

Slip Copy, 2012 WL 5048190 (N.Y.Sup.), 2012 N.Y. Slip Op. 51964(U)  
**(Table, Text in WESTLAW), Unreported Disposition**  
**(Cite as: 2012 WL 5048190 (N.Y.Sup.))**

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NOTE: THIS OPINION WILL NOT APPEAR IN A  
 PRINTED VOLUME. THE DISPOSITION WILL AP-  
 PEAR IN A REPORTER TABLE.

Supreme Court, Kings County, New York.  
 Yehaskel SALMAN, Plaintiff,  
 v.  
 Ilana J. SALMAN,, Defendant.

No. 53611/2011.  
 Oct. 11, 2012.

[Sheldon Farber](#), Esq., New York, attorney for plaintiff.

[Adam W. Schneid](#), Esq., Carol W. Most & Associates,  
 P.C., White Plains, attorney for defendant.

[JEFFREY S. SUNSHINE](#), J.

\*1 The following papers numbered 1 to 7 read on this  
 motion:

Papers	Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Mo- tion and Affidavits (Affirmations) Annexed	1
Opposing Affidavits (Affirmations)	3, 6
Reply Affidavits (Affirmations/Affidavits)	4, 7
Other Papers (2) Memorandum of Law in Support of Order to Show Cause; (5) Reply Memorandum in Support of Or- der to Show Cause; (5b) Sur Reply Memorandum in Fur- ther Support of Order to Show Cause	2, 5, 5b

### *Introduction*

The legislature enacted [DRL 236\[B\]](#), effective Oc-  
 tober 12, 2010, requiring Courts to calculate and award  
 temporary maintenance awards derived from applying  
 statutory formulas to parties' annual income in an effort  
 to regulate and create more consistency among *pendente*  
*lite* maintenance awards. This statutory provision is  
 commonly referred to as the mandatory temporary  
 maintenance guidelines (the "guidelines"). Under the  
 existing statute the guidelines do not apply to final  
 awards. In support of the legislation the sponsor noted:

Purpose of Bill: To take steps toward reforming the  
 state's spousal maintenance awards by providing con-  
 sistency and predictability in calculating temporary  
 spousal maintenance awards, revising the state's laws on  
 final maintenance awards by incorporating factors that  
 reflect the experiences of divorcing couples, and direct-  
 ing a review of our maintenance laws and the economic

consequences of divorce to enable the legislature to im-  
 prove the effectiveness of these laws ...

The legislation established nineteen (19) factors  
 that a Court may consider when deviating from award-  
 ing the presumptively correct temporary maintenance  
 under the guidelines. In applying the statutory formulas,  
 the Court must first determine the parties' respective an-  
 nual incomes. Here, the husband's lifestyle and ex-  
 penses during the marriage greatly exceed his numerous  
 and inconsistent representations regarding his income.  
 Furthermore, he acknowledges that he did not report  
 certain income during the marriage on his tax returns.  
 The husband's representations and his lack of candor  
 with the Court make it impossible for the Court to de-  
 termine, with any degree of accuracy, what the hus-  
 band's income is even after the parties conducted depo-  
 sitions.<sup>FN1</sup> As such, the Court shall fix temporary main-  
 tenance and child support based upon the needs of the

wife and the parties' child (*see* [DRL 236\[B\] \(5-a\)\(g\)](#) and [DRL 240\[1-b\] \[k\]](#) ).

**FN1.** The husband waived deposition of the wife at a prior court appearance, but the husband made a subsequent oral application to the Court at the court appearance on October 11, 2012, to depose the wife, which the Court granted.

Limited judicial resources and the associated expense of counsel fees do not make evidentiary hearings on *pendente lite* applications routine, but in this matter the Court found that the facts and circumstances required that the wife's application be held in abeyance to allow depositions to proceed with the expectation that the deposition testimony would clarify the husband's income and the parties' lifestyle during the marriage and that the information would be applicable to awarding *pendente lite* support.<sup>FN2</sup> This Court notes that there is a large disparity between the husband's representations regarding his income and the monies available to the parties during the marriage. Furthermore, the destruction and or failure to maintain business records, the husband's admissions that he has not reported certain income on his tax returns and his commingling of business and personal assets give the Court no alternative but to base *pendente lite* support on the needs of the wife and the parties' child.

**FN2.** In the matter at bar, any formal evidentiary hearing before the completion of all discovery would be akin to a discovery proceeding with the Judge present.

#### *Procedural History*

\*2 Defendant-wife moves by Order to Show Cause, dated December 13, 2011, for an order: (1) awarding her temporary maintenance and child support in the sum of \$5,354.78, retroactive to the date of commencement of the action; (2) directing that the plaintiff-husband provide health insurance for her and the parties' child; (3) directing that the husband pay any and all uncovered or unreimbursed medical, dental, psychological and/or psychiatric, drug and pharmaceutical expenses incurred by the wife or the parties' child; (4) appointing a neutral

forensic evaluator to value the businesses held by the husband and his father and directing that such evaluation be paid by the husband; (5) granting her an interim award of counsel fees in the sum of \$25,000.00; and (6) such other, further and different relief as this Court may deem just and proper. The wife's counsel filed a Memorandum of Law in Support, dated November 22, 2011. The plaintiff-husband filed an Affidavit in Opposition, dated January 10, 2012. The wife filed an Affidavit in Further Support and her counsel filed a Reply Memorandum in Support, both dated January 25, 2012. The wife's counsel filed a Sur Reply Memorandum in Further Support and a Sur Reply Affirmation in Support both on April 23, 2012. The husband's counsel filed a Sur Sur Reply Affirmation in Opposition, dated on May 8, 2012. This Court heard oral argument on the motions on April 3, 2012.<sup>FN3</sup>

**FN3.** The Supplemental Affidavits and Affirmations post deposition were filed with Court permission.

#### *Background*

The parties were married in a religious ceremony on June 1, 2008 in Florida. The wife is 28 years of age and the husband is 30 years of age. There is one (1) child of this marriage who was born in August 2009. The wife commenced an action for divorce in the Circuit Court of the Fifteenth Judicial Circuit in Palm Beach County, Florida and received an *ex parte* injunction on March 18, 2011 enjoining either party from removing the child from Florida but providing for supervised visits between the father and the child in Florida. The husband commenced this instant action for divorce and custody of the parties' child in Kings County, New York on June 14, 2011. On August 16, 2011, this Court conducted a joint hearing with Judge Charles E. Burton, the justice presiding over the pending Florida proceeding, pursuant to [New York State Domestic Relations Law \(DRL\) section 76-\(f\)\(3\)](#) [the "UCCJEA"]. The wife and counsel for both parties in the Florida proceeding participated in the conference call from the Florida courthouse. The husband and counsel for both parties in the New York proceeding participated in the conference call from the Kings County courthouse. This Court

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granted the wife's application that the issues of custody and visitation be heard by the Florida Court in a written decision dated September 12, 2011 (*see Salman v. Salman*, 32 Misc.3d 1242(A), 2011 WL 4056895). This Court retained jurisdiction over the financial matters in the divorce, including the issues of maintenance, child support and equitable distribution.

#### *The Facts*

\*3 The parties were married for thirty-three (33) months when the wife commenced an action for divorce in Florida on March 18, 2011. The husband commenced an action for divorce in New York on June 13, 2011.

