

2008

# Lori Ann Busche v. Matthias Busche : Reply Brief

Utah Court of Appeals

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## Recommended Citation

Reply Brief, *Busche v. Busche*, No. 20080388 (Utah Court of Appeals, 2008).  
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**IN THE UTAH COURT OF APPEALS**

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LORI ANN BUSCHE,

Petitioner/Cross-Appellant,

vs.

MATTHIAS BUSCHE,

Respondent/Appellant.

REPLY BRIEF OF APPELLANT  
AND BRIEF OF CROSS-APPELLEE

Case No. 20080388

Oral Argument Requested

---

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

---

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**FILED**  
**UTAH APPELLATE COURTS**

**OCT 26 2010**

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## **REPLY BRIEF OF APPELLANT**

### **SUMMARY OF THE ARGUMENT**

Lori Busche (“Lori”) argues that Matthias Busche (“Matthias”) has failed to marshal the evidence in support of the findings of fact entered by the District court, and due to this failure that all findings of fact ought to be deemed adequately supported by the evidence. Rule 24(a)(9) of the Utah Rules of Appellate Procedure requires that a party “challenging a fact finding must first marshal all record evidence that supports the challenged finding.” U.R.A.P. 24(a)(9). Matthias has argued that the trial court failed to consider the statutory requirements of Utah Code Ann § 78-45-7.2(7)(b) (2007) (renumbered 2008). There are no findings made by the court regarding consideration of the statutory requirements to consider employment opportunities in addition to work history, occupational qualifications, etc. Because no findings exist related to the consideration of employment opportunities Matthias cannot marshal facts related to findings which were not made by the court.

Matthias’ challenge of the determination that Matthias is voluntarily under-employed is based upon the trial court’s use of legally insufficient evidence. The deposition of Tom Black, admitted solely for impeachment purposes, is what the court based its finding of voluntary under-employment upon. (R. 1031, Trial Transcript p.137:3-25, 138:1-4, 139:3-4, 141:24-25, 142:1-25, 143:1-2). This evidence was marshaled by Matthias. None of the other determinations by the court related to income



have been challenged. This evidence regarding Matthias' termination is legally insufficient to make a finding of voluntary under-employment. No substantive evidence was presented to the court which would support a finding of voluntary under-employment, as the evidence relied upon was admitted for impeachment purposes only.

Without legally sufficient evidence to support the finding of voluntary under employment the court abused its discretion and the decision ought to be overturned by the court of Appeals. The trial court incorrectly determined that Matthias was voluntarily under-employed and incorrectly imputed income to Matthias.

The trial court's failure to apply the correct version of the statute, and the failure to consider the relevant statutory factors prior to imputation of income also constituted plain error which ought to be reversed. The procedural changes in the statute ought to be retroactively applied, and the correct version of the statute used.

### **ARGUMENT**

#### **I. MATTHIAS PRESENTED EVIDENCE SHOWING THAT THE FINDINGS RELATED TO VOLUNTARY UNDEREMPLOYMENT WERE BASED UPON LEGALLY INSUFFICIENT EVIDENCE**

##### **A. The Evidence Used By the Trial court Was Marshaled and is Legally Insufficient to Support a Finding of Voluntary Under-Employment**

Matthias has shown that the evidence used to conclude that he was voluntarily under-employed was legally insufficient to reach such a conclusion. The "Statement of

Facts” presented by Matthias outlines the evidence considered by the trial court to determine that Matthias is voluntarily under-employed. Matthias does not challenge the findings related to his current income, work history, or his efforts to find new employment. The challenge to the finding of voluntary under employment is based upon the court’s reliance upon evidence not admitted for their truth, but rather for impeachment purposes.

Matthias’ work history and salary were considered by the court. The fact that Matthias “sent out 30-40 resumes” was considered. (R. 0997, Findings of Fact and Amended Decree of Divorce, ¶ 21; R. 1034, Trial Transcript, p. 34:23-25, 35:1-13). Matthias’ current employment was also considered. The voluntary underemployment determination was based upon the finding by the court that the termination from Morinda was due to a termination for cause.

