

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

6	KELLY BARKER, individually and on	)	2:09-cv-00001-GEB-JFM
7	behalf of all those similarly	)	
8	situated; KATHY KENOLE,	)	
9	individually and on behalf of all	)	
10	those similarly situated,	)	
		)	
	Plaintiffs,	)	
		)	
	v.	)	<u>ORDER</u>
		)	
11	CHERYL C. KOFF; PHILIP B. AVILA;	)	
12	BORTON & PETRINI, LLP; CHERYL C.	)	
13	KOFF D.B.A. G.O.N.E., A SOLE	)	
14	PROPRIETORSHIP; CHRISTIAN P. HURST	)	
15	DBA G.O.N.E.; DAWN HARLEMAN;	)	
16	SHELLY PREHM; G.O.N.E., A SOLE	)	
17	PROPRIETORSHIP; GONE, INC.;	)	
18	COMPLEX; AND, DOES 1 THROUGH 50,	)	
19	inclusive,	)	
20		)	
21	Defendants.	)	
22		)	

Defendants Philip B. Avila and Borton Petrini LLP (collectively "Attorney Defendants") move to strike Plaintiffs' Complaint under California's "Anti-Strategic Lawsuit Against Public Participation (SLAPP)" statute, and the Attorney Defendants also seek to strike all individual claims on other grounds; however, only the Anti-SLAPP motion is considered since the Attorney Defendants have not shown that a motion to strike is "a proper way to procure the dismissal of all or a portion of [Plaintiffs'] complaint . . ." 5c Wright, Miller, & Kane, Federal Practice & Procedure, Civil 3d § 1380 p. 391 (West 2004); therefore, the balance of the motion to strike is denied.

1 Defendants Cheryl C. Koff, Christian P. Hurst, GONE Inc.,  
2 Chelsea Van Petten, Dawn Harleman, and Shelly Prehm (collectively  
3 "GONE"), move to amend their Answer, for summary judgment on  
4 Plaintiffs' claims, for summary judgment on their res judicata  
5 affirmative defense, for summary judgment on affirmative defenses not  
6 yet pled, to include additional affirmative defenses in their Answer,  
7 and they seek to adopt the argument and authorities made by the  
8 Attorney Defendants in their Anti-SLAPP motion to strike. Plaintiffs  
9 Kelly Barker and Kathy Kenole (collectively "Plaintiffs") cross-move  
10 for summary judgment on all of Plaintiffs' claims. Each motion is  
11 opposed.

12 GONE's Motion to Amend and for Summary Judgment

13 GONE seeks to amend their Answer under Federal Rule of Civil  
14 Procedure ("Rule") 15 to set forth the following four affirmative  
15 defenses: 1) statute of limitations; 2) laches; 3) Rooker-Feldman  
16 doctrine; and 4) collateral estoppel and res judicata. Since the  
17 collateral estoppel and res judicata defenses are already in GONE's  
18 Answer, this portion of the motion is denied as moot. GONE's motion  
19 for summary judgment based on new defenses not yet pled in GONE's  
20 Answer is denied since the defenses are not yet issues in this case.  
21 However, GONE's motion to add these defenses to their Answer is  
22 granted, provided that the Amended Answer is filed and served no later  
23 than 10 days after this Order is filed.

24 Plaintiffs opposes GONE's res judicata summary judgment  
25 motion arguing "discovery would be needed" to oppose the motion.  
26 However, this issue need not be reached since this portion of GONE's  
27 motion is denied because the motion is based on state court claims  
28 which GONE has not shown are the same as the claims involved in this

1 federal action. Cabrera v. City of Huntington Park, 159 F.3d 374, 381  
2 (9th Cir. 1998) (stating an element of the res judicata defense is  
3 "identity of claims").

4 Plaintiffs' Motion for Summary Judgment

5 Plaintiffs' summary judgment motion is also denied since it  
6 is only supported by conclusory averments, which are insufficient to  
7 justify granting the motion. See Walker v. Sumner, 917 F.2d 382, 387  
8 (9th Cir. 1990) (stating that movant's "conclusory assertions were  
9 wholly insufficient to sustain the [movant's] burden . . . .")