#### *The Wife's Contentions*

The wife was employed at Bloomingdale's earning \$65,000.00 annually when the parties married. She avers that, when she was five (5) months pregnant, the husband insisted that she leave her employment in order to remain home as a homemaker and mother to the parties' child because his income was sufficient to provide for the needs of the family without her annual income. The wife contends that she did not work during the remainder of the marriage and that the parties enjoyed an "affluent" lifestyle funded solely by the husband's income. The wife alleges that the parties dined out at high-end restaurants almost daily, drove luxury vehicles and enjoyed several vacations during the short-term marriage, including trips to Mexico, Las Vegas and a Caribbean cruise.<sup>FN4</sup>

**FN4.** The wife alleges that the parties drove a 2007 Acura and a 2010 Mazda. It is undisputed that the vehicles in question were owned by the husband's father and that the husband's father also paid the auto insurance on the vehicles.

The wife alleges that the husband is a shrewd businessman and that he and his father are involved in a complex cash business structure with a free flow of money between the husband and his father and that they exchange cash and financial benefits to remain "off the books" and avoid paying income taxes. She alleges that the husband and his father fifty-fifty (50–50%) co-own a retail linen and household items store, which generates large sums of unreported cash income. She avers

that the husband's father also compensates the husband for his ownership in the business by providing the parties with rent-free housing, the exclusive use of two (2) automobiles, and by paying most of the parties' daily expenses, such as automotive gas and utility bills, all so that the husband does not have to declare his cash income.<sup>FN5</sup> The wife alleges that the husband carried large sums of cash, generated by the store, which he used for spending money and that he provided her with a weekly \$500.00 cash allowance for groceries and miscellaneous daily expenses.

**FN5.** The wife avers that during the marriage the parties lived, rent-free, in an apartment located on East 12th Street, Brooklyn, New York (hereafter "East 12th apartment"), owned by the husband's father, but that the parties spent between \$30,000.00 and \$50,000.00, mostly in cash, renovating the apartment. The wife further avers that the parties lived, also rent-free, in a second apartment, also owned by the husband's father, while the renovations to the East 12th apartment were ongoing.

The wife requests that this Court monetize the financial support the husband receives from his family, including rent-free apartments, use of automobiles and payment of utilities and daily living expenses and include that sum as income imputed to the husband for the purpose of determining his interim support obligation.

The wife further asserts that the husband's financial representations regarding his income in his Affidavit of Net Worth, dated November 10, 2011, are wholly inaccurate and cannot be relied upon in calculating his interim support obligation. According to the husband's Affidavit of Net Worth, his annual income is \$4,250.00 and his monthly expenses total \$304.00; however, the husband's monthly itemized expenditures include \$508.00 for food (\$400.00 of which are listed as lunches at work), \$216.00 for clothing, \$8.00 for recreation, and \$80.00 for miscellaneous expenditures, which totals \$820.00 monthly. Furthermore, it is undisputed that the husband took at least two (2) trips to Florida during this proceeding to participate in tennis "clinics" and that he sent hundreds of dollars worth of gifts, including a Mer-

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cedes–Benz 300SL sit-and-go toy car costing \$304.00, to the parties' child after the wife and child relocated to Florida.<sup>FN6</sup> None of those expenses are reflected in the husband's Affidavit of Net Worth. During his deposition, the husband testified that he viewed the trips to Florida to participate in tennis tournaments not as recreational trips, but as possible opportunities to earn money. In support of his position, he averred that he played tennis at least four (4) hours a day and ate pizza and Power Bars instead of “partying” and going out. The husband also did not include any expenses for his flight or hotel expenses for his tennis trips to Florida in his Affidavit of Net Worth.

**FN6.** He avers that such gifts were reasonable and that the wife should not have refunded the gift items for cash, despite his failure to provide any financial support for the child. The wife contends that she needs financial support to feed and shelter the child, not expensive luxury toys.

\*4 The wife further notes that while the husband concedes that his father provided him with the exclusive use of an automobile, there is no listing for any regular and routine expenses associated with an automobile, such as gas, tolls or maintenance expenses, included in the husband's Affidavit of Net Worth. The wife requests that the Court impute the sum of \$515.00 in monthly gas expenses to the husband for the purposes of determining his interim support obligation.<sup>FN7</sup>

**FN7.** When confronted with his credit card statements during his deposition, the husband conceded that he spent over \$70.00 on several occasions during the pendency of this proceeding to have an automobile cleaned and detailed.

The wife also avers that the husband is not credible because he offered numerous, inconsistent representations regarding his income during the course of this litigation, none of which comport with the parties' lifestyle during the marriage and information revealed during discovery about the husband's lifestyle after she and the parties' child moved to Florida. During the August 16, 2011 court appearance, the husband, through counsel,

represented that he earns a \$200.00 weekly (\$10,400.00 per year) salary as an employee of Salman Sons, Inc.; however, subsequently, during the same court appearance, he represented, through counsel, that he earned an annual salary of \$43,000.00.<sup>FN8</sup> Two months later, in his Affidavit of Net Worth, dated November 11, 2011, the husband swore that his annual income was just \$4,250.00; however, documents filed with the Court and his representations at subsequent court appearances revealed that the husband also receives at least \$1,650.00 monthly in cash gifts from his family, which was not included in his previous representations regarding income. The husband later conceded that his family provided him with \$1,650.00 each month during the marriage. The husband only revealed these monthly infusions of cash after prior representation, through counsel, on the record at the August 16, 2011 court appearance that his family only provided him with shelter and an automobile and did not provide him with “any cash.”

**FN8.** During his deposition the husband testified that the sum of \$43,000.00 was his annual income for 2010 and included the monthly cash gifts from his father, his salary from Salman Sons from March 2010 through December 2010 and his cash sales from the flea market, which he did not reveal.

At other times during this proceeding the husband represented that he also earned between \$7,000.00 and \$8,000.00 in 2010 selling “scented sachets” at a flea market.<sup>FN9</sup> It is undisputed that the husband did not include the monthly \$1,650.00 cash gifts or his flea market sales income in his 2010 tax returns, which lists his annual income for 2010 as just \$4,250.00. The parties did not file a joint tax returns in 2010 because, the wife contends, she would not have permitted the husband to file allegedly fraudulent tax returns.<sup>FN10</sup> The husband has not provided copies of his 2011 tax returns, but his Affidavit of Net Worth, dated November 11, 2011, also lists his 2011 annual income as \$4,250.00. The husband has not filed an amended Affidavit of Net Worth since November 11, 2011.

**FN9.** Shortly thereafter, during his deposition,

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the husband represented that he only made \$1,000.00 from sales at the flea market in 2010.

**FN10.** The wife posits that the husband's alleged tax fraud enabled him to qualify and to enroll the family in Family Health Plus, a subsidized insurance program which the parties would not have qualified for had he declared his cash income.

The wife contends that the husband's various representations regarding his income are also inconsistent with records uncovered during discovery, including the parties' banking and credit card records. In support of her allegation, the wife annexed bank records revealing that the sum of \$57,272.00 was deposited into the parties' joint bank account between May 23, 2009 and January 5, 2011 and that, during the same period, \$52,938.00 was withdrawn. The bank records reveal that more than \$30,000.00 was deposited into the joint account in 2010. The wife posits that the deposit of more than \$30,000.00 when she was no longer employed outside the home is *defacto* proof that the husband's 2010 tax return, where he lists an annual income of just \$4,250.00 is not accurate and cannot be relied on in making a determination of the husband's interim support obligation. **FN11**

**FN11.** The husband subsequently averred that he also earned income in 2010 selling scented sachets at a flea market. The wife avers that she has no recollection that he ever sold anything at a flea market during the marriage and posits that the husband concocted a fictional flea market job to explain deposits into the parties bank account in 2010.