Matthias’ current income is undisputed. He does argue that the finding of voluntary under-employment, based upon a termination for cause, is based upon legally insufficient evidence. The court of Appeals has given guidance regarding legal insufficiency and stated that “examples of legal insufficiency might include...,[a] document that was used for impeachment only and had not been admitted as substantive evidence,...” *Kimball v. Kimball*, 2009 UT App 233, ¶ 20 n.5.

The trial court’s findings that Matthias was terminated for cause were based upon the deposition of Tom Black and his affidavit that were used only for impeachment

purposes. This evidence was not admitted for its truth. Mr. Black failed to appear at the trial, despite the subpoena requiring his presence. Matthias did not have the opportunity to cross-examine Mr. Black. Absent the deposition of Tom Black the court had no evidence with which it could support the finding that Matthias was voluntarily under-employed based upon a termination for cause.

**B. Matthias is not Required to Marshal Evidence Which is not Challenged**

The evidence presented related to Matthias' current income and employment are undisputed. The marshaling requirement allows for a meaningful review of challenged facts, but parties are not required to marshal undisputed facts. Matthias is not asking that the findings related to his current income and employment be set aside. It is undisputed that his current income is substantially less than his previous employment.

Neither party is challenging Matthias' current income, or employment. The challenge to the factual findings rests upon the court's finding that Matthias was terminated for cause and that it was this termination that formed the basis for the finding of voluntary under-employment. Matthias has met the marshaling requirement and shown the evidence relied upon to support the finding is legally insufficient to support a finding of voluntary under-employment.

**II. THE COURT COMMITTED REVERSABLE ERROR WHEN IT IMPLIEDLY FOUND TERMINATION FOR CAUSE**

**A. *Hall v. Hall* is Applicable to the Present Case**

Despite Lori's arguments to the contrary *Hall v. Hall*, 858 P.2d 1018 (Utah App. 1993) is applicable. In *Hall* and the present case, the finding of under-employment was based upon insufficient findings by the trial court. Similar to *Hall*, the trial court found that Matthias was currently earning less than he was previously earning. In the present case the court did not enter findings related to Matthias' employment capacity and earning potential. There was no evidence presented, and no findings entered, which showed that Matthias is voluntarily under-employed at a level below what he is capable of earning. The court did not enter findings related to the statutory factors and absent such findings the court could not logically conclude that Matthias was under-employed. Just like in *Hall* the trial court did not answer the questions related to Matthias' abilities, if his current salary is below the prevailing market for a person with his abilities, or if there are job openings for a person with his abilities. *Id.* At 1025. None of those findings were made by the trial court related to Matthias' current employment.

Lori claims that the trial court considered the factors stated in *Hall* and that this is sufficient. The trial court found that at his current job Matthias earned less than he is presently earning. This is one of the factors articulated in *Hall*, but as stated in *Hall*, this was only "one element in the matrix of factual issues affecting the ultimate finding of whether Appellant is underemployed." *Id.* As previously discussed, the only evidence that should have been considered by the court, related to the loss of employment, is legally insufficient to support a finding of under-employment.

The court discussed the fact that Matthias sent out resumes in an effort to find other employment, but made no findings related to the reasonableness of these efforts, whether the employment opportunities available were beneath his qualifications, whether Matthias passed up higher paying jobs when he took the current job, or his earning potential. No findings were made regarding the minimum standards set in *Hall* regarding Matthias' "employment capacity and earnings potential." *Id.* The findings the court made were that Matthias earned more at his previous job than he is earning at his present job. There was no finding that his current salary is below what it should be for a person with his abilities.

Because the court failed to consider the relevant factors related to Matthias' employment, and the evidence considered by the court related to Matthias' termination is not sufficient to support the finding, the determination that Matthias is voluntarily under-employed was in error.

**B. *Connell v. Connell* is Distinguishable**

Lori argues that *Connell v. Connell* 2010 UT App 139, is directly on point with the present case. In support of this argument she claims that the trial court's imputation of \$5,996 per month, when Mr. Connell was earning \$5,000 per month at his present job controls the present case. What Lori fails to address is the fact that findings of the trial court in *Connell* existed regarding Mr. Connell's forced resignation. Additionally,

evidence existed that Mr. Connell had historically earned significantly more than even the \$5,996 which he was imputed. *Id.* at ¶14.

