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**NOT FOR PUBLICATION**

ENTERED <u>1/7/09</u> FILED <div style="border: 1px solid black; padding: 5px; text-align: center;">           JAN - 7 2009         </div> CLERK, US BANKRUPTCY COURT SOUTHERN DISTRICT OF CALIFORNIA BY <i>sn</i> DEPUTY
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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF CALIFORNIA

<p>In re ANIBAL MESALA SILVA,  Debtor.</p> <hr/> <p>ANIBAL MESALA SILVA,  Plaintiff, v. VIRGINIA JAIMES, et al.,  Defendants.</p>	<p>Bankruptcy No. 07-03740-JM7 Adversary No. 07-90588-JM7</p> <p>MEMORANDUM DECISION CONCERNING MOTIONS TO DISMISS AND MOTION TO STRIKE SECOND AMENDED COMPLAINT, AND PROPOSED FINDINGS AND CONCLUSIONS FOR DISTRICT COURT</p>
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I

Anibal Mesala Silva ("Plaintiff" or "Debtor") filed a second amended complaint ("Second Amended Complaint") to bring claims in this court as part of the case initiated by his third bankruptcy petition. Several of the defendants filed motions to dismiss the Second Amended Complaint and one also filed a motion to strike various claims and for an award of fees under the California Anti-SLAPP statute, Cal. Code

1 Civ. Pro. § 425.16.<sup>1</sup> ("§ 425.16"). Due to the Plaintiff's  
2 unavailability, the Court reviewed the motions and determined that  
3 oral argument would not be helpful. The hearings that had been  
4 scheduled on the motions were taken off calendar and the motions taken  
5 under submission. After review of the motions and the other pleadings  
6 in this case, the Court enters this Memorandum as the analysis behind  
7 the proposed findings of fact and conclusions of law for consideration  
8 by the District Court.

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10 II

11 ALLEGATIONS AND PROCEDURAL BACKGROUND

12 This adversary proceeding, and the main bankruptcy case in which  
13 it was filed, have a long and complicated history. On July 16, 2007,  
14 the Debtor filed a Chapter 13 petition to initiate his third  
15 bankruptcy case, No. 07-03740-JM13 ("Third Case"). Shortly  
16 thereafter, the Debtor's second bankruptcy case was dismissed because  
17 he failed to appear and testify at the First Meeting of Creditors,  
18 which had been continued to July 16, 2007.<sup>2</sup> The Debtor filed the  
19 balance of schedules in the Third Case on July 31, 2007, and included  
20 claims against many of the defendants as personal property on Schedule  
21 B.

22 On September 21, 2007, while the Third Case was still pending  
23 under Chapter 13, the Debtor filed the original complaint to initiate  
24 this Adversary Proceeding, No. 07-90588-JM ("Adversary Proceeding").

25  
26 <sup>1</sup> California Code of Civil Procedure § 425.16 contains the Strategic Lawsuits Against Public  
27 Participation Statute, or Anit-SLAPP statute, and provides a procedure to respond to a complaint with  
a special motion to strike.

28 <sup>2</sup> The Debtor's second case, filed in this district as Bankruptcy No. 07-00324-A7, was dismissed  
on the motion of the Chapter 7 Trustee by an order entered on July 20, 2007. The Debtor's first case  
was filed in 2004 in the Western District of Texas, San Antonio Division as Bankruptcy No. 04-55947-  
LMC13, and was dismissed in July 2005.

1 The Clerk of the Court issued a Summons on September 21, 2007, but  
2 there is no indication that the original summons and complaint were  
3 ever served on any defendant. An amended summons was issued on  
4 November 6, 2007. There is no certificate of service in the file to  
5 show that the amended summons dated November 6, 2007, was served.<sup>3</sup> The  
6 Debtor filed an Amended Complaint on January 23, 2008, and a further  
7 Amended Summons was issued that same day. The Debtor filed the Second  
8 Amended Complaint on January 24, 2008. The Proof of Service  
9 declarations indicate an Amended Summons and Amended Complaint were  
10 served by first class mail on the defendants on January 28, 2008. It  
11 is not clear from the Proof of Service declarations whether the Second  
12 Amended Complaint was served, but the motions to dismiss were directed  
13 at the Second Amended Complaint, so it appears that is the document  
14 sent with the Amended Summons to the defendants on January 28, 2008.