**\*5** The wife avers that she and the child are currently living with her parents in Florida where she is employed earning \$35,000.00 annually; however, she avers that her salary is insufficient to cover basic expenses for her and the parties' child and that she must live in her parents' home. She avers that the husband has not provided any financial support to her or the parties' child since April 2011. In support of her representation,

the wife presented documentation showing that the husband cancelled the parties' credit card in her name on February 24, 2011, within hours after she e-mailed him stating that she needed to use the credit card to purchase diapers and wipes for the parties' child. During his deposition, the husband testified that he cancelled the credit card not because he did not have the money to pay for it but because he did not want her to use it anymore. She avers that her monthly expenses, including the cost of renting an apartment where she and the child can live, will be \$7,210.41 and that she cannot afford these expenses without receiving financial support from the husband.

The wife posits that this Court should impute the sum of \$166,440 .00 to the husband for the purposes of determining his interim support obligation based on the parties' standard of living during the marriage and the husband's inconsistent and incredible representations regarding his income **FN12**.

**FN12.** The wife posits that this sum was arrived at by adding up the husband's various representations regarding his income during this proceeding and including her version of how the financial benefits the husband enjoys from his family should be monetized. The wife avers that this sum is probably less than what the husband actually earns annually.

#### *The Husband's Contentions*

The husband vehemently denies the wife's representations regarding the parties' lifestyle during the marriage. He avers that the couple lived "modest, constrained and very limited financial" lives during the marriage and that the marriage was filled with never-ending financial stress and strain. The husband alleges that he is a high-school drop-out and a failed businessman who is destitute and living off the cash "charity" of his family.

The husband posits that he is a "miserable failure" in business. He concedes that he owned a business in 2006, but contends that it failed within a year because he could not afford the rent and that, as a result, he and his father (who allegedly guaranteed the commercial

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lease) have an outstanding judgment against them in the sum of \$954,168.71, which was entered on January 26, 2011. The husband claims he was unemployed in 2008 and 2009. He contends that since March 2010 he and his father have been fifty-fifty (50–50%) co-owners of a retail linens and household items business but alleges that the business does not produce a profit.

He contends that the wife's claim that the parties lived a life of luxury is pure fantasy concocted for the purposes of this litigation and that this litigation amounts to a search for non-existent income and wealth. He posits that the few “luxuries” the parties enjoyed during the marriage, including a cruise and rare dinners out at high-end restaurants were paid from monies received as engagement, wedding and baby shower cash gifts and that all of that gift money was spent during the marriage. He avers that the parties rarely spent more than \$70.00 monthly on dining out and that when the parties ate out it largely consisted of slices of take-out pizza, not lavish fine dining.

\*6 The husband vehemently denies the wife's allegation that he earns additional cash income and explains the parties' lifestyle above his reported income as only possible because of the generosity of his family, which he contends will no longer be readily available because his parents are suffering financial difficulties and are considering a divorce. The husband concedes that the parties lived rent-free in properties owned by his father and enjoyed the use of automobiles owned by his father, but he contends that the apartments were small and run-down and not the comfortable apartments described by the wife and that the automobiles the parties drove were merely repaired, high-mileage “loaner” cars, not luxury automobiles <sup>FN13</sup>. During the proceeding he conceded that he receives cash gifts from his family in the sum of \$1,650.00 monthly (approximately \$20,000.00 annually) <sup>FN14</sup>. The husband denies that he provided the wife with \$500.00 weekly for spending money. He also avers that the wife left her employment for Bloomingdale's on her own initiative, not because he wanted her to remain home as a wife, mother and homemaker.

<sup>FN13</sup>. The husband denies spending \$30,000.00–\$50,000.00 to renovate the East

12th apartment and claims that such an investment would make the apartment the “Taj Mahal” and that no one would invest that much money renovating a “rat trap” like East 12th.

<sup>FN14</sup>. During this proceeding the husband first represented that he received monthly cash in the sum of \$1,500.00 then \$1,700.00 but finally in the sum of \$1,650.00.

The husband avers that the vacations the couple enjoyed during the marriage were paid for by their families, not with undisclosed cash income he earned. He avers that the sole vacation the parties paid for themselves during the marriage, a trip to Mexico, was a budget, all-inclusive, off-season trip, not a luxury one. He concedes that, during the short-term marriage, the parties also took a cruise and took a trip to Las Vegas <sup>FN15</sup>. He further concedes that the parties' took frequent trips to Florida during the marriage but avers that they were paid for by the wife's father so that the parties could visit the wife's family.

<sup>FN15</sup>. He posits that the wife's grandmother paid for the cruise and that the parties paid for the trip to Las Vegas with money received as wedding gifts.

The husband avers that during the marriage he earned a very modest income selling “sachets” and other cheap trinkets for a dollar (\$1.00) at the Aqueduct Flea Market on occasional weekends <sup>FN16</sup>. He represented that he earned approximately \$900.00 monthly from sales at the flea market and avers that the “wads of cash” the wife alleges he carried were actually small bills used to make change for customers at the flea market. He contends that he stopped selling items at the flea market because he was not making enough income to make it worthwhile.

<sup>FN16</sup>. During the husband's deposition he averred that he sold scented “sachets” in 2009 and linens in 2010. He avers that the items he sold were mostly “gifts” and left overs received from his father and his cousin.

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The husband provided the Court with two sworn Affidavits regarding personal and business income, dated February 2, 2012<sup>FN17</sup> and May 8, 2012<sup>FN18</sup> in which he attempts to clarify his representations regarding his annual income and to explain his prior inconsistent representations. He claims that any inconsistency in his prior representations resulted from confusion on his part regarding questions and that his total annual income from gifts, incidental earnings and salary from Salman Sons, Inc. is \$43,000.00. He contends that the sum of \$4,250.00 reported on his 2010 tax returns only reflected several months of salary from Salman Sons, Inc. because he and his father only opened the store in April 2010. In his final amended Affidavit regarding income, dated May 8, 2012, the husband avers that he receives the sum of \$230.00 biweekly as a salaried employee of Salman Sons, Inc. and, as such, his full annual income is \$5,520.00<sup>FN19</sup>. He also avers that he receives a monthly cash gift from his father in the sum of \$1,650.00, not the sum of \$1,700.00.

<sup>FN17</sup>. The Affidavit dated February 2, 2012 asserts that the husband is a fifty (50%) percent owner of Salman Sons, Inc.; that it opened March 2010 and made its first sales in April 2010; that the husband has not taken any monies over and above the \$4,250.00 reported in the husband's 2010 tax return; that he earns no monies from any other business; and that he receives the sum of \$1,650.00 from his father each month.

<sup>FN18</sup>. The Affidavit dated May 8, 2012 revised statements from the prior Affidavit and Certification to add the increased amount of \$5,520.00 earned from Salman Sons, Inc. business, which is payment over the course of a full year. The document also asserts the husband tried and failed to obtain other employment due to his lack of ability and his obligation to be on call to help at Salman Sons, Inc. when his father does not show up. At his deposition he testified that he has not applied for any other employment because he has “a job.”