In discussing the reasons behind allowing the court to impute income if voluntary under-employment is found the court of Appeals has stated that the reason “is to prevent parents from reducing their child support or alimony by purposeful unemployment or underemployment.” *Id.* at ¶ 16, quoting *Griffith v. Griffith*, 959 P.2d 1015, 1018 (Utah Ct. App 1998). The evidence before the trial court in the present case regarding Matthias’ termination, as has previously been argued, was legally insufficient.

In *Connell* the court had sufficient evidence before it to make findings that Mr. Connell was voluntarily under-employed, and even with this finding that he was voluntarily under-employed he was not imputed income at his highest historical income earned during the marriage.

### **III. THE COURT COMMITTED REVERSABLE ERROR WHEN IT FAILED TO APPLY THE CORRECT VERSION OF THE STATUTE.**

#### **A. The Correct Version of the Statute Should be Applied**

Lori argues that amended statutes can only be retroactively applied to a pending action, and then argues that the present matter was not pending because the trial had concluded. Lori concedes that the memorandum decision had not been entered by the court prior to the statute’s amendment. Therefore, the case remained pending. The matter had not concluded, as no final order had been entered by the court.

Because U.C.A. § 78-45-7.5(7) (amended and renumbered as §78B-12-203(7)),

which specifies the requirements for a court to impute income to a party, had been amended prior to the issuance of the memorandum decision, and no substantive rights were affected, the court ought to have applied the correct version of the statute. The legislature's amendment of the statute, which provided specification of the methods used by the court to determine whether income ought to be imputed to a party, is a procedural change in the statute, and does not change the substantive rights of the parties.

**B. The Statutory Amendment Does Not Constitute a Change in the Substantive Rights of the Parties**

The Utah Supreme court has stated the general principle that retroactivity is not favored in the law. *Goebel v. Salt Lake City R. Co.*, 104 P.3d 1185, 1198, ¶ 39 (Utah 2004) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)). More specifically, it is clearly established in the law that amendments that affect substantive rights do not apply retroactively. *Homeside Lending, Inc., v. Miller*, 31 P.3d 607, 615, ¶ 47 (Utah Ct. App. 2001) (quoting *Thronson v. Thronson*, 810 P.2d 428, 432 (Ut. Ct. App. 1991)). The Utah Supreme court has also stated that “[a] statute is considered procedural or remedial, as opposed to substantive, if the statute does not enlarge, eliminate, or destroy vested rights.” *Smith v. Cook*, 803 P.2d 788, 792 (Utah 1990).

In *Goebel*, plaintiff sued a municipal entity for negligence causing personal injury. *Goebel*, 104 P.3d at 1189, ¶ 4. Plaintiff served notice on the mayor of the city, according to the notice requirements under the Governmental Immunity Act in force at the time of the accident. *Id.*, ¶ 37. However, in the meantime, the Legislature had

amended the Governmental Immunity Act such that notice served was inadequate under the statute at the time of service. *Id.*, ¶ 38. While the court did hold that the amendment applied retroactively, it was careful to note that this was only permissible because it effected a change of *procedural* rights, and did nothing to alter a party's *substantive* rights. *Id.* That is, the retroactive effect was only permissible because it altered procedural, as opposed to substantive rights. *Id.* And in *Smith*, the court defined a change in substantive rights as one that would "enlarge, eliminate or destroy *vested* rights." *Smith*, 803 P.2d at 792 (emphasis added). None of the vested rights of the parties were affected by the change in the statutory language which required the court to consider employment opportunities along with the work history, occupation qualifications, and prevailing earnings for persons of similar backgrounds in the community, etc.

The failure of the trial court to apply the correct version of the statute constitutes plain error which could not have been known to the parties at the time of trial. Had the correct version of the statute been applied, and proper consideration given to Matthias' current employment opportunities, the result of these findings would not have supported an imputation of income at the highest amount that Matthias had earned during the course of the marriage.