15 Meanwhile, as part of the main bankruptcy case, Judge Hargrove  
16 granted the Chapter 13 Trustee's motion to dismiss the Third Case at  
17 a hearing on September 25, 2007. Before a written order was entered,  
18 the Debtor filed a motion for reconsideration of the Court's oral  
19 ruling dismissing the case, as reflected on the Minute Order, and  
20 obtained a hearing date of October 30, 2007. At the hearing on  
21 October 30, 2007, Judge Hargrove granted the Debtor's motion for  
22 reconsideration with several conditions. On November 6, 2007, the  
23 Debtor filed a document entitled Notice of Compliance with Minute  
24 Order and Amended Minute Order, and also filed a Notice of Conversion  
25 to convert the case from a Chapter 13 to a Chapter 7 proceeding. On  
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27 <sup>3</sup> However, the ex parte application for an extension of time, which was filed on December 12,  
28 2007, on behalf of the Department of Justice, Assistant U.S. Attorney Gaeta and Judge Lee Yeakel,  
indicates those defendants were served in mid-November 2007.

1 November 21, 2007, the Debtor filed the balance of schedules to  
2 reflect his assets and liabilities on conversion to Chapter 7. He  
3 included the Adversary Proceeding as one of the assets on an  
4 attachment to Schedule B, as well as another complaint he had filed  
5 against many of the defendants in the District Court as Civil No. 07-  
6 CV-1931 JAH (JMA).<sup>4</sup>

7 The Second Amended Complaint named as defendants eighteen  
8 individuals and two departments of the United States. The individuals  
9 include three federal judges, two attorneys for the United States, the  
10 Chapter 7 trustee appointed in the Plaintiff's Second Case, several  
11 people with whom the Plaintiff or his wife had entered contracts, and  
12 attorneys who had represented the parties to those contracts. The  
13 Plaintiff introduces the claims in the Second Amended Complaint as  
14 follows:

15 1. This is an amended complaint to redress civil  
16 rights violations and to recover damages pursuant to 28  
17 U.S.C. 1343, 42 U.S.C. Sections 1981, 1982, 1983, 1985 and  
18 1986, and California Civil Codes 45, 46 and 1714; For  
19 declaratory and further relief pursuant to 28 U.S.C.  
20 Sections 2201 and 2202; To recover money of the Estate  
21 pursuant to 11 U.S.C. 542; and For injunctive and equitable  
22 relief.

23 2. Plaintiff does not consent to entry of final  
24 orders or judgment by the bankruptcy judge on non-core  
25 matters.

26 3. Defendants fraudulently and maliciously broke the  
27 terms of their contractual obligations causing Plaintiff  
28 monetary damages, and to further their fraud, Defendants  
acted outside the scope of their duties and in violation of  
the Rules for Civil and Bankruptcy Procedure and the  
Constitution and Laws of the United States, thus depriving  
Plaintiff of his Constitutional and Legal rights.  
Defendants specifically conspired to interfere with  
Plaintiff's civil rights, neglected to prevent Plaintiff's  
civil rights violations, intentionally and maliciously made  
false statements in a Federal complaint and proceeding in  
detriment to Plaintiff's reputation with the main intention

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<sup>4</sup> According to an exhibit filed by the Plaintiff in the Third Case, it appears the District Court case was dismissed, without prejudice, by an Order dated January 2, 2008.

1 of obtaining a profit by fraudulent means. To consummate  
2 their fraud, Defendants intentionally and maliciously filed  
3 or caused to be filed a frivolous and unconstitutional  
4 Federal complaint in detriment to Plaintiff's well being  
5 with the intention of inflicting emotional distress, used  
6 the offices of the U.S. Trustee and Chapter 7 Trustee to  
7 illegally obtain information and documents to be used in  
8 the frivolous, illegal and unconstitutional case with the  
9 intention of obtaining a profit by fraudulent means, and  
10 finally, after being disqualified as Federal judges, they  
11 proceeded to issue rulings and orders with the intention of  
12 violating Plaintiff's Constitutional and Legal rights.

