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**NOT FOR PUBLICATION**

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA  
FRESNO DIVISION

In re

Martha Jean Barigian,  
Debtor.

Case No. 08-10115-B-7

James E. Salven, Chapter 7  
Trustee,

Plaintiff,

Adv. Proceeding No. 08-1273

DC No. KDG-1

v.

Mark McQuinn, Earl T.  
McQuinn, Betty McQuinn, and  
Earl T. McQuinn and Betty  
McQuinn, Co-Trustees for the  
Benefit of the McQuinn Family  
Trust Dated March 13, 1992,

Defendants.

**MEMORANDUM DECISION REGARDING PLAINTIFF'S  
REQUEST FOR DISCOVERY SANCTIONS**

This Memorandum Decision is not approved for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of res judicata and claim preclusion.

Connie M. Parker, Esq., appeared on behalf of the chapter 7 trustee/plaintiff, James E. Salven (the "Plaintiff").

Douglas V. Thornton, Esq., appeared on behalf of the defendants, Mark McQuinn, Earl T. McQuinn, Betty McQuinn, and Earl T. McQuinn and Betty McQuinn, Co-Trustees for the Benefit of the McQuinn Family Trust Dated March 13, 1992 (the "Defendants").

1 Before the court is a discovery dispute arising out of two  
2 contentious adversary proceedings.<sup>1</sup> Plaintiff filed this adversary  
3 proceeding to recover moneys allegedly paid by the Debtor on account  
4 of several pre-petition loan obligations owed to the Defendants. The  
5 Plaintiff filed this motion to compel the Defendants to respond to some  
6 of his discovery requests (the “Discovery Motion”). The Discovery  
7 Motion was granted by order dated September 16, 2009. Under  
8 submission is Plaintiff’s request for sanctions (the “Sanction Request”),  
9 *i.e.*, an award of attorney’s fees and costs incurred in having to bring  
10 the Discovery Motion. For the reasons set forth below, the Sanction  
11 Request will be granted.

12 This Memorandum Decision contains findings of fact and  
13 conclusions of law required by Federal Rule of Civil Procedure 52  
14 (made applicable to this adversary proceeding by Federal Rule of  
15 Bankruptcy Procedure 7052). The court has jurisdiction over this  
16 motion pursuant to 28 U.S.C. § 1334 and General Orders 182 and 330  
17 of the U.S. District Court for the Eastern District of California. This is  
18 a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(O).

19 **Background.**

20 Prior to the bankruptcy, the Debtor, Martha Barigian, operated a  
21 business known as Parimex International (“Parimex”). It appears that  
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23 <sup>1</sup>This adversary proceeding is related to, and the issues are almost identical to the  
24 issues in, adversary proceeding number 08-1271. The underlying factual allegations in  
25 both adversary proceedings are virtually the same. The defendants are represented by the  
26 same counsel. Both adversary proceedings were consolidated for discovery purposes.  
27 The Plaintiff propounded identical discovery requests in each adversary proceeding and  
received virtually identical responses. The Plaintiff’s discovery motion was filed in both  
adversary proceedings.

1 the Debtor, through Parimex, was heavily involved in real estate  
2 investment. The Debtor filed a petition under chapter 13 in January  
3 2008. The Debtor's schedules list 15 parcels of real property and 83  
4 loan transactions secured by liens against the various properties. Five  
5 of the scheduled secured obligations are owed to the Defendants, Mark  
6 McQuinn, Earl T. McQuinn, Betty McQuinn, and Earl T. McQuinn and  
7 Betty McQuinn, Co-Trustees for the Benefit of the McQuinn Family  
8 Trust Dated March 13, 1992, in various amounts ranging from \$20,000  
9 to \$318,000 (the "McQuinn Loans"). The schedules state that the  
10 McQuinn Loans are secured by deeds of trust against apartment  
11 properties. No other information is given regarding the collateral for  
12 the McQuinn Loans. On March 17, 2008, after numerous objections  
13 were filed to the Debtor's chapter 13 plan, the case was converted to  
14 chapter 7 on the chapter 13 trustee's motion. Plaintiff, James E. Salven  
15 was appointed the chapter 7 trustee.

16 This adversary proceeding was filed on December 22, 2008.  
17 The Plaintiff seeks to recover from the Defendants an unspecified  
18 amount of the interest payments made by the Debtor on account of the  
19 McQuinn Loans. The Plaintiff alleged, *inter alia*, that the interest  
20 payments were usurious and avoidable under California law. On March  
21 11, 2009, the Plaintiff's counsel served on Defendants' counsel a  
22 request for production of documents and a set of interrogatories. At the  
23 request of the Defendants, the Plaintiff agreed to extend the time for the  
24 Defendants' response to June 22, 2009.