#### **IV. THE FAILURE TO REDUCE OR ELIMINATE MATTHIAS' ALIMONY OBLIGATION WAS AN ABUSE OF DISCRETION**



Although the court does have discretion to select a method for determining income, the failure to make findings related to the award of alimony does constitute reversible error. The court is required to consider ability to pay when examining an award of alimony. *See Jones v. Jones*, 700 P.2d 1072, 1075 (Utah 1985). In the present case it is undisputed that Matthias' income was substantially reduced. The Court found that Matthias income was less than he was presently making. The trial court then imputed income to Matthias and set the alimony award based upon this imputation of income. The reality is that Matthias does not have the ability to provide the alimony ordered by the court. This fact was acknowledged by the court, but despite the inability to pay, the Court refused to reduce the alimony award.

The trial court found, and it was undisputed by the parties, that his income at the time of trial was \$4,583 per month. A full 72% of his income is now ordered to go to child support and alimony. No findings were made regarding Matthias' tax liability, and the effect on his ability to pay, despite the requirement to do so. *See Andrus v. Andrus*, 2007 UT App 291, ¶17, 169 P.3d 754. Even if findings were made related to Matthias' ability to pay, which they were not, it is clear that such an award is inequitable and an abuse of discretion. The award is decision is simply not supported by the findings. Matthias clearly does not have an ability to pay based upon the findings. The refusal of the trial court to reduce Matthias' income is not supported by the findings and is reversible error. *See Fish v. Fish*, 2010 UT App 292 ¶ 21.

The simple fact that the court made findings that Matthias was employed and sent out 30-40 resumes after his termination do not constitute sufficient findings to determine that Matthias has an ability to provide alimony. The Court must consider the “employment potential and probably earnings used to determine the amount of income imputed to a spouse for purposes of determining alimony, ‘from employment opportunities, work history, occupation qualifications, and prevailing earnings for persons of similar backgrounds in the community, or the median earnings for persons of similar backgrounds in the community, or the median earnings for persons in the same occupation in the same geographical area.’” *Id.* at ¶ 20. This analysis was not done by the Court. Because the findings are inadequate, the refusal to reduce or eliminate the alimony award constitutes an abuse of discretion and the award ought to be overturned.

**V. THE COURT FAILED TO ENTER FINDINGS ON THE MANDATORY FACTORS RELATED TO AN AWARD OF ATTORNEY’S FEES**

Lori argues that the trial court addressed her needs related to attorney’s fees and that the finding is sufficient to support the award. A single finding of need does not justify an award of attorney’s fees without the other required findings related to reasonableness, and ability to pay. Lori fails to address the trial court’s clear statement that the court was “aware that this decision will have catastrophic financial results” (R. 0968, Memorandum Decision p.18, section VII). It is clear from the findings that

Matthias did not have the ability to pay attorney's fees, but the court entered the order despite the finding that such an award would be financially ruinous to Matthias.

The court also found that Lori's attorney's fees were excessive. (Findings of Fact and Amended Decree of Divorce p. 21 ¶74) The court's finding that the fees were excessive, coupled with the finding that such an award would devastate Matthias financially, cannot support an award of attorney's fees for the simple fact that the court found that Lori had a need. Lori is asking for an award of attorney's fees of \$20,000 to be upheld, supported by findings that the fees were excessive, that Matthias had no ability to provide that amount, and that she had a need. Such an inequitable or unjust award ought not stand. See *Young v. Young* 2009 UT App 3, ¶21, 201 P.3d 3014 (citing *Wilde v. Wilde*, 2001 UT App 318 at ¶38).

The failure by the court to consider the required factors, coupled with the inequitable and unjust award, and findings that attorney's fees were excessive and Matthias' inability to provide the fees, constitutes an abuse of discretion and the award should be overturned.

#### **VI. MATTHIAS APPEAL IS WELL TAKEN AND LORI SHOULD NOT BE AWARDED FEES ON APPEAL**

Lori concludes that this appeal is frivolous and she ought to be awarded fees on appeal. She offers no support for her contention that the appeal is "not grounded in fact, nor warranted by existing law, or not based on a good faith argument to extend, modify or reverse existing law." Utah R. App. P. 33. The arguments presented in this appeal,

coupled with the fact that the trial court found that the initial claims were not brought in bad faith, were not brought in bad faith. Matthias has shown that the arguments were grounded in fact and existing law. Therefore, an award of attorney's fees on appeal ought not stand.