13 4. As a consequence of Defendants' actions, Plaintiff  
14 suffered monetary losses; Plaintiff's Chapter 7 Bankruptcy  
15 case No 07-00324 was improperly dismissed thus denying  
16 Plaintiff his right to Bankruptcy relief, Plaintiff's due  
17 process rights to an impartial trial, notification before  
18 an adverse action taking place, and opportunity for a  
19 hearing to oppose the adverse action were violated in  
20 California, thus denying Plaintiff's civil rights and done  
21 with the intention of obtaining a profit from Plaintiff by  
22 fraudulent means; the private personal information of  
23 Plaintiff was released in California to third parties; the  
24 personal reputation of Plaintiff was greatly damaged in  
25 California and throughout the United States; Plaintiff's  
26 real estate properties' equities were lost; Plaintiff's  
27 future income was negatively affected in California, and  
28 Plaintiff incurred costs and loss of income in California  
as a result of defending from the frivolous and  
unconstitutional federal complaint filed in Austin, Texas.

1 5. Plaintiff seeks declaratory and further relief,  
2 injunctive and equitable relief, recovery of money owed to  
3 Plaintiff by Defendants, and money damages stemming from  
4 the civil rights violations, fraud, libel, slander, and  
5 negligence. Plaintiff also seeks recovery of his  
6 reasonable fees and costs.

7 The Second Amended Complaint continues for an additional 43  
8 pages describing pleadings filed, hearings held and orders  
9 entered in three different courts: the District Court in Austin  
10 Texas, and the Bankruptcy Courts in San Antonio, Texas and San  
11 Diego, California. Despite liberally sprinkling the pages with  
12 terms such as "illegal, unconstitutional, intentional, willful,  
13 and frivolous," the Second Amended Complaint is devoid of any  
14 specific factual allegations that could form the basis of the  
15 civil rights or tort claims asserted by the Plaintiff.

1 Four motions to dismiss the Second Amended Complaint were  
2 filed on behalf of ten of the defendants ("Motions to Dismiss").  
3 Defendant Gerald Davis also filed an Anti-SLAPP Motion to Strike  
4 the Complaint and for an award of attorneys fees under § 425.16  
5 ("Anti-SLAPP Motion"). The motions were scheduled for a hearing  
6 on July 10, 2008, but due to the Plaintiff's unavailability, the  
7 hearing was vacated and the five motions were taken under  
8 submission.

9 On May 15, 2008, after the Second Amended Complaint, the  
10 Motions to Dismiss and the Anti-SLAPP Motion were filed, Chapter  
11 7 Trustee James Kennedy filed a Notice of Proposed Abandonment of  
12 Property ("Abandonment Notice"). Included on the Abandonment  
13 Notice was the estate's interest in the claims asserted in the  
14 Second Amended Complaint. The deadline to object to the proposed  
15 abandonment expired on June 18, 2008, and no objections were  
16 filed. An Order authorizing the Abandonment Notice was  
17 eventually submitted, which was then signed and entered on  
18 November 14, 2008 ("Abandonment Order"). In accordance with the  
19 Abandonment Order and 11 U.S.C. § 554, the claims asserted in the  
20 Complaint are no longer property of the estate under 11 U.S.C. §  
21 541, but have been abandoned to the Debtor.

22 The Debtor's discharge was entered on June 4, 2008. It  
23 appears there are no assets available for the Chapter 7 Trustee  
24 to distribute.

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1 III

2 DISCUSSION

3 A. Standing

4 While the case was pending under Chapter 13, the Debtor  
5 remained in possession of property of the estate pursuant to 11  
6 U.S.C. § 1306(b), and would have standing to file the Adversary  
7 Proceeding. Upon conversion to Chapter 7 on November 6, 2007,  
8 the Chapter 7 Trustee became the real party in interest with  
9 standing to pursue the claims in the Adversary Proceeding. 11  
10 U.S.C. § 348(f)(1); Turner v. Cook, 362 F.3d, 1219, 1225 - 1226  
11 (9<sup>th</sup> Cir. 2004).