<sup>FN19</sup>. The husband avers that the representa-

tion that his salary was only \$200.00 biweekly was a misstatement by his prior attorney when the sum was actually \$230.00 biweekly.

\*7 When questioned during his deposition regarding two (2) trips he took to Florida to participate in tennis clinics after commencing this proceeding he testified that he flew to Florida, stayed in a hotel for several days and that the trip was solely for leisure but stated that the trip “wasn't a vacation in [his] eyes.”<sup>FN20</sup>

<sup>FN20</sup>. Deposition of Yeheskel Salman, February 15, 2012, p. 201–202. He claims that he trained for four (4) hours each day while he was there and that he ate free hotel breakfast, Power Bars and cheap pizza.

The husband claims that the wife earns \$36,000.00 per year currently, which he maintains makes her the monied spouse because he only earns a little more than \$5,000.00 annually. As such, he posits that he should not be required to provide any interim support to the wife or to the parties' child.

The wife claims that the husband's income should be imputed based on his earned income as well as the benefits afforded the husband by his family. She asserts that the \$43,000.00 annual income amount claimed by the husband should be considered the base from which the Court should begin imputing his income for the purposes of determining his interim support obligation. In her Affidavit in Further Support of Order to Show Cause, dated January 25, 2012, the wife avers that she “cannot recall” the husband ever working at a flea market during the marriage and posits that the husband always worked for his father earning “off the books” income made up of consistent cash “gifts” from his business-partner father and other financial benefits, such as rent-free housing, use of automobiles and payment of daily living expenses, including utilities, groceries and payment of many credit card expenses for luxury items.

The wife contends that the husband is, and always has been, the monied spouse for purposes of calculating interim support and that the husband relies heavily on cash income generated from the store he co-owns with

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his father and that the additional cash income is evidenced by the parties' lifestyle during the marriage. The wife notes that the vast majority of the expenses on the parties' credit cards are for "luxury" purchases such as dinners at high-end restaurants and clothing purchases from designer stores and that there are almost no records of payments or withdrawals from the parties' bank accounts or charges to their credit cards for daily necessities such as groceries. Furthermore, the wife posits that her allegation of cash income is supported by the fact that credit card records show that some credit card payments during the marriage were not drawn from the parties' bank account and, therefore, were paid in cash or by someone else. The husband testified during his deposition that his father did, at times, pay his credit card bills. The wife contends that the financial assistance he receives from his father should also be imputed income to the husband. The wife states that the husband first asserted in his deposition testimony that he never deposited his cash income from the retail business into his bank account because he used the cash salary for "spending money" but that later in the same deposition when questioned regarding certain deposits into his bank account he changed his testimony and stated that he did deposit his salary from the retail business into his bank account <sup>FN21</sup>.

<sup>FN21</sup>. The wife also cited testimony from the husband's deposition testimony where he first swore that he did not receive any cash from his mother but later, when asked about his deposit history he changed his testimony and swore that he received between \$7,000.00 and \$8,000.00 from his mother. He avers that the \$8,000.00 was a one-time gift from his mother so that he had money to visit his son in Florida and should not be included in any income imputed to him for the purposes of determining any interim support obligation.

\*8 The wife annexed 2011 statements from an American Express credit card in the husband's name listing luxury expenses for items such as: \$98.25, Le Chocolatier, March 18, 2011; almost weekly iTunes charges; \$543.29, Apple Store, April 30, 2011 <sup>FN22</sup>;

\$185.08, Top Wine & Spirits, June 17, 2011; \$149.16, Nike, July 24, 2011; \$184.00, Zappos, September 30, 2011; \$276.18, Zappos, October 4, 2011; \$219.03, Zappos, November 18, 2011; \$426.57, Polo; \$127.57, Sal's Italian Restaurant, October 16, 2011; \$86.58, Beauty & Essex, October 26, 2011; monthly EZ-Pass charges in excess of \$120.00 and charges to StubHub and other entertainment companies for concert tickets, including \$533.00 for tickets to a Dunken Sheik concert.

<sup>FN22</sup>. The husband testified during his deposition that this expense was for the purchase of a new iPad for himself.

#### *Manhattan Beach House*

In support of her contentions regarding the parties' comfortable lifestyle during the marriage, the wife avers that the husband's cash income was enough that he saved more than \$3,000.00 monthly, above what the parties used to fund their luxurious lifestyle, which he used for an alleged down-payment on a house (the "Manhattan Beach House"). It is undisputed that the house and the mortgage for the Manhattan Beach House are in the husband's father's name; however, the wife alleges that the husband provided his father with over \$93,000.00 in cash, which his father converted to cashier's checks and used for the down-payment on the Manhattan Beach House. The wife posits that this is another example of the husband and his father's complex money-laundering scheme designed to obscure their cash income and to shield the husband's ownership of the Manhattan Beach House. The wife further posits that the husband charged the sum of \$65,570.18 worth of renovation charges for the Manhattan Beach House to his American Express credit card over a three (3) month period. The husband avers that the American Express credit card is in his name for convenience only and that his father is solely responsible for the charges. The husband's father's name does not appear on the credit card statements. In support of her allegation, the wife provided documentation showing that the husband paid certain expenses associated with the Manhattan Beach House, including some insurance premiums. She posits that it is incongruous for the husband to make thousands of dollars of payments towards the father's



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expenses when the husband is allegedly living off his father's monthly cash "charity" and other financial benefits, such as rent-free apartments <sup>FN23</sup>.

**FN23.** In support of her allegation that the husband is the actual owner of Manhattan Beach House, the wife provided statements showing that, in November 2010, the husband paid the sum of \$2,655.00 for an insurance premium for Manhattan Beach House and that he made the following payments, which the wife attributes to expenses for Manhattan Beach House: \$1,257.62, L & G Plumbing and Heating; \$434.30, Thermasoft Heated Flooring; and several thousand dollars in receipts from Home Depot and Lowes. The wife also provided copies of the husband's February 15, 2012 deposition transcript where the husband testified that the address of Manhattan Beach House was listed on his personal checks because when he ordered the checks he was "planning to move" into Manhattan Beach House with the wife and child when the renovations were completed.

The husband denies any ownership interest in the Manhattan Beach House and avers that he had no financial involvement in the purchase of the property. He concedes that the parties would have lived at the Manhattan Beach House had the wife not moved to Florida, but only for convenience and until the market improved and his father could sell the property at a profit. He concedes that he paid certain expenses associated with the Manhattan Beach House, including certain plumbing bills and insurance premiums, but avers that he did so as a favor to his father who later repaid him in full; however, the husband did not provide any documentation supporting his allegation that his father repaid him for his expenditures for the Manhattan Beach House. <sup>FN24</sup>

**FN24.** The husband does not provide any documentation in support of his claim that the father repaid him for his payments for plumbing expenses and insurance premiums for Manhattan Beach House. The husband avers that the payment in the sum of \$434.30 to Thermasoft

Heated Flooring cited by the wife was for the purchase of a heated area rug for the basement apartment, owned by his father, where the parties lived and was not an expense associated with Manhattan Beach House.