### **CONCLUSION**

Matthias respectfully requests that the alimony and child support award be overturned based upon a legally insufficient finding of voluntary under-employment. Despite the undisputed evidence of a substantial change in circumstances the trial court incorrectly imputed income to Matthias at a level that is not supported by the evidence and not based upon the proper statutory factors. The award of attorney's fees, despite findings of excessive fees and devastating consequences for Matthias also ought to be overturned. Principles of law, equity and fundamental fairness dictate that the orders entered by the trial court be reversed.

### **APPELLANT'S REPLY BRIEF TO CROSS APPEAL**

#### **SUMMARY OF THE ARGUMENT**

As previously discussed, the trial court's award of attorney's fees to Lori was error. The findings of the court related to Matthias' ability to pay and the reasonableness of the fees do not outweigh a single finding that Lori has a need for fees.

Lori's argument that the trial court erred in finding that Matthias' equity interest in the marital home ought not be considered. It is within the broad discretion of the trial

court to determine what constitutes income. Conversely it is also within the broad discretion of the trial court to exclude funds that it does not consider income. There is no argument made by Lori that the trial court did not consider the equity interest in the marital home. Lori's argument is that the equity was considered by the trial court, but that she disagrees with the refusal by the trial court, after consideration of the equity, to classify the equity interest in the home as ongoing income for purposes of attorney's fees.

### **ARGUMENT**

#### **I. THE TRIAL COURT HAS DISCRETION TO CONSIDER MATTHIAS' EQUITY INTEREST IN THE MARITAL HOME AND DETERMINE THAT IT IS NOT ONGOING INCOME**

The trial court did not find, as Lori contends, that the equity in the marital home cannot be considered assets or income. The court found that the "Respondent's equity in the marital home is not ongoing income and...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." (Findings of Fact and Amended Decree of Divorce, ¶ 77) The court did not conclude, despite Lori's argument, that as a matter of law that the equity could not be used in consideration of an award of attorney's fees. The court considered the equity and found that it was not ongoing income. The court was within its broad discretion to make this finding and to refuse to consider the equity in awarding attorney's fees.

The finding of the court that the equity interest in the marital home is not ongoing income for purposes of ability to provide attorney's fees is within the sound discretion of

the court. See *Stonehocker v. Stonehocker*, 2008 UT App 11, ¶10, 176 P.3d 476. Lori argues that the trial court is required to utilize the equity in the marital home to award attorney's fees. She then cites cases which discuss the ability of the court to consider other sources of funds for purposes of awarding attorney's fees.

The *Crompton* case, cited by Lori, allows the court to consider income, but does not mandate the utilization of those funds for the finding of an ability to pay. *Crompton v. Crompton*, 888 P.2d 686 (Utah App. 1994). The court can exclude those funds if it so chooses. That is exactly what occurred in this case. The court considered those funds, and determined that they were not ongoing income for purposes of awarding fees. *Crompton* does not require that the court utilize the equity in the home, it simply gives the court the discretion to do so, should it so desire.

All of the cases cited by Lori show that the trial court has the ability to consider equity in a marital home for the fashioning of awards, and have upheld those awards as within the discretion of the court. Nothing in those cases requires the court to determine that equity in a home is income for purposes of awarding fees. Such a determination will be upheld on appeal, but it is not an absolute requirement. It follows that if the court has the discretion to consider and include equity, then it also has the discretion to consider and exclude those funds in determining income for purposes of awarding fees.

## **II. A TRIAL COURT'S DETERMINATION OF THE REASONABLENESS OF ATTORNEY'S FEES IS WITHIN THE DISCRETION OF THE COURT**

The trial court made findings related to the reasonableness of the fees awarded to Lori. The court outlined specific concerns regarding the amount of attorney's fees being requested by Lori. (Findings of Fact and Amended Decree of Divorce, ¶ 65-71). It is clear that the decision regarding fees is within the discretion of the court, so long as that decision is supported by adequate findings. See *Andrus v. Andrus*, 2007 UT App 291, ¶19, 169 P.3d 754.