12 The Debtor's attempt to pursue the claims when he was not  
13 the real party in interest, and the subsequent abandonment of the  
14 claims by the Chapter 7 Trustee, results in a conundrum for the  
15 Bankruptcy Court. When the Original Complaint was filed in this  
16 adversary, the Third Case was still a Chapter 13. When the  
17 Second Amended Complaint was filed, and before any summons was  
18 served, the Debtor had voluntarily converted the Third Case to  
19 one under Chapter 7, and the claims were property of the estate.  
20 Turner v. Cook, 362 F.3d at 1225 - 1226. At that time, it was  
21 the Chapter 7 Trustee, and not the Debtor who had standing as the  
22 real party in interest to assert the claims. Id. The motions to  
23 dismiss the complaint due to the Debtor's lack of standing raised  
24 a meritorious position. However, since the Trustee has abandoned  
25 the claims to the Debtor, the Debtor now has regained standing to  
26 assert the claims. But at this point, there is no bankruptcy  
27 purpose to be served by retaining the claims in this Court. None  
28 of the claims are core proceedings under 28 U.S.C. § 157, the

1 claims have no relationship to the Third Case, the Debtor has  
2 received his discharge, and the creditors will not share in any  
3 recovery on the claims through the estate. Furthermore, as  
4 claims for civil rights violations, negligence, libel and  
5 slander, the causes of action asserted by the Plaintiff all  
6 appear to fall within the category of personal injury torts,  
7 which are specifically excluded from this Court's core  
8 jurisdiction under 28 U.S.C. § 157(b)(2)(O).

9 As a non-core proceeding which could have been filed in the  
10 District Court, the bankruptcy court is precluded from entering  
11 a final order over the stated objection of the Plaintiff. As a  
12 result, in accordance with F.R.Bankr.P. 9033, this Court is  
13 filing proposed findings and conclusions of law for consideration  
14 by the District Court.

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16 B. Failure to State Cause of Action

17 Despite filing three versions of the complaint in this  
18 Adversary Proceeding, the Plaintiff has not alleged any specific  
19 facts to support the claims. The Second Amended Complaint lacks  
20 factual allegations that raise a right to relief above the  
21 speculative level and therefore fails to meet the standard  
22 enunciated by the Supreme Court in Bell Atlantic Corp. V.  
23 Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1964 - 65 (2007). The  
24 Plaintiff did not include facts to support plausible grounds for  
25 the relief requested to defeat a motion to dismiss under  
26 F.R.Civ.P. 12.

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1 C. Immunity

2 The arguments by defendants concerning immunity are also  
3 well taken. Although different levels of immunity apply to  
4 various defendants and actions alleged in the Second Amended  
5 Complaint, each is sufficient to support dismissal of the Second  
6 Amended Complaint.

7 Judge Yeakel, Judge Clark and Judge Adler have absolute  
8 immunity as to the claims asserted in the Second Amended  
9 Complaint. Stump v. Sparkman, 435 U.S. 349, 356 (1978);  
10 Forrester v. White, 484 U.S. 221, 225 (1988). Any actions  
11 attributed to Judge Yeakel, Judge Clark and Judge Adler were  
12 performed by judges and relate to the judicial process.

13 Department of Justice Attorneys Ms. Hong and Mr. Gaeta are  
14 entitled to a quasi-judicial immunity for their discretionary  
15 actions in representing the United States. See, Duvall v. County  
16 of Kitsap, 260 F.3d 1124, 1133 - 1134 (9<sup>th</sup> Cir. 2001); Balser v.  
17 Department of Justice, 327 F.3d 903, 909 - 910 (9<sup>th</sup> Cir. 2003).  
18 All actions ascribed to them in the Second Amended Complaint  
19 appear to fall within the category of discretionary actions.

20 Gerald Davis is entitled to quasi-judicial immunity for his  
21 role as Trustee in Debtor's Second Chapter 7 case. In re  
22 Castillo, 297 F.3d 940, 948 (9<sup>th</sup> Cir. 2002). The Trustee is also  
23 protected by the Barton Doctrine, which requires leave of the  
24 appointing court to sue a trustee for actions taken in  
25 administration of the estate. Barton v. Barnour, 104 U.S. 126,  
26 129 (1881). There is no indication the Plaintiff obtained leave  
27 as part of the Second Case to sue Trustee Davis.

