

1 WRITTEN DECISION — NOT FOR PUBLICATION

2 ENTERED JUN 29 2006  
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4 JUN 29 2006  
5 CLERK, U.S. BANKRUPTCY COURT  
6 SOUTHERN DISTRICT OF CALIFORNIA  
7 BY \_\_\_\_\_ DEPUTY

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14 SOUTHERN DISTRICT OF CALIFORNIA  
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8 UNITED STATES BANKRUPTCY COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA

10 In re: ) BANKRUPTCY CASE NO. 02-09721-H7  
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12 COMMERCIAL MONEY CENTER, ) ADVERSARY NO. 04-90191-H7  
13 INC., )  
14 Debtor. ) MEMORANDUM DECISION  
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24 Richard M. Kipperman, Chapter 7 trustee (the "trustee"),  
25 moved to compel defendant to answer questions regarding  
26 defendant's tax returns and requested sanctions under Federal  
27 Rule Civil Procedure ("FRCP") 37(a)(4)(A).

28 After considering the pleadings and hearing oral argument,

57

1 the Court granted the trustee's motion and took the issue of  
2 sanctions under submission.

3 This Court has jurisdiction to determine this matter  
4 pursuant to 28 U.S.C. §§ 1334 and 157(b) (1) and General Order  
5 No. 312-D of the United States District Court for the Southern  
6 District of California. This is a core proceeding pursuant to  
7 28 U.S.C. § 157(b) (2) (A).

8 I.

9 FACTS

10 The trustee filed a complaint against defendant alleging  
11 claims for relief under 11 U.S.C. §§ 544(b), 547, 548 and 550.<sup>1</sup>  
12 On August 10, 2005, trustee's counsel, Jesse S. Finlayson  
13 ("Finlayson") took defendant's deposition. Defendant refused to  
14 answer any questions regarding his tax returns on the grounds  
15 that the returns, and their contents, were privileged under  
16 California law.

17 In the Fall 2005, defendant's counsel, Howard F. Burns  
18 ("Burns") had some communication with trustee's counsel, Michael  
19 R. Williams ("Williams"), regarding the discovery dispute.  
20 Several months later, Finlayson initiated a formal meet and  
21 confer with Burns by letter on March 17, 2006, in accordance with  
22 Local Bankruptcy Rule ("LBR") 7026-2. After an email exchange,  
23 counsel spoke by telephone on March 24, 2006. Subsequently,  
24 emails were exchanged until April 8, 2006. The meet and confer  
25 did not result in a resolution.

26 The trustee moved to compel defendant's testimony on the  
27 ground that the tax returns were not privileged under federal

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<sup>1</sup> The trustee later moved to file a first amended complaint to add  
claims for relief for actual fraud.

1 privilege law. Finlayson also alleges that Burns did not meet  
2 and confer in good faith. The trustee seeks \$7,267 in attorney  
3 fees as a sanction against defendant because his refusal to  
4 answer questions regarding his tax returns was not "substantially  
5 justified."

6 Defendant opposed the trustee's motion to compel on several  
7 grounds, including inter alia, that the information sought was  
8 not relevant to his good faith defense and California privilege  
9 law should apply. Defendant cites Pagano v. Oroville Hosp., 145  
10 F.R.D. 683, 695 (E.D. Cal. 1993), which held that pendent state  
11 law claims are governed by federal privilege law, but state law  
12 should be applied where provisions of state privilege can be  
13 harmonized with federal discovery law. In other words, in a case  
14 where there are both federal and state claims, a federal court  
15 may, under certain circumstances, apply state privilege law in  
16 the interests of comity. Defendant also requested attorney fees  
17 against the trustee in the amount of \$3,575 contending that the  
18 trustee's motion was not "substantially justified."