#### *The Wife's Neutral Forensic Evaluation Request*

**\*9** The husband avers that Salman Sons, which he co-owns with his father, sells linens and "cheap household items" and that it is a "struggling" start-up business that is "going nowhere" in the present economy. He avers that, although he is a 50–50% co-owner with his father, his father runs the business and makes all of the business decisions. He avers that he is a co-owner of Salman Sons in name only and that the only benefit he receives from the store is a biweekly cash salary of \$230.00 as an employee. He avers that he provided the wife with all of the existing business records for the business. He avers that no records were destroyed, that no records are missing and that the ledgers provided are accurate and that even if they were not it should not reflect poorly on him because although he is a fifty (50%) percent co-owner of the store his father makes all the business decisions and, as such, he should not be held responsible for any missing business records.

During a three-day deposition, the husband testified that Salman Sons maintains virtually no business, that he is the only employee of the store and that the store is not profitable even though it does not pay any commercial rent because his father and uncle own the building where the store is located. The husband testified that he is the only employee at the store but that at least four (4) other "workers" come to the store and "work for tips." During the deposition he first averred that the four (4) "workers" are solely compensated by customer tips ranging from \$2.00 to \$20.00; however, he later testified that his father also compensates the workers with "cash from his pocket" and other benefits such as items from the store, beer and food.

The husband further testified during his deposition that the store does not maintain inventory lists because there are too many items in the store and as such it would be impossible to maintain inventory lists. He avers that he and his father discard all invoices for or-

ders to stock the store and that they regularly delete all e-mails regarding orders and sales. The husband also testified at his deposition that the store does not reconcile the register totals at the end of the day and that any transaction logs, such as the store's credit card logs reflecting daily credit card sales, are regularly destroyed. He also avers that the accountant who maintained the store's accountings and prepared the store's tax returns moved to China and is not available.

The wife contends that the nominal documentation the husband provided regarding the business is inadequate. She posits that the store relies largely on cash sales and generates large sums of cash income for the husband and his father. She avers that the "sales ledger" provided by the husband appears to be a self-serving, *post-hoc* document that merely records the funds deposited into the store's bank account each week from limited non-cash sales and that it is not an accurate reflection of the many cash sales and cash income generated by the store. She posits that the husband's failure to keep—or refusal to turn over—business records indicates that the husband and his father hide profits and expenses in an effort to avoid paying taxes. She notes that the people the husband refers to as "workers" are actually employees that the husband and his father pay, in cash, "off the books" and that it is incredible that anyone tips \$20.00 for someone to bag items at a discount households store where most items are sold for less than \$20.00.

**\*10** The wife claims that because the husband refuses to be forthright regarding his income and has not cooperated with discovery regarding the value of the business that a neutral forensic evaluator is necessary to value the business. She argues that because the husband is the monied spouse, has destroyed necessary financial business records and has not complied with discovery that he should be solely (100%) responsible for the payment of the neutral forensic business evaluator.

The husband posits that a neutral forensic evaluation of the store would be very expensive and time consuming because there are hundreds of individual items and the store does not maintain inventory records. He contends that if this Court appoints a neutral

forensic evaluator that the wife should be solely (100%) financially responsible for the cost because she is the monied spouse earning \$35,000.00 annually while he only earns \$4,250.00 annually and, therefore, does not have sufficient income from which to pay for the forensic. He asserts that the wife is also the one who should pay the expenses because she is the party who wants the evaluation even though he has represented that the business is not profitable.

#### *Counsel fees*

The wife claims that because there are two (2) actions pending in this matter—the proceeding pending before this Court and the proceeding pending in Florida—she was required to retain two (2) attorneys. She avers that, as of April 23, 2012, she has an outstanding balance in the sum of \$55,997.85 due and owing for services rendered by her attorneys in the proceeding pending before this Court. She also avers that, as of November 18, 2011, she has an outstanding balance in the sum of \$25,311.65, due and owing for services rendered by her attorneys in the proceeding pending before the Court in Florida. As such, she contends that she has incurred counsel fees in the sum of more than \$81,000.00 as of April 2012. She avers that she borrowed the sum of \$3,000.00 from her parents to pay the retainer; however, she also notes that she does not have access to any additional funds from which to pay her outstanding bill for further charges that she will incur as a result of further litigation necessary to resolve this divorce. The wife requests that this Court grant her the sum of \$25,000.00 in interim counsel fees, with leave to seek an additional award of counsel fees, so that she can continue litigating this divorce. She argues that the husband's refusal to be forthright regarding his income resulted in unnecessary counsel fees.

The husband claims that he, too, has incurred substantial attorney's fees as a result of this proceeding. He avers that, as of November 16, 2011, he had a bill in the sum of \$11,013.38 due and owing for services rendered by his attorneys in the pending Florida proceeding. He also avers that, as of January 9, 2012, he had a bill in the sum of \$8,000.00 due and owing for services rendered by his attorney in the pending New York pro-

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ceeding, of which he paid a retainer in the sum of \$2,000.00. The husband did not provide the source of funds for the \$2,000.00 retainer payment. The husband denies that he should be responsible for any portion of the wife's counsel fees because she is the monied spouse and because she left him and moved to Florida. He claims that he should not be burdened with the counsel fees incurred to the wife because this divorce should have been a quick and simple proceeding if not for the wife's litigation tactics. He further notes that this Court should deny the wife's counsel fee application, and all other forms of relief she seeks, because she continues litigating this matter in a "spiteful fashion" by searching endlessly for nonexistent income streams.

#### *Discussion*

\*11 The husband has had repeated opportunities to be candid and forthright with the Court regarding his financial circumstances and annual income but he has repeatedly chosen to attempt to obscure his income. At different times and often in quick succession—sometimes during the same court appearance—the husband has made vastly inconsistent representations regarding his income which he later attempted to reconcile when confronted with financial records and documentation discrepant with his representations.

#### *The Husband's 2010 Tax Returns*

Based on the husband's own representations, through counsel, both on the record in open court during court appearances and in sworn documents filed with the Court, it appears that the husband grossly underreported his income on his individual 2010 tax returns. This Court notes that the husband failed to offer any credible explanation for deposits into his checking account totaling \$30,000.00 in 2010 when he only reported \$4,250.00 annual income on his 2010 tax returns. The husband also failed to credibly trace whether the \$30,000.00 in deposits included some or all of the monthly cash gifts he acknowledges that he received from his family in 2010. Additionally, the husband did not indicate whether or not those deposits included the cash income he allegedly earned selling items at a flea market in 2010. According to the husband's representations, he earned \$1,000.00, \$7,000.00 or \$8,000.00, de-

pending on which representation this Court considers, in cash income from sales at a flea market in 2010. The husband concedes that he did not report any of this cash income in his 2010 tax returns.

Additionally, the husband initially denied that he received any cash gifts from his family, including his business-partner father, during the marriage; however, as this proceeding continued, he eventually conceded that he received \$1,650.00 monthly in cash gifts from his family throughout the marriage, including 2010 and 2011, but that he did not report this cash as income or produce a gift tax return. The husband offered no explanation for why this income was omitted from his 2010 tax returns and his Affidavit of Net Worth, dated November 11, 2011. This Court notes that it is undisputed that the husband also received many financial benefits, such as rent-free use of apartments and automobiles owned by his father and business partner, payment of credit card bills and utilities and purchase of groceries throughout the marriage and that he continues to enjoy these financial benefits. Based on the vast number of inconsistencies and self-contradictory statements, this Court cannot rely on the husband's last filed tax return in determining his interim support obligation. This Court notes that the husband represents that he has not yet filed his 2011 tax returns.

