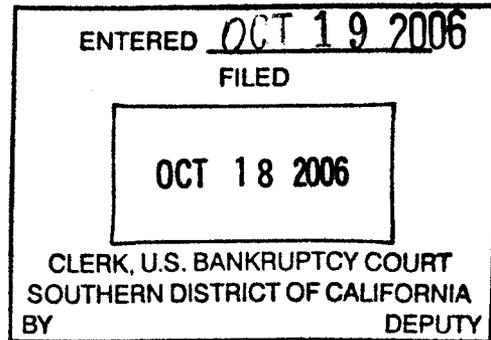


1 **NOT FOR PUBLICATION**



8 UNITED STATES BANKRUPTCY COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA

10  
11 In re )  
12 JEAN LEONARD HARRIS, )  
13 Debtor. )  
14 \_\_\_\_\_ )  
15 JEAN LEONARD HARRIS, )  
16 Plaintiff, )  
17 v. )  
18 SANDRA WITTMAN; JACK SWAIN; )  
19 PETER DUNCAN; PYLE, SIMS, )  
20 DUNCAN & STEVENSON; and )  
21 GRANT & ZEKO. )  
22 Defendants. )  
23 \_\_\_\_\_ )

Case No. 99-32841-B7  
Adv. No. 06-90289-PB

ORDER ON MOTION TO STRIKE  
(C.C.P. § 425.16)

22 Jean Leonard Harris (Plaintiff) filed a complaint in  
23 state court against the Defendants alleging, among other  
24 things, that Defendants breached a settlement agreement  
25 which was reached in his bankruptcy case by misallocation  
26 of certain assets. Defendant Sandra Wittman, the Trustee in

1 Plaintiff's bankruptcy case, removed the action to this  
2 Court and brought a motion to strike the complaint as a  
3 violation of California's "anti-SLAPP" law. The Court finds  
4 that the acts which gave rise to Plaintiff's alleged breach  
5 of contract cause of action were not acts in furtherance of  
6 the Trustee's right of petition or free speech.

7 Accordingly, the motion to strike is denied.

8 This Court has subject matter jurisdiction pursuant to  
9 28 U.S.C. § 1334 and General Order No. 312-D of the United  
10 States District Court for the Southern District of California.

11  
12 **BACKGROUND**

13 In May 2006, the Plaintiff filed a complaint against the  
14 Defendants in San Diego Superior Court. The Trustee removed the  
15 action to the District Court, which referred it to this Court.<sup>1</sup>  
16 The Plaintiff's complaint initially contained causes of action  
17 for breach of contract, breach of fiduciary duty, fraud,  
18 negligent misrepresentation and constructive fraud. Each of the  
19 causes of action related to Plaintiff's contention that the  
20 Defendants breached the "Settlement and Mutual Release of All  
21 Claims," (Settlement Agreement) which was entered into in the  
22 Plaintiff's bankruptcy case. Specifically, Plaintiff alleged that  
23 the Trustee breached the Settlement Agreement by transferring a  
24 1957 Mercedes automobile and the Alpine Property to Defendant

25  
26 

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<sup>1</sup> The Court found that it had jurisdiction over the matter and denied Plaintiff's motion to remand.

1 Jack Swain, as opposed to the Plaintiff's bankruptcy estate as,  
2 according to Plaintiff, was required under the Settlement  
3 agreement.

4 The Trustee, Pyle, Sims, Duncan & Stevenson, and Grant &  
5 Zeko each filed motions to dismiss the Complaint on several  
6 grounds including failure to comply with the Barton Doctrine,  
7 lack of standing, derived judicial immunity and litigation  
8 privilege. The Trustee also filed a motion to strike the  
9 complaint under California's "Anti-SLAPP" statute, C.C.P.  
10 § 425.16.

11 Before the motions were heard, Plaintiff filed his First  
12 Amended Complaint which retained only the breach of contract  
13 claim.

14 On August 14, 2006, the Court held a hearing on the motions.  
15 The Court found that the Plaintiff failed to comply with the  
16 Barton Doctrine. The Court also found that each of the moving  
17 defendants were entitled to derived judicial immunity.  
18 Accordingly, the Court granted each of the motions to dismiss.  
19 The Court took the motion to strike under submission.  
20

#### 21 DISCUSSION

22 California's anti-SLAPP law is set out in the California  
23 Code of Civil Procedure (C.C.P.) § 425.16 which provides in  
24 relevant part:

25 (b) (1) A cause of action against a person arising from  
26 any act of that person in furtherance of the person's  
right of petition or free speech under the United

1 States or California Constitution in connection with a  
2 public issue shall be subject to a special motion to  
3 strike, unless the court determines that the plaintiff  
4 has established that there is a probability that the  
5 plaintiff will prevail on the claim.