19 In reply, the trustee pointed out that after defendant  
20 initially claimed his tax returns privileged under California  
21 law, he now claims he should not be required to answer because  
22 the information is irrelevant. The trustee contends that it  
23 would be improper for defendant to assert a relevance objection  
24 at the deposition and he should not be able to assert that  
25 objection now. Further, the information is highly relevant to  
26 the defendant's good faith defense and as impeachment evidence.  
27 Finally, the trustee contends that Pagano is no longer valid law  
28 in light of the Supreme Court's ruling in Jaffee v. Redmond, 116

1 S.Ct. 1932 (1996).<sup>2</sup>

2 For the reasons set forth below, the Court will grant the  
3 trustee's request for sanctions.

4 II.

5 DISCUSSION

6 A. THE MEET AND CONFER

7 Local Bankruptcy Rule 7026-2 provides:

8 The court shall entertain no motion pursuant  
9 to Fed. R. Bankr. P. 7026 through 7037 unless  
10 counsel shall have previously met and  
11 conferred by telephone or in person  
12 concerning all disputed discovery issues....  
13 If counsel for the moving party seeks to  
14 arrange such a conference and counsel for the  
15 non-moving party willfully refuses or fails  
16 to meet and confer,...the judge may order the  
17 payment of reasonable expenses, including  
18 attorney fees, pursuant to Fed. R. Bankr. P.  
19 7037.

15 The local rule contemplates that counsel will make  
16 reasonable efforts to work together to resolve discovery  
17 disputes. Moreover, the duty prescribed by LBR 7026-2 is a  
18 professional obligation which counsel owe to this Court. As  
19 such, inherent in the meet and confer process is a good faith  
20 requirement for both the moving and non-moving party. In  
21 referring to a local rule that is similar to the one in this  
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23 <sup>2</sup> Specifically, in Folb v. Motion Picture Ind. Pension and Health Plans,  
24 16 F.Supp.2d 1164 (C.D. Cal. 1998), the court held that federal privilege  
25 governs both federal and pendent state law claims in federal questions cases,  
26 and a federal court should not look to the law of the forum state as a matter  
27 of comity. In Folb, the magistrate judge had denied the plaintiff's motion to  
28 compel production of a mediation brief finding that California's mediation  
privilege applied in the case as a matter of comity because it is consistent  
with federal interests. The district court found that the magistrate judge  
had erred as a matter of law when applying the California privilege as a  
matter of comity. The district court noted that to the extent the magistrate  
relied on authority (such as Paqano), that authority is disapproved by Jaffee.  
Id. at 1170. In Jackson v. County of Sacramento, 175 F.R.D. 653, 654 (E.D.  
Cal. 1997), the court also noted that Paqano was overruled by Jaffee.

1 district, one court noted "[t]he purpose of the rule is simple:  
2 to lessen the burden on the court and reduce the unnecessary  
3 expenditure of resources by litigants, through promotion of  
4 informal, extrajudicial resolution of discovery disputes."  
5 Nevada Power Co. v. Monsanto Co., 151 F.R.D. 118, 119 (D. Nev.  
6 1993).

7 The declarations submitted by Finlayson and attached  
8 correspondence demonstrates to this Court, that the trustee, as  
9 moving party, complied with the meet and confer requirements  
10 under LBR 7026-2 and FRCP 37(a)(2)(B).<sup>3</sup> Finlayson alleges that  
11 Burns did not meet and confer in good faith.

12 The initial email sent from Burns to Williams in the Fall of  
13 2005 set forth the legal authority Burns relied upon that the  
14 requested tax returns were privileged under California law.  
15 Citing Davis v. Leal, 43 F. Supp. 2d 1102 (E.D. Cal. 1999), Burns  
16 claimed that California privilege law applied to the adversary  
17 proceeding since the trustee was proceeding to set aside a  
18 fraudulent transfer under California law.<sup>4</sup> Months later, during  
19 the telephonic meet and confer on March 24, 2006, Finlayson  
20 explained his position regarding applicable privilege law and  
21

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22 <sup>3</sup> When filing a motion to compel, the moving party must "include a  
23 certification that the movant has in good faith conferred or attempted to  
24 confer with the person or party failing to make discovery in an effort to  
secure the information or material without court action." FRCP 37(a)(2)(B).