#### *The Husband's Affidavit of Net Worth*

This Court finds that the husband's Affidavit of Net Worth, dated November 11, 2011, is wholly incredible. The husband's representations in the Affidavit of Net Worth regarding his 2011 income do not comport with the parties' banking or credit card records for the corresponding periods of time or with the husband's own sworn statements and representations to the Court prior and subsequent to the date of the Affidavit. The inconsistencies on the face of the Affidavit of Net Worth make it wholly incredible. In it, the husband lists his income for 2011 as \$4,250.00 annually and purports that his expenses total \$304.00 monthly; however, he also lists that he spends \$400.00 monthly for lunches at work (\$4,800.00 annually), which is \$550.00 more than he avers in the same document that he earns in annual salary. Moreover, prior to executing his Affidavit in

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November 2011, the husband represented, through counsel, on the record in open Court on August 16, 2011 that he earns \$200.00 weekly (\$10,400.00 annually) as an employee at Salman Sons, Inc. He now maintains that he earns just \$230.00 biweekly (\$5,980.00 annually) as a 50–50% co-owner of Salman Sons, Inc., just slightly more income than he avers that he spends on lunches at work on an annual basis. <sup>FN25</sup>

This Court notes that at other times, including during his deposition, the husband testified that he spends no money on lunches at work because his father purchases his groceries and his mother prepares his lunches for work. With each representation, the husband creates an ever constricting web of inconsistencies.

<sup>FN25</sup>. This Court notes that the husband initially represented that he was only an employee of Salmon Sons, Inc. but later revealed in his Affidavit of Net Worth that he is a 50–50% co-owner with his father of Salman Sons, Inc. He continues to maintain that he only earns a nominal salary, which he represented at different times during this proceeding \$200.00 weekly, \$230.00 biweekly or \$43,000.00 annually.

\*12 The Court has considered the parties' representations regarding their lifestyle during the marriage and the supporting documentation annexed to their papers. This Court finds that, based on the lifestyle of the parties during the marriage and their reasonable needs, that the wife and the parties' child's reasonable annual expenses require the sum of \$80,000.00 annually. The wife is currently employed earning approximately \$33,017.76 annually (\$35,000.00, less \$1,982.24 for FICA, Social Security and Medicare). As such, the reasonable needs of the wife and the parties' child require support in the sum of \$46,982.24 annually.

#### *Pendente Lite Maintenance*

In accordance with [DRL 236\[B\]\(5–a\)\(e\)\(1\)](#), commonly referred to as the temporary maintenance guideline statute, “[t]he court shall order the presumptive award of temporary maintenance in accordance with paragraphs c and d of this subdivision, unless the court finds that the presumptive award is unjust or inappropriate and adjusts the presumptive award of tem-

porary maintenance accordingly based upon consideration of the following factors:”

- (a) the standard of living of the parties established during the marriage;
- (b) the age and health of the parties;
- (c) the earning capacity of the parties;
- (d) the need of one party to incur education or training expenses;
- (e) the wasteful dissipation of marital property;
- (f) the transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;
- (g) the existence and duration of a pre-marital joint household or a pre-divorce separate household;
- (h) acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the Social Services Law;
- (I) the availability and cost of medical insurance for the parties;
- (j) the care of the children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws that has inhibited or continues to inhibit a party's earning capacity or ability to obtain meaningful employment;
- (k) the inability of one party to obtain meaningful employment due to age or absence from the workforce;
- (l) the need to pay for exceptional additional expenses for the child or children, including, but not limited to, schooling, day care and medical treatment;
- (m) the tax consequences to each party;
- (n) marital property subject to distribution pursuant to

subdivision five of this part;

(o) the reduced or lost earning capacity of the party seeking temporary maintenance as a result of having foregone or delayed education, training, employment or career opportunities during the marriage;

(p) the contributions and services of the party seeking temporary maintenance as a spouse, parent, wage earner and homemaker and to the career or career potential of the other party; and

\*13 (q) any other factor which the court shall expressly find to be just and proper.

Furthermore, as relevant here, [DRL 236\[B\] \(5-a\)\(g\)](#) provides:

... when a party has defaulted and/or the court is otherwise presented with insufficient evidence to determine gross income, the court shall order the temporary maintenance award based upon the needs of the payee or the standard of living of the parties prior to commencement of the divorce action, whichever is greater. Such order may be retroactively modified upward without a showing of change in circumstances upon a showing of newly discovered or obtained evidence ...

Furthermore, [DRL § 240\(1-b\)\(b\)\(5\)\(iv\)\(D\)](#) gives the Court discretion to attribute and/or impute income to a party on the basis of “money, goods, or services provided by relatives and friends” ( *Matter of Simmons v. Simmons*, 48 AD3d 691, 692, 853 N.Y.S.2d 102 [2d Dept 2008] [citations omitted]; *Abellard v. Aime*, 18 AD3d 653, 653, 795 N.Y.S.2d 652 [2d Dept 2005] [the Court properly considered the assistance petitioner received from his father in calculating his child support obligation by imputing the loans that he received from his father as income]; *Miller v. Miller*, 18 AD3d 629, 631, 796 N.Y.S.2d 97 [2d Dept 2005] [the Court should have considered the assistance the husband received from her mother when calculating her child support obligation]; *Matter of Yaroshenko v. Kats*, 7 AD3d 806, 806, 776 N.Y.S.2d 877 [2d Dept 2004] [the Court properly imputed loans that the father received from his mother as income]; *Mellen v. Mellen*, 260 A.D.2d 609,

610, 688 N.Y.S.2d 674 [2d Dept 1999] [it was proper for the Court to consider sums of money which the husband received from his parents as income for purposes of determining the amount of his support obligation]; *Tesler v. Tesler*, 228 A.D.2d 491, 492, 644 N.Y.S.2d 316 [2d Dept 1996] [the Court properly attributed and imputed to the husband moneys received from his parents] ). Similarly, the Court may impute income to a party based on the value of rent-free living accommodations provided by a relative (see *Baffi v. Baffi*, 24 AD3d 578, 579, 807 N.Y.S.2d 388 [2d Dept 2005] ). Here, it is clear that the husband receives substantial and consistent financial assistance from his family, including rent-free living accommodations and monthly infusions of cash.

This Court has fully considered the temporary maintenance guidelines and statutory factors in [DRL 236](#). This Court finds that under the facts and circumstances presented here, including the husband's complete lack of candor with the Court and his incredible and inconsistent sworn financial affidavits, tax returns and deposition testimony that the Court cannot calculate the presumptively correct sum of temporary maintenance utilizing the temporary maintenance guidelines. Therefore, this Court finds that the specific facts and circumstances presented here make this an appropriate situation for the Court, under the authority in [DRL 236\[B\] \(5-a\)\(g\)](#), to deviate from awarding a presumptively correct sum of temporary support under the guidelines and to award *pendente lite* maintenance based on the needs of the payee or the standard of living of the parties prior to commencement of the divorce action. Where a parties representations are so incredible that the court cannot impute an exact amount or calculate a reasonable amount to impute, the court is left with no alternative but to conduct a needs based and lifestyle analysis and not utilize the maintenance guidelines.