25 Plaintiff's interrogatory no. 2 went to the core of the adversary  
26 proceeding. It asked the Defendants to "Identify all payments made by  
27  
28

1 [the Debtor] to YOU from 2003 to present.” In response, Defendants  
2 objected on the grounds of “tax payers’ privilege” and refused to  
3 produce any details or supporting information. Defendants Earl &  
4 Betty McQuinn’s response to interrogatory no. 2 was:

5           Objection. Tax payers’ privilege. Other than the  
6           return schedules, Responding Party does not have  
7           documents showing the amount of interest  
8           received from the subject loans, however, the  
9           amount of interest paid was \$50,250. This  
10          Responding Party does not have copies of the  
11          checks received from Martha Barigian or Parimex  
12          International, LTD. Additionally, Martha Barigian  
13          or Parimex International, LTD, did not issue  
14          payment receipts or Form #1099s.

15          Defendant Mark McQuinn’s response to interrogatory no. 2 was:

16           Objection. Tax payers’ privilege. Other than the  
17           return schedules, Responding Party does not have  
18           documents showing the amount of interest  
19           received from the subject loans, however, the  
20           amount of interest paid was \$36,800. This  
21           Responding Party does not have copies of the  
22           checks received from Martha Barigian or Parimex  
23           International, LTD. Additionally, Martha Barigian  
24           or Parimex International, LTD, did not issue  
25           payment receipts or Form #1099s.

26          Plaintiff’s request for production of documents no. 3 asked the  
27          Defendants to identify and produce any documents evidencing  
28          payments made by the Debtor on account of the McQuinn Loans  
including receipts, ledgers and spreadsheets. Again, the Defendants  
objected on the grounds of “tax payers’ privilege” and declined to  
produce any documents. On August 14, 2009, after Plaintiff’s counsel  
made a bona fide effort to meet and confer with Defendants’ counsel  
regarding these discovery requests, the Plaintiff filed the Discovery  
Motion. In response, the Defendants acknowledged that they had  
located “documentation showing payments” and agreed to produce

1 those “documents” in a supplemental response. Accordingly, the  
2 Discovery Motion was granted.

3 The Plaintiff’s attorney requests an award of \$1,360 (8 hours x  
4 \$170 per hour) for time spent preparing the Discovery Motion in two  
5 adversary proceedings (*see* footnote 1, *supra*) and appearing at the  
6 initial hearing. The Defendants object to the Sanction Request and  
7 argue, without supporting evidence, that they timely produced all of the  
8 documents and information that were available to them with the  
9 original discovery response.<sup>2</sup> In short, the Defendants contend that the  
10 Discovery Motion was unnecessary. However, they offer no  
11 explanation why the additional documentation could not have been  
12 located and produced with their original discovery response, or after the  
13 attorneys met and conferred prior to the filing of the Discovery Motion.

14 **Analysis.**

15 **Applicable Law.**

16 Discovery in an adversary proceeding is governed by the Federal  
17 Rules of Civil Procedure. FRCP 37(a) (made applicable to this  
18 adversary proceeding by FRBP 7037), provides for a monetary award  
19 of legal fees and costs to a party who must file a motion to compel  
20 disclosure or discovery, and is successful. Fed.R.Civ.P. 37(a)(4)(A)  
21 provides in pertinent part:

22 If the motion is granted or if the disclosure or requested  
23 discovery is provided after the motion was filed, the court shall,  
24 after affording an opportunity to be heard, require the party or  
deponent whose conduct necessitated the motion or the party or

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26 <sup>2</sup>The Defendants’ responsive pleading is not supported by a declaration from any  
27 of the Defendants or their counsel. Neither the Discovery Motion, nor the Defendants’  
response were served on the Defendants.

1 attorney advising such conduct or both of them to pay to the  
2 moving party the reasonable expenses incurred in making the  
3 motion, including attorney's fees, unless the court finds that the  
4 motion was filed without the movant's first making a good faith  
5 effort to obtain the disclosure or discovery without court action,  
6 or that the opposing party's nondisclosure, response, or objection  
7 was substantially justified, or that other circumstances make an  
8 award of expenses unjust.

6 The Discovery Motion was successful. The fact that the  
7 Defendants began producing some "supplemental documents" after the  
8 Discovery Motion was filed does not vitiate the sanction issue. Rule  
9 37(a)(4)(A) states that fees and costs *shall* be awarded, even if the  
10 discovery is produced after the Motion was filed.

11 The pertinent question is whether the Discovery Motion was  
12 necessary and whether the moving party made a good faith effort to get  
13 the discovery without court intervention. The court is persuaded that  
14 the Defendants' failure to diligently search for and locate the  
15 "supplemental documents" necessitated the Discovery Motion. The  
16 court is also persuaded that Plaintiff's attorney made a good faith effort  
17 to obtain the discovery responses without court action. Ergo, attorney's  
18 fees *shall* be awarded and the Sanction Request will be granted. Since  
19 the Sanction Request relates to two adversary proceedings, one-half of  
20 the requested attorney's fees will be awarded in this adversary  
21 proceeding.

22 Dated: December 18, 2009

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24  
25 /s/ W. Richard Lee  
26 W. Richard Lee  
27 United States Bankruptcy Judge  
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