25 <sup>4</sup> In Davis v. Leal, the FDIC and receiver moved to compel from defendant  
26 Leal discovery including tax return information and general business records.  
27 Leal asserted various privileges under state law. Thus, at issue was whether  
28 federal or state privilege law would apply. To resolve the discovery dispute,  
the court had to analyze whether state or federal law would supply the rule of  
decision in the action. The court found that the FDIC alleged only state law  
claims and, therefore, state law would supply the rule of decision for all  
claims. Id. at 1108. "Having determined that state law will supply the rule  
of decision, it follows that assertions of privilege will be governed by state  
law." Id.

1 offered protective measures to ensure defendant's privacy. Burns  
2 wanted time to review Finlayson's authorities, so Finlayson gave  
3 Burns until March 27, 2006, to respond. After getting no  
4 response, Finlayson contacted Burns to let him know of the  
5 scheduled date for the motion to compel.

6 On April 3, 2006, Burns responded that he would review the  
7 authorities and respond to Finlayson by April 5, 2006. On that  
8 date, Burns indicated that he reviewed the authorities and it was  
9 still his opinion that the tax returns could not be discovered.  
10 Burns provided no analysis regarding Finlayson's authorities. On  
11 the same day, Finlayson sent an email back to Burns requesting  
12 that Burns provide some explanation why the authorities cited by  
13 Finlayson did not support the trustee's position. On April 6,  
14 2006, Burns responded that after the March 24, 2006, telephone  
15 conference, he "thought that we had agreed to disagree over the  
16 question." He further stated that "I don't understand why you  
17 need for me to put in writing what we discussed over forty  
18 minutes during our March 24 conversation." He concluded "I have  
19 read the authority that you cited, which echoed the authority  
20 that I had read before our call, and it did not change my mind."  
21 Finlayson responded on April 8, 2006, expressing his frustration  
22 that Burns was unwilling to explain his analysis.

23 One court has interpreted the meaning of good faith in the  
24 context of FRCP 37(a)(2)(B): "'Good faith' under 37(a)(2)(B)  
25 contemplates, among other things, honesty in one's purpose to  
26 meaningfully discuss the discovery dispute, freedom from  
27 intention to defraud or abuse the discovery process, and  
28 faithfulness to one's obligation to secure information without

1 court action." Shuffle Master, Inc. v. Progressive Games, Inc.,  
2 170 F.R.D. 166, 171 (D. Nev. 1996) (citation omitted). "'Good  
3 faith' is tested by the court according to the nature of the  
4 dispute, the reasonableness of the positions held by the  
5 respective parties, and the means by which both sides conferred."  
6 Id. "'Conferring' under Rule 37(a)(2)(B) must be a personal or  
7 telephonic consultation during which the parties engage in  
8 meaningful negotiations or otherwise provide legal support for  
9 their position." Id. at 172.

10 [T]he parties must present to each other the  
11 merits of their respective positions with the  
12 same candor, specificity, and support during  
13 informal negotiations as during the briefing  
14 of discovery motions. Only after all the  
15 cards have been laid on the table, and a  
16 party has meaningfully assessed the relative  
17 strengths and weaknesses of its position in  
18 light of all available information, can there  
19 be a "sincere effort" to resolve the matter.  
20 Further, to ensure that the parties have made  
every effort to reach a "satisfactory  
resolution," judicial intervention should be  
considered appropriate only when 1) informal  
negotiations have reached an impasse on the  
substantive issue in dispute, or 2) one party  
has acted in bad faith, either by refusing to  
engage in negotiations altogether or by  
refusing to provide specific support for its  
claims of privilege.

21 Nevada Power Co. v. Monsanto Co., 151 F.R.D. 118, 120 (D. Nev.  
22 1993) (discussing local district court rule that required meet  
23 and confer requirement for discovery dispute) (citation omitted).