\*14 According to the wife's sworn Affidavit of Net Worth, dated November 8, 2011, her monthly expenses for herself and the parties' child will be \$7,210.41, which includes anticipated expenses associated with renting an apartment for herself and the parties child. Pursuant to the wife's Affidavit of Net Worth, her

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monthly expenses are as follows: (1) housing (anticipated cost of renting an apartment in Florida), \$2,000.00; (2) utilities, including: electricity, gas and water, \$480.00; (3) food (including lunches at work and school lunches for the child), \$725.00; (4) clothing, \$300.00; (5) laundry and dry cleaning, \$60.00; (6) insurance (for herself and the child through her employer-sponsored program), \$400.00; (7) unreimbursed medical, \$62.00; (8) household maintenance, \$70.00; (9) household help (including babysitter and housekeeper), \$380.00; (10) automotive (lease, repairs, car wash and parking/tolls), \$589.99; (11) education (pre-school), \$1,598.42; (12) recreation (including cable television and gym membership), \$260.00; (13) income taxes, \$0,000.00; (14) miscellaneous, \$135.00; and (15) other (cellular telephone), \$150.00. As such, her total anticipated expenses are \$7,210.41 monthly (\$86,524.92 annually.)

The husband's declarations of poverty are incompatible with the parties' lifestyle during the marriage and the husband's lifestyle following commencement of this proceeding. This Court notes that the wife represented that the parties enjoyed a very comfortable lifestyle during the marriage, including fine dining, luxury purchases such as an iPad and designer clothing and multiple vacations a year. The wife presented documentation, including credit card receipts, in support of her representations. The wife's itemized expenses in her Affidavit of Net Worth appear, at this time, consistent with the lifestyle she and the child would have enjoyed had the marriage continued.

The wife is currently employed earning approximately \$33,017.76 annually (\$35,000.00, less \$1,982.24 for FICA, Social Security and Medicare) <sup>FN26</sup>. As such, this Court finds that an award of *pendente lite* spousal support to the wife in the sum of \$1,305.06 is appropriate at this time based on the prior lifestyle and the needs of the wife. There are many open questions regarding the husband's tax returns. The husband concedes that he did not disclose the vast majority of his annual income anywhere in his 2010 tax returns. As such, the husband has enjoyed the tax-free benefit of certain sums of income. As such, this Court finds that

there is a clear rationale for not permitting the husband to use any payments of *pendente lite* maintenance as tax deductions at this time. *See* 26 U.S.C.A. § 71(b)(1)(B); *see also Grumet v. Grumet*, 37 AD3d 534, 829 N.Y.S.2d 682 [2 Dept.,2007] ).

FN26. The Court does not have any additional information regarding the wife's federal tax obligations.

#### *Pendente Lite Child Support*

The Appellate Division, Second Department has held that where a party presents “insufficient and incredible evidence” to establish his or her income that the Supreme Court may properly award child support based on the needs of the child ( *Hicks v. Hicks*, 87 AD3d 1143, 929 N.Y.S.2d 875 [2 Dept.2011]; *see Domestic Relations Law* 240[1–b][k]; *see also Feng Lucy Luo v. Yang*, 89 AD3d 946, 933 N.Y.S.2d 80 [2 Dept.,2011]; *Tsarova v. Tsarov*, 59 AD3d 632, 875 N.Y.S.2d 84 [2 Dept.,2009]; *Evans v. Evans*, 57 AD3d 718, 870 N.Y.S.2d 394 [2 Dept., 2008] ). Here, the husband's representations regarding his income are wholly incredible. This Court finds that the husband presented insufficient and incredible information regarding his income and, therefore, the Court does not have the ability to impute a specific sum of income to the husband at this time for the purposes of determining his interim child support. As such, this Court shall award *pendente lite* child support based on the pre-commencement standard of living the child would have enjoyed had the marriage continued and the child's current needs.

\*15 This Court notes that, despite his declarations of poverty, when confronted with certain financial documentation during his deposition, the husband conceded that he shops at expensive clothing stores, dines at high-end restaurants, purchases consumer electronics, such as multiple iPhones and iPads, and travels, for “leisure,” to participate in tennis clinics in Florida and treats others, including at least one girl-friend, to drinks at a trendy Manhattan restaurants. The husband's personal spending is incongruous with his assertions that he is too poor to provide financial support to feed and shelter the parties' child.

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It is undisputed that the husband has not provided any financial support to the parties' child since April 2011.<sup>FN27</sup> The wife avers, and provided e-mails and documentation in support of her allegation, that the husband cut off her access to a joint credit card in February 2011 within hours after she e-mailed him that she needed to use the credit card to purchase diapers and wipes for the child. When questioned at his deposition about why he cut off the wife's access to the parties' credit card the husband stated that he simply did not want her to have access to the parties' credit card because she left him.

**FN27.** The husband did not present any accounting of actual support that he provided to the wife prior to April 2011.

In determining this award of *pendente lite* child support, this Court considered the wife's current income in the sum of \$33,017.76 annually (\$35,000.00, less \$1,982.24 for FICA, Social Security and Medicare) and the pre-commencement standard of living the child would have enjoyed had the marriage continued and finds that the needs of the child require that the husband pay the sum of \$2,610.12 monthly as and for *pendente lite* child support.<sup>FN28</sup> Commencing on the 15th day of October, 2012, and continuing on the 15th day of each month thereafter, the husband shall pay the sum of \$2,610.12 monthly to the wife as and for *pendente lite* child support based on the needs of the child.

**FN28.** This Court notes that the wife included statutory add-ons, such as the cost of child care and private tuition for the parties' young child. It is undisputed that the parties enrolled the child in a private school in New York prior to the wife and child moving to Florida. The wife represents that she enrolled the child in a comparable school (Temple Bnai Isreal) in Florida. As such, this Court will not direct the husband to pay an additional percentage for add-ons as it would result in a double-dipping situation. Given the husband's refusal to be forthright and candid regarding his finances, this Court is unable to adequately determine any *pro rata* interim payment of statutory add-ons. As such,

payment of interim statutory add-ons is included in the child support sum based on the needs and expenses of the child and the prior lifestyle. In calculating the child's needs the Court specifically included add-ons.

#### *Retroactivity*

The Court notes that an award of maintenance and child support is effective as of the date of application ( *see Domestic Relations Law § 236[B][6][a]*; *see also Elimelech v. Elimelech*, 58 AD3d 672, 874 N.Y.S.2d 490 [2 Dept., 2009]; *Evans v. Evans*, 57 AD3d 718, 870 N.Y.S.2d 394 [2 Dept., 2008]. The wife's first application for maintenance and child support was December 5, 2011<sup>FN29</sup> (*see Domestic Relations Law section 240*; *see also Dooley v. Dooley*, 128 A.D.2d 669, 513 N.Y.S.2d 167 [1987] ). “Courts have continuing jurisdiction to modify or vacate support orders until they are completely satisfied, except that they have no discretion to reduce or cancel arrears of child support which accrue before an application for downward modification of the child support obligation” ( *Dembitzer v. Rindenow*, 35 AD3d 791, 828 N.Y.S.2d 139 [2 Dept., 2006] [quoting *Hasegawa v. Hasagawa*, 290 A.D.2d 488, 490, 736 N.Y.S.2d 398 [2 Dept., 2002]; *see Matter of Dox v. Tynon*, 90 N.Y.2d 166, 659 N.Y.S.2d 231, 681 N.E.2d 398 [1997]; *Matter of Jenkins v. McKinney*, 21 AD3d 558, 799 N.Y.S.2d 904 [2 Dept., 2005]; *Matter of Miller v. Miller*, 308 A.D.2d 541, 764 N.Y.S.2d 850 [2 Dept., 2003]; *Howfield v. Howfield*, 250 A.D.2d 573, 574, 671 N.Y.S.2d 988 [2 Dept., 1998]; *Domestic Relations Law section 236[B][9][b]* ).

