating circumstances that justify that action.

(iii) In determining alimony, the income of any subsequent spouse of the payor may not be considered, except as provided in this Subsection (8).

(A) The court may consider the subsequent spouse's financial ability to share living expenses.

(B) The court may consider the income of a subsequent spouse if the court finds that the payor's improper conduct justifies that consideration.

(h) Alimony may not be ordered for a duration longer than the number of years that the marriage existed unless, at any time prior to termination of alimony, the court finds extenuating circumstances that justify the payment of alimony for a longer period of time.

(9) Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates upon the remarriage or death of that former spouse. However, if the remarriage is annulled and found to be void ab initio, payment of alimony shall resume if the party paying alimony is made a party to the action of annulment and his rights are determined.

(10) Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is cohabitating with another person.

Amended by Chapter 285, 2010 General Session

Utah Code

Title 78A Judiciary and Judicial Administration

Chapter 4 Court of Appeals

Section 103 Court of Appeals jurisdiction.

78A-4-103. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

- (a) to carry into effect its judgments, orders, and decrees; or
- (b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire, and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of:

(i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and

(ii) a challenge to agency action under Section **63G-3-602**;

(c) appeals from the juvenile courts;

(d) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(e) appeals from a court of record in criminal cases, except those involving a conviction or charge of a first degree felony or capital felony;

(f) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(g) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons and Parole except in cases involving a first degree or capital felony;

(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, parent-time, visitation, adoption, and paternity;

(i) appeals from the Utah Military Court; and

(j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63G, Chapter 4, Administrative Procedures Act, in its review of agency adjudicative proceedings.

Amended by Chapter 344, 2009 General Session

Utah Code

Title 78B Judicial Code

Chapter 12 Utah Child Support Act

Section 203 Determination of gross income -- Imputed income.

78B-12-203. Determination of gross income -- Imputed income.

(1) As used in the guidelines, "gross income" includes prospective income from any source, including earned and nonearned income sources which may include salaries, wages, commissions, royalties, bonuses, rents, gifts from anyone, prizes, dividends, severance pay, pensions, interest, trust income, alimony from previous marriages, annuities, capital gains, Social Security benefits, workers' compensation benefits, unemployment compensation, income replacement disability insurance benefits, and payments from "nonmeans-tested" government programs.

(2) Income from earned income sources is limited to the equivalent of one full-time 40-hour job. If and only if during the time prior to the original support order, the parent normally and consistently worked more than 40 hours at the parent's job, the court may consider this extra time as a pattern in calculating the parent's ability to provide child support.

(3) Notwithstanding Subsection (1), specifically excluded from gross income are:

(a) cash assistance provided under Title 35A, Chapter 3, Part 3, Family Employment Program;

(b) benefits received under a housing subsidy program, the Job Training Partnership Act, Supplemental Security Income, Social Security Disability Insurance, Medicaid, Food Stamps, or General Assistance; and

(c) other similar means-tested welfare benefits received by a parent.

(4) (a) Gross income from self-employment or operation of a business shall be calculated by subtracting necessary expenses required for self-employment or business operation from gross receipts. The income and expenses from self-employment or operation of a business shall be reviewed to determine an appropriate level of gross income available to the parent to satisfy a child support award. Only those expenses necessary to allow the business to operate at a reasonable level may be deducted from gross receipts.

(b) Gross income determined under this subsection may differ from the amount of business income determined for tax purposes.

(5) (a) When possible, gross income should first be computed on an annual basis and then recalculated to determine the average gross monthly income.

(b) Each parent shall provide verification of current income. Each parent shall provide year-to-date pay stubs or employer statements and complete copies of tax returns from at least the most recent year unless the court finds the verification is not reasonably available. Verification of income from records maintained by the Department of Workforce Services may be substituted for pay stubs, employer statements, and income tax returns.

(c) Historical and current earnings shall be used to determine whether an underemployment or overemployment situation exists.

(6) Gross income includes income imputed to the parent under Subsection (7).

(7) (a) Income may not be imputed to a parent unless the parent stipulates to the amount imputed, the parent defaults, or, in contested cases, a hearing is held and the judge in a judicial proceeding or the presiding officer in an administrative proceeding enters findings of fact as to the evidentiary basis for the imputation.

(b) If income is imputed to a parent, the income shall be based upon employment potential and probable earnings as derived from employment opportunities, work history, occupation qualifications, and prevailing earnings for persons of similar backgrounds in the community, or the median earning for persons in the same occupation in the same geographical

area as found in the statistics maintained by the Bureau of Labor Statistics.

(c) If a parent has no recent work history or a parent's occupation is unknown, income shall be imputed at least at the federal minimum wage for a 40-hour work week. To impute a greater income, the judge in a judicial proceeding or the presiding officer in an administrative proceeding shall enter specific findings of fact as to the evidentiary basis for the imputation.

(d) Income may not be imputed if any of the following conditions exist and the condition is not of a temporary nature:

(i) the reasonable costs of child care for the parents' minor children approach or equal the amount of income the custodial parent can earn;

(ii) a parent is physically or mentally unable to earn minimum wage;

(iii) a parent is engaged in career or occupational training to establish basic job skills; or

(iv) unusual emotional or physical needs of a child require the custodial parent's presence in the home.

(8) (a) Gross income may not include the earnings of a minor child who is the subject of a child support award nor benefits to a minor child in the child's own right such as Supplemental Security Income.