24 The Court has reviewed the various correspondence provided  
25 by the trustee and concludes that Burns failed to engage in any  
26 meaningful negotiations or otherwise provide legal support for  
27 his position during the meet and confer. His initial authorities  
28 provided to attorney Williams, simply reiterated that under

1 California law, tax returns are privileged. His citation to  
2 Davis v. Lael also does not support his argument that this Court  
3 should apply California privilege law in this adversary  
4 proceeding. In Lael, only state law claims were alleged and no  
5 federal claims were implicated as they are in this adversary.  
6 Further, the authority cited to Williams was not the authority  
7 Burns relied upon in his brief opposing the trustee's motion. At  
8 no time during the meet and confer did Burns mention the Pagano  
9 case to either Williams or Finlayson.

10 In sum, Burns did not present the merits of his position to  
11 the trustee's counsel with the same candor, specificity and  
12 support as he did in his brief. He did not, as the court in  
13 Nevada Power Co. v. Monsanto Co. prescribed, lay out all the  
14 cards on the table. Not only did he withhold the case law that  
15 he principally relied upon in his written opposition, he failed  
16 to provide trustee's counsel with any analysis whatsoever  
17 regarding the weaknesses, if any, in the trustee's authorities.

18 In Burns' declaration, he contends that he does not believe  
19 that the trustee's counsel made a good faith effort to meet and  
20 confer because he "failed to adequately address the principal  
21 issue in this motion, namely how the contents of Mr. Quiroz' tax  
22 returns are relevant to the alleged fraudulent transfers between  
23 CMC and Mr. Quiroz." [Decl. of Howard F. Burns, 2:18-21]. Burns  
24 declares that he asked trustee's counsel on several occasions  
25 during the telephone conference how the tax returns were  
26 relevant. [Id. at 2:24-25]. Burns also declares that he "did  
27 agree to review some authorities that Mr. Finlayson cited . . .  
28 but those authorities pertained only to the tax return privilege

1 and said nothing pertaining to my relevance objection." [Id. at  
2 3:12-14]. Burns declares that he made the relevance objection  
3 "during my conversation with Mr. Finlayson on March 24, 2006,"  
4 but then acknowledges that he "did not make a relevance objection  
5 at the deposition since such objections are disfavored at a  
6 deposition and because relevance is not a ground for directing a  
7 client not to answer." [Id. at 16-18].

8 Burns clearly recognizes that a party may instruct a  
9 deposition witness not to answer when necessary to preserve a  
10 privilege, FRCP 30(d)(1), but that it is inappropriate to  
11 instruct a witness not to answer a question on the basis of  
12 relevance. Nonetheless, after claiming the tax returns were  
13 privileged, he then shifted his position and attempted to focus  
14 the issue on one of relevance.

15 Burns' declaration, which contains the legal argument for  
16 asserting that Finlayson did not meet and confer in good faith,  
17 provides further support of Burns' failure to meaningful  
18 participate in the meet and confer. One aspect of good faith is  
19 the reasonableness of the positions held by the respective  
20 parties. Shuffle Master, Inc., 170 F.R.D. at 171. It was  
21 unreasonable for Burns to take the position that the tax returns  
22 were privileged under California law and that California  
23 privilege law applied to this adversary, and then later claim in  
24 the meet and confer that the tax returns were not relevant while  
25 at the same time acknowledging that relevancy is not a proper  
26 ground for instructing a witness not to answer.<sup>5</sup>

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27  
28 <sup>5</sup> The Court addressed the relevancy of the tax returns at the hearing on  
this matter and found them relevant to defendant's good faith defense and for  
impeachment purposes.

1 The Court finds that Burns did not engage in any meaningful  
2 negotiations or make reasonable efforts to resolve the discovery  
3 dispute nor does the record support a finding that he ever was  
4 acting in good faith. Sanctions are therefore appropriate.