28 Finally, in addition to their arguments that the Plaintiff

1 lacks standing to pursue the claims, Defendants Davis, Hargadon  
2 and Black move to dismiss on grounds that any acts which they are  
3 alleged to have performed in the Second Amended Complaint were  
4 regarding litigation activity. Such actions are protected  
5 through a privilege under Cal.Civ.Code § 47.

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7 D. Anti-SLAPP Motion to Strike and for Sanctions

8 The facts alleged in the Second Amended Complaint fall  
9 within the broad scope of the California Anti-SLAPP statute, §  
10 425.16. Dowling v. Zimmerman, 85 Cal.App.4th 1400 (2001). The  
11 Motion to Strike and for Sanctions filed by Gerald Davis is  
12 meritorious as to the negligence, libel and slander claims.  
13 Although § 425.16 does not apply to federal claims, it is  
14 properly applied with respect to pendent state law claims. In re  
15 Bah, 321 B.R. 41, 46 (9<sup>th</sup> Cir. BAP 2005).

16 The Court has reviewed and analyzed the pleadings concerning  
17 Mr. Davis and engaged in the two-step process applicable to rule  
18 on an anti-SLAPP motion to strike as set forth in Equilon  
19 Enterprises v. Consumer Cause, Inc., 29 Cal.4th 52, 67 (2002).  
20 Each allegation in the Second Amended Complaint concerning Mr.  
21 Davis implicates his free speech or petition rights as defined by  
22 § 425.16. All conduct attributed to him concerns statements,  
23 filing or conduct performed in his position as Chapter 7 Trustee  
24 for the Second Case.

25 Once the Court determines the activities complained of fall  
26 within the scope of § 425.16, the burden shifts to the Plaintiff  
27 to show that there is a probability that he will prevail on the  
28 claims. Shekhter v. Financial Indemnity Co., 89 Cal.App.4th 141,

1 151 (2001). Despite having an extended period to respond to the  
2 Anti-SLAPP Motion, Plaintiff's opposition lacked any support for  
3 his claims. Plaintiff has not provided any pleadings or  
4 affidavits which state facts to support the allegations in the  
5 Second Amended Complaint on the pendent state court claims  
6 directed at Mr. Davis. Plaintiff failed to show that the Second  
7 Amended Complaint is both legally sufficient and supported by a  
8 sufficient prima facie showing of facts to demonstrate the  
9 probability that he will prevail in the litigation. The pendent  
10 state law claims of negligence, libel and slander should be  
11 stricken.

12 Mr. Davis is entitled to a mandatory award of attorneys fees  
13 pursuant to § 425.16, on appropriate motion. Kearney v. Foley  
14 and Lardner, 553 F.Supp.2d 1178 (D.S.Cal. 2008).

15  
16 IV

17 CONCLUSION

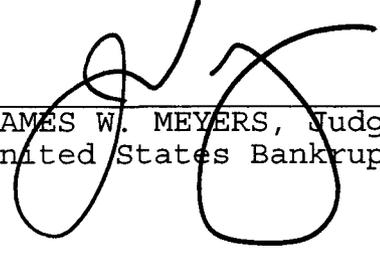
18 The claims in the Second Amended Complaint are non-core  
19 proceedings which have no remaining relationship to the  
20 underlying bankruptcy case. The Plaintiff objects to the entry  
21 by the Bankruptcy Court of final orders on non-core matters. The  
22 Bankruptcy Court has prepared proposed findings and conclusions  
23 to submit to the District Court in accordance with 28 U.S.C. §  
24 157(c)(1) and F.R.Bankr.P. 9033, so that the District Court, with  
25 its broader jurisdiction, can enter a final order on the pending  
26 motions, award sanctions under § 425.16, and dismiss the Second

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1 Amended Complaint, with prejudice.<sup>5</sup> After the proposed findings  
2 and conclusions are filed, the parties will have an opportunity  
3 to file objections under Fed.R.Bankr.P. 9033(b).

4 Dated: **JAN 07 2009**

  
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JAMES W. MEYERS, Judge  
United States Bankruptcy Court

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27 <sup>5</sup> The Court notes that an Order of Default was entered against some of the defendants in this  
28 case, and others did not file a motion to dismiss. The lack of plausible grounds set forth in the Second Amended Complaint may support dismissal of the Second Amended Complaint against all defendants.