6 The first step in determining whether § 425.16 applies is to  
7 determine whether the Trustee's right of petition and/or free  
8 speech are implicated. Section 425.16(e) provides:

9 (e) As used in this section, "act in furtherance of a  
10 person's right of petition or free speech under the  
11 United States or California Constitution in connection  
12 with a public issue" includes: (1) any written or oral  
13 statement or writing made before a legislative,  
14 executive, or judicial proceeding, or any other  
15 official proceeding authorized by law; (2) any written  
16 or oral statement or writing made in connection with an  
17 issue under consideration or review by a legislative,  
18 executive, or judicial body, or any other official  
19 proceeding authorized by law; (3) any written or oral  
20 statement or writing made in a place open to the public  
21 or a public forum in connection with an issue of public  
22 interest; (4) or any other conduct in furtherance of  
23 the exercise of the constitutional right of petition or  
24 the constitutional right of free speech in connection  
25 with a public issue or an issue of public interest.

26 Thus, the Court must identify the "act" from which Plaintiff's  
breach of contract claim arose<sup>2</sup> and determine whether such act is  
protected speech or petitioning. In re Bah, 321 B.R. 41, 47  
(9<sup>th</sup> Cir.BAP 2005); Flores v. Emerich & Fike, 416 F.Supp.2d 885,  
896 (E.D.Cal. 2006). The court in Flores case explained:

In performing this analysis, the California Supreme  
Court has stressed, "the critical point is whether the  
plaintiff's cause of action itself was *based on* an act  
in furtherance of the defendant's right of petition or  
free speech." City of Cotati v. Cashman, 29 Cal.4th 69,  
78, 124 Cal.Rptr.2d 519, 52 P.3d 695 (2002) (emphasis  
in original). In other words, "the defendant's act  
underlying the plaintiff's cause of action must itself

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<sup>2</sup> For the purposes of this motion, the Court assumes Plaintiff has stated a cause of action  
for breach of contract.

1 have been an act in furtherance of the right of  
2 petition or free speech." Id.

3 Id. at 897. The Trustee, as movant, bears the burden of  
4 establishing that the complaint is directed toward a protected  
5 act. Flores v. Emerich & Fike, 416 F.Supp.2d at 896; Navellier  
6 v. Sletten, 29 Cal.4th 82, 88 (2002).

7 The Trustee asserts two distinct acts from which she  
8 contends the Plaintiff's cause of action arose - "negotiating and  
9 drafting the Settlement Agreement," and "petition[ing] for  
10 authority to dispose of assets to satisfy obligations of the  
11 estate, and reduc[ing] those requests to writings filed with...  
12 the Court...." Reply at 3:4-28. The Court does not agree that  
13 the Trustee's act of drafting and negotiating the Settlement  
14 Agreement gave rise to the Plaintiff's breach of contract claim.  
15 It was not the creation of the Settlement Agreement which gave  
16 rise to the cause of action, but rather the breach thereof.

17 The Court also rejects the contention that the act of filing  
18 the requisite motion to approve the transfer of the assets to  
19 Swain was the act which gave rise to the breach of contract cause  
20 of action. Rather, the Court finds that the act which gave rise  
21 to the breach of contract cause of action was the transfer of the  
22 assets to Swain. The motion was merely a necessary incident to  
23 the act of transfer.

24 The Trustee cites to Navellier v. Sletten, for the  
25 proposition that the anti-SLAPP protection can be applied to a  
26 breach of contract claim. The Court accepts the general

1 principle, but finds the case easily distinguished from the  
2 situation at hand. In Navellier, the plaintiffs alleged in a  
3 state court case that they were directly injured by the act of  
4 defendant filing certain counterclaims in a prior federal action.  
5 That is, the act of filing the counterclaims (an exercise of a  
6 right of petition) was the specific act which gave rise to the  
7 cause of action asserted in the state court. Naturally, the  
8 court held that the cause of action was subject to anti-SLAPP  
9 protection. 29 Cal.4th at 89. In the case at hand, the "act"  
10 which gave rise to Plaintiff's breach of contract claim was the  
11 Trustee's transfer of the Mercedes and Alpine Storage to Swain,  
12 which Plaintiff contends is a breach of the Settlement Agreement.  
13 The act of transferring the property was not an act in  
14 furtherance of the Trustee's right of petition or free speech.  
15 Accordingly, Plaintiff's cause of action for breach of contract  
16 is not subject to a motion to strike under California's anti-  
17 SLAPP statute.

18 **CONCLUSION**

19 For the reasons set forth above, the Trustee's motion to  
20 strike is denied.

21 IT IS SO ORDERED.

22 DATE: OCT 18 2006

23  
24 

25 PETER W. BOWIE, Judge  
26 United States Bankruptcy Court