5 B. SANCTIONS UNDER RULE 37(a)(4)(A): PAGANO AND  
6 SUBSTANTIAL JUSTIFICATION

7 Federal Rule Bankruptcy Procedure 7037 makes FRCP 37  
8 applicable in adversary proceedings. Federal Rule Civil  
9 Procedure 37(a)(4)(A) provides that if a motion to compel  
10 discovery is granted

11 the court shall, after affording an  
12 opportunity to be heard, require the party or  
13 deponent whose conduct necessitated the  
14 motion or the party or attorney advising such  
15 conduct or both of them to pay to the moving  
16 party the reasonable expenses incurred in  
17 making the motion, including attorney's fees,  
18 unless the court finds the motion was filed  
19 without the movant's first making a good  
20 faith effort to obtain the disclosure or  
21 discovery without court action, or that the  
22 opposing party's ... objection was  
23 substantially justified....

24 "The great operative principle of Rule 37(a)(4) is that the  
25 loser pays. Fee shifting when the judge must rule on discovery  
26 disputes encourages their voluntary resolution and curtails the  
27 ability of litigants to use legal processes to heap detriments on  
28 adversaries (or third parties) without regard to the merits of  
the claims." Rickels v. City of South Bend, Indiana, 33 F.3d 785  
(7th Cir. 1994) (citation omitted). The principle that the  
"loser pays" is presumptive rather than automatic, because Rule  
37(a)(4) provides an exception where the losing party can avoid  
assessment of fees and expenses if its opposition to the motion  
to compel was substantially justified.

1 "A request for discovery is 'substantially justified' under  
2 the rule if reasonable people could differ as to whether the  
3 party requested must comply." Reygo Pacific Corp. v. Johnston  
4 Pump Co., 680 F.2d 647, 648 (9th Cir. 1982) (citation omitted);  
5 See also Pierce v. Underwood, 487 U.S. 552, 564-65, 108 S.Ct.  
6 2541, 2549-50 (1988) (finding substantially justified means  
7 justified to a degree that could satisfy a reasonable person).  
8 "When a dispute involves differing interpretations of governing  
9 law, opposition is substantially justified unless it involves an  
10 unreasonable, frivolous or completely unsupportable reading of  
11 the law." Bowne of New York City, Inc. v. AmBase Corp., 161  
12 F.R.D. 258, 265 (S.D.N.Y. 1995) (citations omitted). "Such a  
13 lenient standard is necessary given the fact that attorneys must  
14 advocate for their clients, and they must be allowed to address  
15 areas of the law that have not been fully elucidated by the  
16 courts." Id.

17 "[A] motion for sanctions under Rule 37, even one which  
18 names only a party, places both that party and its attorney on  
19 notice that the court may assess sanctions against either or both  
20 unless they provide the court with a substantial justification  
21 for their conduct." Devaney v. Continental Amer. Ins. Co., 989  
22 F.2d 1154, 1159 (11th Cir. 1993) (noting that "a party listing  
23 only its opponent in a motion for sanctions does not absolve the  
24 opponent's attorney of potential liability.").

25 Both sides agree that state and federal fraudulent transfer  
26 law are implicated in the trustee's adversary proceeding against  
27 defendant. The next question is what privilege law this Court  
28 should apply.

1 "Federal Rule Evidence 501 governs any claim of privilege in  
2 a case proceeding in the federal courts." Platypus Wear, Inc. v.  
3 K.D. Co., Inc., 905 F.Supp. 808, 810 (S.D. Cal. 1995). Federal  
4 Rule Evidence 501 makes clear that in federal question cases, the  
5 federal common law of privilege applies and where state law  
6 provides the rule of decision, state privilege law will govern.  
7 But this adversary involves both federal question claims and  
8 pendent state claims so it does not fit neatly in either  
9 category. The Platypus stated that the "Ninth Circuit has not  
10 addressed the issue of what privilege law should be applied in  
11 cases involving both state and federal claims." Id. at 810.  
12 Nonetheless, the Platypus court recognized that the "need for  
13 consistency requires federal courts to apply federal privilege  
14 policies, rather than state privilege law, where evidence goes to  
15 both federal and state law claims." Id. at 811-12.