10 Motion to Strike

11 The Attorney Defendants argue Plaintiffs' Complaint should  
12 be stricken under California's Anti-SLAPP statute. However, the  
13 Attorney Defendants have not shown this statute applies to the federal  
14 claims against them. See Globetrotter Software, Inc., v. Elan  
15 Computer Group, Inc., 63 F. Supp. 2d 1127, 1130 (N.D. Cal. 1999)  
16 (concluding "the anti-SLAPP statute not applicable to the federal  
17 claims asserted by [Plaintiffs]"). Therefore, this portion of the  
18 motion is denied.

19 A two-step analytical process is involved when deciding  
20 Plaintiffs' Anti-SLAPP motion. "First, [the Attorney Defendants] must  
21 make an initial prima facie showing that the [P]laintiff[s'] suit  
22 arises from an act in furtherance of the [Attorney Defendants'] rights  
23 of petition . . . ." Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097,  
24 1110 (9th Cir. 2003). "Second, once the [Attorney Defendants have]  
25 made a prima facie showing, "the burden shifts to the plaintiff to  
26 demonstrate a probability of prevailing on [each of their claims  
27 against the Attorney Defendants]." Id.

1           The Attorney Defendants argue Plaintiffs' Complaint in this  
2 federal action concerns the Attorney Defendants petitioning activity  
3 in state court; specifically, the protected activity under the Anti-  
4 SLAPP statute of filing a state court lawsuit on behalf of their  
5 clients. (Mot. at 2.) The Attorney Defendants filed claims in state  
6 court on behalf of their clients, and subsequently obtained default  
7 judgments against Plaintiffs on those claims. These "litigation  
8 activities" are protected under the Anti-SLAPP suit. Church of  
9 Scientology v. Wollersheim, 42 Cal.App.4th 628, 647-49 (1996) ("A cause  
10 of action 'arising from' defendant's litigation activity may  
11 appropriately be the subject of a [California Code of Civil Procedure]  
12 section 425.16 motion to strike. California Code of Civil Procedure §  
13 425.16(e) of the Anti-SLAPP statute prescribes "[A] writing made in  
14 . . . a judicial proceeding . . . ." is a protected activity for Anti-  
15 SLAPP purposes.

16           Plaintiffs counter that the Anti-SLAPP statute does not  
17 apply because the Attorney Defendants' committed the crime of perjury  
18 when litigating the state court action by "using false declarations  
19 wherein [the Attorney Defendants] falsely state they have personal  
20 knowledge of the facts giving rise to the . . . [state court] lawsuits  
21 [], when, in fact, [they] have no such personal knowledge," and this  
22 perjury is not a protected activity under the Anti-SLAPP statute.  
23 (Compl. ¶ 8.) However, "conduct that would otherwise come within the  
24 scope of the Anti-SLAPP statute does not lose its coverage simply  
25 because it is alleged to have been unlawful or unethical." Lauter v.  
26 Anoufrieve, No. 07-6811, 2009 WL 2192362, at \*33 (C.D. Cal. July 14,  
27 2009) (citing Birkner v. Lam, 156 Cal. App. 4th 275, 285 (2007)). The  
28 "petition activity loses protection only if it is established through

1 defendant's concession or by uncontroverted and conclusive evidence  
2 that the conduct was illegal as a matter of law." Id. (citing Flatley  
3 v. Mauro, 39 Cal. 4th 299, 320 (2006)). Plaintiffs have not satisfied  
4 this standard.

5 Plaintiffs also argue the Anti-SLAPP statute does not apply  
6 because this is an action brought on behalf of the public. Section  
7 425.17 provides "§ 425.16 does not apply to any action brought solely  
8 in the public interest or on behalf of the general public if . . .  
9 the plaintiff does not seek any relief greater than or different from  
10 the relief sought for the general public . . . ." Since Plaintiffs  
11 seek the personal relief of setting aside the state default judgments  
12 entered against them, this exception does not apply. Accordingly, the  
13 Attorney Defendants have met their burden of demonstrating that they  
14 were engaged in protected activities under the Anti-SLAPP statute.

15 The Attorney Defendants argue Plaintiffs have not  
16 demonstrated a probability of prevailing on the merits of each state  
17 claim at issue. Plaintiffs allege the following claims against the  
18 Attorney Defendants: violations of the California Rosenthal Unfair  
19 Debt Collection Practices Act ("RFDCPA"); the Unlawful Business  
20 Practices Act; conspiracy to commit unlawful acts; state Due Process  
21 law; and the California Fair Credit Reporting Act.