**FN29.** This Court notes that the wife requests that this Court grant her retroactive support to the date of commencement; however, the husband commenced this proceeding in New York against the wife and the wife has not yet filed an Answer. As such, the wife's first application for support before this Court was in her Order to Show Cause for *pendente lite* relief on December 5, 2011.

\***16** The husband's combined *pendente lite* maintenance and child support obligation is \$3,915.18 monthly (\$46,982.21 annually.) The retroactive award is calcu-

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lated from the date of the wife's first application, December 5, 2011 to date, and totals \$39,151.80 (\$3,915 .18/month x 10 months [December 2011 through September 2012] ). Retroactive sums due by reason of this award shall be paid, together with the monthly support obligation, at the rate of \$500 per month for child support and \$250 per month for maintenance until paid in full, with a credit for any temporary maintenance or child support payments already made by check or other negotiable instrument, since December 5, 2011, the date of first application (*see Domestic Relations Law § 236[B][6][a]* ).(*see Mosso v. Mosso*, 84 AD3d 757, 924 N.Y.S.2d 394 [2 Dept.,2011] ).

#### *Neutral Forensic Business Appraisal*

The husband concedes the he is a 50–50% co-owner of a business which he avers is not profitable; however, he avers that he cannot provide documentation in support of his representation because he and his father routinely destroy all order and sales records that would show whether the business is profitable or not. Yet, the husband posits that the wife should be denied a neutral business appraisal because she does not accept his representation. It is incongruous for the husband to ask this Court to credit his sworn statements regarding his income when his sworn statements regarding income, including his 2010 tax return and his Affidavit of Net Worth, are incredible and when his representations to the Court have changed dramatically during the course of this proceeding. It is evident that the husband has attempted to obscure his true financial situation and income from the Court and that he is attempting to utilize the potential cash nature of his business to conceal his income and avoid paying taxes.

The wife's application for appointment of a neutral forensic expert to appraise Salman Sons, the linens and household items store co-owned by the husband and his father is granted. The husband concedes that the business was started during the marriage on or about March 2010 and that he is a fifty (50%) percent owner. He contends that the business has no value. The wife alleges that the business generates significant sums of cash income which the husband and his father do not report.

The husband concedes that he and his father do not maintain inventory logs and that they routinely delete and destroy sales and order logs and, as such, it is likely that the forensic evaluator will require random on site audits of the business. As such, the wife and this Court are left to either rely on the husband's representation regarding the store's value or to guess at the business' value. This Court shall appoint a neutral forensic evaluator by separate order. In as much as it is the husband's failure to be forthright with the Court and his business practice not to maintain business records, the husband shall be solely (100%) responsible for the payment of the neutral forensic appraisal of the retail business, subject to reallocation at time of final determination of the financial issues.

#### *Interim Counsel Fees*

\*17 An award of interim counsel fees is within the discretion of the Court ( *DeCabrera v. Cabrera–Rosete*, 70 N.Y.2d 879 [1987] ). Pursuant to *Domestic Relations Law section 237(a)*, the Court in an action for divorce:

... may direct the person or persons maintaining the action, to pay counsel fees and fees and expenses of experts directly to the attorney of the other spouse to enable the other party to carry on or defend the action or proceeding as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties. There shall be rebuttable presumption that counsel fees shall be awarded to the less monied spouse. In exercising the court's discretion, the court shall seek to assure that each party shall be adequately represented and that where fees and expenses are to be awarded, they shall be awarded on a timely basis, pendente lite, so as to enable adequate representation from the commencement of the proceeding.

“An award of an attorney's fee pursuant to *Domestic Relations Law § 237(a)* is a matter within the sound discretion of the trial court, and the issue is controlled by the equities and circumstances of each particular case” ( *Grant v. Grant*, 71 AD3d 634, 634–635, 895 N.Y.S.2d 827 [2d Dept 2010], quoting *Gruppuso v. Caridi*, 66 AD3d 838, 839, 886 N.Y.S.2d 613 [2d Dept 2009], quoting *Morrissey v. Morrissey*, 259 A.D.2d 472,



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473, 686 N.Y.S.2d 71 [2d Dept 1999] ). “In determining whether to award such a fee, the court should review the financial circumstances of both parties together with all the other circumstances of the case, which may include the relative merit of the parties' positions” ‘ ( *Gruppuso*, 66 AD3d at 839, quoting *DeCabrera v. Cabrera-Rosete*, 70 N.Y.2d 879, 881, 524 N.Y.S.2d 176 [1987] ). “An appropriate award of attorney's fees should take into account the parties' ability to pay, the nature and extent of the services rendered, the complexity of the issues involved, and the reasonableness of the fees under all of the circumstances” ‘ ( *DiBlasi v. DiBlasi*, 48 AD3d 403, 405, 852 N.Y.S.2d 195 [2d Dept 2008], *lv denied* 10 NY3d 716, 862 N.Y.S.2d 468 [2008], quoting *Grumet v. Grumet*, 37 AD3d 534, 536, 829 N.Y.S.2d 682 [2d Dept 2007] [citations omitted] ).

It is also well-settled that “[a]n award of interim counsel fees is designed to create parity in divorce litigation by preventing a monied spouse from wearing down a nonmonied spouse on the basis of sheer financial strength” ( *Rosenbaum v. Rosenbaum*, 55 AD3d 713, 714, 866 N.Y.S.2d 234 [2d Dept 2008], citing *O'Shea v. O'Shea*, 93 N.Y.2d 187, 193, 689 N.Y.S.2d 8 [1999]; *Wald v. Wald*, 44 AD3d 848, 844 N.Y.S.2d 86 [2d Dept 2007] ). “Such awards are designed to redress the economic disparity between the monied spouse and the non-monied spouse' and ensure that the matrimonial scales of justice are not unbalanced by the weight of the wealthier litigant's wallet” ‘ ( *Kaplan v. Kaplan*, 28 AD3d 523, 523, 812 N.Y.S.2d 360 [2d Dept 2006], quoting *Frankel v. Frankel*, 2 NY3d 601, 607, 781 N.Y.S.2d 59 [2004], quoting *O'Shea*, 93 N.Y.2d at 190).

**\*18** The Court may also consider imputed income in awarding counsel fees (*see Steinberg*, 59 A.D.2d at 705; *Rocanello v. Rocanello*, 254 A.D.2d 269, 269, 678 N.Y.S.2d 385 [2d Dept 1998]; *Popelaski v. Popelaski*, 23 AD3d 735, 738, 803 N.Y.S.2d 108 [2d Dept 2005] ).

This Court finds that under the totality of the facts and circumstances presented and in consideration of the parties' respective incomes, including the facts and circumstances surrounding the husband's attempts to obscure and to shield his income to avoid paying interim support to the wife and the parties' child that it is an ap-

propriate exercise of the Court's discretion to award the wife the sum of \$10,000.00 in interim counsel fees. The husband is the monied spouse, not the wife. Payment shall be made directly from the husband to the wife's counsel within thirty (30) days of service of notice of entry of this decision and order. The wife's attorney may enter a judgement for the full amount due and owing, plus statutory interest, with the Clerk of the Court upon ten (10) days written notice by certified and regular mail to the husband and without further application to this Court if the husband fails to make the payment in compliance with this decision and order.

This shall constitute the decision and order of this Court.

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