16 Besides Platypus, the trustee also cited Wm. T. Thompson Co.  
17 v. Gen. Nutrition Corp., 671 F.2d 100 (3d Cir. 1982) in support  
18 of his position that when there are federal law claims in a case  
19 also presenting state law claims, the federal rule favoring  
20 admissibility, rather than state law privilege is the controlling  
21 rule. In Thompson, the state law claims overlapped the federal  
22 claims so that the same evidence would be necessary as to all  
23 issues. The court found that application of both state and  
24 federal law to the same evidence would be unworkable. Id. at  
25 103.

26 Burns recognizes that in federal questions cases, or such  
27 cases with pendent state claims, the general rule is that federal  
28 privilege law applies. Burns argues, however, that this is not

1 the end of the analysis and cites Pagano, 145 F.R.D. at 683 in  
2 support. Burns contends that Pagano stands for the proposition  
3 that the strong policy of comity between state and federal  
4 sovereignties impels this Court to recognize state law privileges  
5 even in federal question cases where this can be accomplished at  
6 no substantial costs to federal substantive and procedural  
7 policy. According to Burns, as long as there is no inconsistency  
8 between the state law privilege and federal privilege law, the  
9 two should be read together in order to accommodate the  
10 legitimate expectations of the state's citizens. Id. at 688.  
11 Burns maintains that several courts, including the Ninth Circuit,  
12 have extended some protection against disclosure of tax returns.  
13 In contrast, the state courts have also qualified the privilege  
14 under state law so it is not absolute. Thus, he concludes that  
15 because the disclosure of tax returns under federal law is  
16 qualified, as is the privilege against disclosure under  
17 California law, there is no inconsistency.

18 Assuming, but not deciding, that Pagano is still good law on  
19 the issue of comity,<sup>6</sup> considerations of comity would not require  
20 this Court to adopt the California privilege for tax returns for  
21 several reasons. First, embracing state privilege law is  
22 inappropriate when the Ninth Circuit has explicitly rejected a  
23 federal privilege for tax returns. Heathman v. U.S.D.C., 503  
24 F.2d 1032 (9th Cir. 1974); see also Young v. U.S., 149 F.R.D.  
25 199, 201 (S.D. Cal. 1993) ("Under federal law, tax returns are  
26

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27 <sup>6</sup> There was much discussion at the hearing on this matter whether Pagano  
28 was subsequently overruled by Jaffee v. Redmond, 116 S.Ct. 1932 (1996). This  
Court need not conclusively decide that Jaffee overruled Pagano to determine  
whether defendant's objection to the trustee's motion was substantially  
justified.

1 generally discoverable where necessary in private civil  
2 litigation.") (citation omitted). Even under Pagano, the court  
3 went on to explain that state privilege law should not apply  
4 "[w]hen there is a clear inconsistency - for example, the state  
5 privilege is absolute in its application while the federal  
6 privilege is qualified, or the federal courts have explicitly  
7 rejected a federal privilege analogous to an asserted state  
8 privilege - state privilege law should not apply." 145 F.R.D. at  
9 687.

10 Next, the trustee's claims for relief for fraudulent  
11 transfers under 11 U.S.C. §§ 544 and 548 require most, if not  
12 all, of the same evidence. Where evidence goes to both federal  
13 and state law claims, the "need for consistency requires federal  
14 courts to apply federal privilege policies, rather than state  
15 privilege law. Platypus, 905 F.Supp. at 811 - 812. One court  
16 further explained

17 Where a document is relevant to both federal  
18 and state claims but the federal and state  
19 privilege rules are inconsistent, the  
20 application of an inconsistent state rule in  
21 either direction could undermine the federal  
22 evidentiary interest -- either by barring  
23 disclosure of a document that federal law  
24 permits a party to see, or by requiring the  
25 disclosure of a document that federal law  
26 protects from prying eyes. At least with  
27 respect to discovery, "it would be  
28 meaningless to hold the communication  
privileged for one set of claims and not for  
the other."