22 The Attorney Defendants argue Plaintiffs have not  
23 demonstrated a probability of prevailing on their RFDCPA claims  
24 against the Attorney Defendants since Plaintiffs failed to provide  
25 evidence that they brought the action "within one year from the date  
26 on which the violation occurs." Cal. Civ. Code § 1788.30(f). The  
27 Attorney Defendants argue the "exhibits to the [C]omplaint demonstrate  
28 that the alleged acts occurred more than one-year prior to the filing

1 of the [C]omplaint.” (Attorney Defendants [‘] Mot. at 2.) The  
2 Attorney Defendants are correct.

3 The Attorney Defendants also argue Plaintiffs have not  
4 demonstrated a probability of prevailing on the merits of their  
5 Unlawful Business Practices Act claim, which is alleged under Cal.  
6 Bus. & Prof. Code § 17200, because Plaintiffs failed to provide  
7 evidence indicating that Plaintiffs have standing to bring this claim.  
8 To allege standing, Plaintiffs must establish they have “suffered  
9 injury in fact and ha[ve] lost money or property.” Walker v. Geico  
10 General Ins. Co., 558 F.3d 1025, 1027 (9th Cir. 2009) (citing Cal.  
11 Bus. & Prof. Code § 17204). Plaintiffs have not met this standard.

12 Further, the Attorney Defendants argue Plaintiffs have not  
13 demonstrated a probability of prevailing on the merits of their  
14 conspiracy to commit unlawful acts claim since “conspiracy does not  
15 give rise to a cause of action unless an independent civil wrong has  
16 been committed.” Lyddon v. Rocha-Albertsen, No. 1:03-05502, 2006 WL  
17 3086951, at \*36 (citing Rusheen v. Cohen, 37 Cal. 4th 1048, 1062  
18 (2006)). Plaintiffs failed to provide admissible evidence indicating  
19 that the Attorney Defendants committed an independent civil wrong.

20 The Attorney Defendants also argue Plaintiffs have not  
21 demonstrated a probability of prevailing on the merits of their state  
22 Due Process law violations premised are on Plaintiffs “not [being]  
23 provided with notice and an opportunity to be heard prior to the  
24 [state] court’s entry of default . . . .” (Compl. ¶ 46). The  
25 Attorney Defendants argue this claim constitutes a de facto appeal of  
26 the underlying state court judgments and thus is barred by the Rooker-  
27 Feldman doctrine. “Under Rooker-Feldman, a federal district court  
28 does not have subject matter jurisdiction to hear a direct appeal from

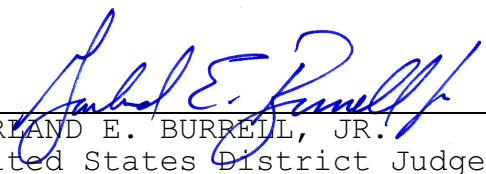
1 the final judgment of a state court." Noel v. Hall, 341 F.3d 1148,  
2 1154 (9th Cir. 2003). Since Plaintiffs allege their state Due Process  
3 rights were violated based on erroneous state court decisions, this  
4 claim constitutes a de facto appeal of the state court judgment, and  
5 therefore is dismissed for lack of subject matter jurisdiction.

6 Finally, the Attorney Defendants argue Plaintiffs have not  
7 demonstrated a probability of prevailing on the merits of their claims  
8 alleged under the California Fair Credit Reporting Act. Plaintiffs  
9 allege in these claims that the Attorney Defendants "caused to be  
10 reported to third persons, including credit reporting agencies, false  
11 statements regarding the alleged debts [Plaintiffs] owed . . . ."  
12 (Compl. ¶ 26.) The Attorney Defendants argue Plaintiffs have  
13 presented no admissible evidence that the Attorney Defendants reported  
14 any credit information about Plaintiffs. The Attorney Defendants are  
15 correct. Therefore, the Attorney Defendants' Anti-SLAPP motion to  
16 strike Plaintiffs' state claims is granted.

17 Motion to Adopt the Argument and Authorities of the Attorney  
18 Defendants

19 GONE also filed an untimely motion to adopt the Attorney  
20 Defendants' Anti-SLAPP motion to which Plaintiffs object on the ground  
21 that the motion is untimely. Plaintiffs' objection is sustained.  
22 Therefore, GONE's untimely motion to adopt the Attorney Defendants'  
23 Anti-SLAPP motion is stricken.

24 Dated: September 8, 2009

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26   
27 \_\_\_\_\_  
28 GARLAND E. BURRELL, JR.  
United States District Judge