In support of her contention that the court's finding of excessive fees Lori points to the case of *Rappleye v. Rappleye*, 855 P.2d 260 (Utah App. 1993). This case is clearly distinguishable from the present case. In *Rappleye* the court of Appeals had insufficient findings to support the initial award of fees, and remanded the issue for findings regarding the reasonableness of the award. In the present case the court made findings about the reasonableness of the fees, and determined that the fees were unreasonable. Matthias does not disagree that the fees are unreasonable. The court found that they were unreasonable, and provided findings related to why the fees were unreasonable. This is within the discretion of the court, and the findings were adequate to support a determination that the fees were excessive. Therefore the finding of excessive fees is within the discretion of the court, and ought to be upheld.

### **III. THE SPECIFIC FINDINGS OF THE TRIAL COURT SUPPORT A DETERMINATION BY THE COURT THAT LORI'S ATTORNEY'S FEES ARE EXCESSIVE**

Lori argues that the finding of the court that the amount of fees charged by her attorney is excessive is in error because the trial court found that the fees incurred by Matthias were approximately one fifth of those incurred by Lori. She would have this court believe that the only piece of evidence considered in making such a finding was a statement made by counsel for Matthias. What Lori fails to address is the findings of the court related to the difficulty of the litigation, the efficiency of the presentation of the case, the number of exhibits which were created and not used, the finding of her counsel's fee being above the norm, and that the fees are excessive. Findings of Fact and Amended Decree of Divorce, ¶ 68-71, 74. This determination of excessive fees is supported, and based upon the findings made by the court. See *Foote v. Clark*, 962 P.2d 52, 55 (Utah 1998)

The findings of the trial court support the determination that the fees were excessive. The cases cited by Lori all discuss instances where the trial court made insufficient findings related to the award of fees and the reasonableness of the fees. In the present case the trial court did make findings related to the reasonableness of the fees. The findings related to the fees show consideration of more than the finding that Lori's fees were considerably more than Matthias' fees. This was one of multiple factors considered, but was clearly not the determinative factor, despite Lori's assertions to the contrary.



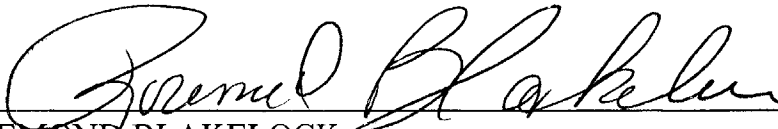
### CONCLUSION

Matthias respectfully requests, based upon the foregoing, that this court not overturn the trial court's finding of excessive fees. Additionally, Matthias asks that this court affirm the trial court's determination, which was within the discretion of the court, to refuse to consider Matthias' equity in the marital home for determination of an ability to pay attorney's fees.

### STATEMENT CONCERNING ADDENDUM

Pursuant to Utah R. App. P. 24(A)(11), Matthias states that no addendum is necessary inasmuch as Matthias has previously submitted an addendum.

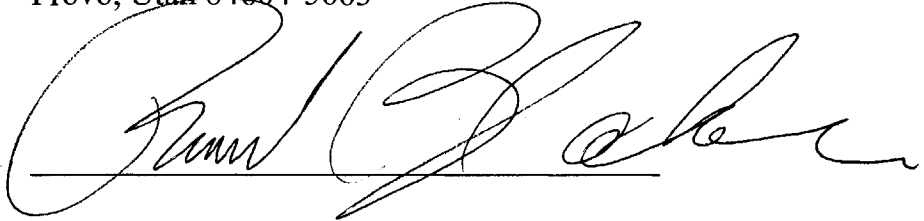
RESPECTFULLY SUBMITTED this 26 day of October, 2010

  
\_\_\_\_\_  
ROSEMOND BLAKELOCK  
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that on the 26 day of October, 2010, I mailed a true and correct copy of the foregoing to the following:

Douglas B. Thayer (8109)  
HILL JOHNSON & SCHMUTZ, L.C.  
RiverView Placa, Suite 300  
4844 North 300 West  
Provo, Utah 84604-5663

A handwritten signature in black ink, appearing to read "Douglas B. Thayer", is written over a horizontal line.