25 In re Sealed Case (Medical Records), 381 F.3d 1205, 1212 (D.C.  
26 2004) (citation omitted); see also Platypus, 905 F.Supp. at 811-12  
27 (court noted that it would not be forced to apply two different  
28 privilege rules to the same evidence and, therefore, state

1 privilege law would apply to state causes of action).

2 The Court finds that defendant's assertion of privilege for  
3 his tax returns was not substantially justified. Burns' citation  
4 to Pagano does not support the application of comity in this case  
5 especially in light of the fact that the majority of federal  
6 courts hold federal privilege law applies when the evidence  
7 sought is relevant to both the federal and state claims. See  
8 generally In re Sealed Case, 381 F.3d at 1212 n.7.

9 Finlayson further pointed out that had Burns cited Pagano  
10 during the meet and confer, he could have discussed the  
11 weaknesses in the case, i.e., that even under Pagano if there's  
12 binding authority from the Ninth Circuit or the Supreme Court  
13 rejecting a specific privilege, it cannot be recognized under the  
14 concept of comity. "But that's the part of the analysis that  
15 never took place." [Transcript 14-19].

16 The Court finds that reasonable people could not differ as  
17 to whether or not the tax returns were privileged in this mixed  
18 federal and state claim fraudulent transfer action. The Court  
19 recognizes that attorneys must advocate for their clients and  
20 they must be allowed to address areas of the law that have not  
21 been fully elucidated by the courts. However, this is an area of  
22 the law that has been fully elucidated. Had Burns taken the time  
23 and initiative to thoroughly review the trustee's authorities and  
24 share his own analysis with respect to Pagano, it is unlikely  
25 that this dispute would have ended up before the Court.

26 The Court will award sanctions only against Burns since  
27 there is no evidence that the defendant had any involvement in  
28 the meet or confer or was involved in any respect other than to

1 take his attorney's advice. See Devaney v. Continental Amer.  
2 Ins. Co., 989 F.2d at 1159.

3 C. Amount of the Sanction

4 "When the sanctions award is based upon attorney's fees and  
5 related expenses, an essential part of determining the  
6 reasonableness of the award is inquiring into the reasonableness  
7 of the claimed fees." In re Yagman, 796 F.2d 1165, 1184 (9th Cir.  
8 1986). "[T]he court must make some evaluation of the fee  
9 breakdown submitted by counsel." Id. (citation omitted). The  
10 court should consider "'not actual expenses and fees but those  
11 the court determines to be reasonable.'" Id. at 1185 (citation  
12 omitted).

13 Trustee's counsel has requested his fees and those of the  
14 trustee's accountants. There have been no time records submitted  
15 in support of his request and, therefore, the Court cannot  
16 determine whether the amounts requested are reasonable. The  
17 trustee may submit the time records to the Court with any  
18 response within fourteen days thereafter.

19  
20 III.

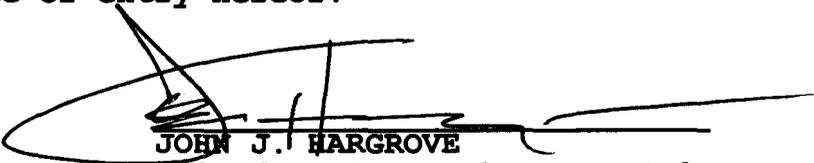
21 CONCLUSION

22 The Court finds that Burns did not engage in a meaningful  
23 meet and confer which is required under LBR 7026-2 nor was his  
24 objection to the line of questioning regarding the defendant's  
25 tax returns substantially justified under existing case law.  
26 Sanctions are therefore appropriate under LBR 7026-2 and FRBP  
27 7037(a)(4)(A).

28 This Memorandum Decision constitutes findings of fact and

1 conclusions of law pursuant to Federal Rule of Bankruptcy  
2 Procedure 7052. The trustee is directed to file with this Court  
3 an order in conformance with this Memorandum Decision within ten  
4 (10) days from the date of entry hereof.

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6 Dated: June 29, 2006



7 **JOHN J. HARGROVE**  
8 United States Bankruptcy Judge

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