(b) Social Security benefits received by a child due to the earnings of a parent shall be credited as child support to the parent upon whose earning record it is based, by crediting the amount against the potential obligation of that parent. Other unearned income of a child may be considered as income to a parent depending upon the circumstances of each case.

Renumbered and Amended by Chapter 3, 2008 General Session

Utah Code

Title 78B Judicial Code

Chapter 12 Utah Child Support Act

Section 210 Application of guidelines -- Use of ordered child support.

78B-12-210. Application of guidelines -- Use of ordered child support.

(1) The guidelines in this chapter apply to any judicial or administrative order establishing or modifying an award of child support entered on or after July 1, 1989.

(2) (a) The guidelines shall be applied as a rebuttable presumption in establishing or modifying the amount of temporary or permanent child support.

(b) The rebuttable presumption means the provisions and considerations required by the guidelines, the award amounts resulting from the application of the guidelines, and the use of worksheets consistent with these guidelines are presumed to be correct, unless rebutted under the provisions of this section.

(3) A written finding or specific finding on the record supporting the conclusion that complying with a provision of the guidelines or ordering an award amount resulting from use of the guidelines would be unjust, inappropriate, or not in the best interest of a child in a particular case is sufficient to rebut the presumption in that case. If an order rebuts the presumption through findings, it is considered a deviated order.

(4) The following shall be considered deviations from the guidelines, if:

(a) the order includes a written finding that it is a deviation from the guidelines;

(b) the guidelines worksheet has:

(i) the box checked for a deviation; and

(ii) an explanation as to the reason; or

(c) the deviation is made because there were more children than provided for in the guidelines table.

(5) If the amount in the order and the amount on the guidelines worksheet differ by \$10 or more:

(a) the order is considered deviated; and

(b) the incomes listed on the worksheet may not be used in adjusting support for emancipation.

(6) (a) Natural or adoptive children of either parent who live in the home of that parent and are not children in common to both parties may at the option of either party be taken into account under the guidelines in setting or modifying a child support award, as provided in Subsection (7). Credit may not be given if:

(i) by giving credit to the obligor, children for whom a prior support order exists would have their child support reduced; or

(ii) by giving credit to the obligee for a present family, the obligation of the obligor would increase.

(b) Additional worksheets shall be prepared that compute the obligations of the respective parents for the additional children. The obligations shall then be subtracted from the appropriate parent's income before determining the award in the instant case.

(7) In a proceeding to adjust or modify an existing award, consideration of natural or adoptive children born after entry of the order and who are not in common to both parties may be applied to mitigate an increase in the award but may not be applied:

(a) for the benefit of the obligee if the credit would increase the support obligation of the

obligor from the most recent order; or

(b) for the benefit of the obligor if the amount of support received by the obligee would be decreased from the most recent order.

(8) (a) If a child support order has not been issued or modified within the previous three

years, a parent, legal guardian, or the office may move the court to adjust the amount of a child support order.

(b) Upon receiving a motion under Subsection (8)(a), the court shall, taking into account the best interests of the child:

(i) determine whether there is a difference between the payor's ordered support amount and the payor's support amount that would be required under the guidelines; and

(ii) if there is a difference as described in Subsection (8)(b)(i), adjust the payor's ordered support amount to the payor's support amount provided in the guidelines if:

(A) the difference is 10% or more;

(B) the difference is not of a temporary nature; and

(C) the order adjusting the payor's ordered support amount does not deviate from the guidelines.

(c) A showing of a substantial change in circumstances is not necessary for an adjustment under this Subsection (8).

(9) (a) A parent, legal guardian, or the office may at any time petition the court to adjust the amount of a child support order if there has been a substantial change in circumstances. A change in the base combined child support obligation table set forth in Section 78B-12-301 is not a substantial change in circumstances for the purposes of this Subsection (9).

(b) For purposes of this Subsection (9), a substantial change in circumstances may include:

(i) material changes in custody;

(ii) material changes in the relative wealth or assets of the parties;

(iii) material changes of 30% or more in the income of a parent;

(iv) material changes in the employment potential and ability of a parent to earn;

(v) material changes in the medical needs of the child; or

(vi) material changes in the legal responsibilities of either parent for the support of others.

(c) Upon receiving a petition under Subsection (9)(a), the court shall, taking into account the best interests of the child:

(i) determine whether a substantial change has occurred;

(ii) if a substantial change has occurred, determine whether the change results in a difference of 15% or more between the payor's ordered support amount and the payor's support amount that would be required under the guidelines; and

(iii) adjust the payor's ordered support amount to that which is provided for in the guidelines if:

(A) there is a difference of 15% or more; and

(B) the difference is not of a temporary nature.

(10) Notice of the opportunity to adjust a support order under Subsections (8) and (9) shall be included in each child support order.

Renumbered and Amended by Chapter 3, 2008 General Session

Utah R. Civ. P. 26(a)(4)

(a)(4) Pretrial disclosures. A party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment:

(a)(4)(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying witnesses the party expects to present and witnesses the party may call if the need arises;

(a)(4)(B) the designation of witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(a)(4)(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by subdivision (a)(4) shall be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B) and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Utah Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

Utah R. Civ. P. 37(f)

Rule 37. Failure to make or cooperate in discovery; sanctions.

(f) Failure to disclose. If a party fails to disclose a witness, document or other material as required by Rule 26(a) or Rule 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), that party shall not be permitted to use the witness, document or other material at any hearing unless the failure to disclose is harmless or the party shows good cause for the failure to disclose. In addition to or in lieu of this sanction, the court on motion may take any action authorized by Subdivision (b)(2).