No. _____

In the Supreme Court of the United States

PORTFOLIO RECOVERY ASSOCIATES, LLC,
Petitioner,

v.

IRIS POUNDS; CARLTON MILLER; VILAYUAN SAYAPHET-TYLER; RHONDA HALL,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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[ENTERED MAY 17, 2018]

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 18-174

(1:16-cv-01395-WO-JEP)

PORTFOLIO RECOVERY ASSOCIATES, LLC

Petitioner

v.

IRIS POUNDS; CARLTON MILLER; VILAYUAN SAYAPHET-TYLER; RHONDA HALL; PIA TOWNES

Respondents

O R D E R

Upon review of submissions relative to the petition for permission to appeal, the court denies the petition.

Entered at the direction of Chief Judge Gregory with the concurrence of Judge Wilkinson and Judge Diaz.

For the Court

/s/ Patricia S. Connor, Clerk

[ENTERED MARCH 28, 2018]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

IRIS POUNDS, CARLTON MILLER, VILAYUAN SAYAPHET-TYLER, RHONDA HALL, and PIA TOWNES, on behalf of themselves and all others similarly situated,

Plaintiffs,

v. 1:16CV1395

PORTFOLIO RECOVERY ASSOCIATES, LLC,

Defendant.

MEMORANDUM OPINION AND ORDER

OSTEEN, JR., District Judge

This matter comes before the court on Plaintiffs' Motion to Remand. (Doc. 11.) Defendant Portfolio Recovery Associates, LLC ("PRA") responded, (Doc. 17), and Plaintiffs replied, (Doc. 21). An oral argument was held October 5, 2017, and the parties submitted supplemental briefing. (Docs. 32-33, 35-36.) This matter is now ripe for resolution, and, for the reasons stated fully below, the court will grant in part and deny in part Plaintiffs' Motion to Remand.

Also before the court are Plaintiffs' Motion for Expedited Determination of Motion to Remand, (Doc.

22), and Motion to Defer Time to File Federal Motion for Class Certification, (Doc. 27). These motions have been briefed and are also ripe for resolution. (Docs. 23, 28, 29.) This court will deny Plaintiffs' Motion to Expedite as moot and, having considered the parties' arguments, will grant in part and deny as moot in part the Motion to Defer Time to File Federal Motion for Class Certification.

I. PROCEDURAL HISTORY

Plaintiffs commenced the present putative class action in Durham County in the Superior Court Division of the General Court of Justice of the State of North Carolina on November 21, 2016, against Defendant PRA. (Class Action Complaint ("Compl.") (Doc. 3) at 1.)[1] Defendant was served on November 21, 2016. (Notice of Removal ("NOR") (Doc. 1) at 2; Civil Summons (Doc. 4).)

Defendant filed its NOR in this court on December 9, 2016, (NOR (Doc. 1) at 3), on the basis of diversity jurisdiction pursuant to the Class Action Fairness Act of 2005 ("CAFA"). 28 U.S.C. §§ 1332(d), 1453.[2] In the NOR, Defendant, relying on Plaintiffs' allegations and

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[1] All citations in this Memorandum Opinion and Order to documents filed with the court refer to the page numbers located at the bottom right-hand corner of the documents as they apppear on CM/ECF.

[2] Subject to exceptions not applicable here, § 1332(d) creates federal jurisdiction over class actions in which the amount in controversy exceeds $5 million, exclusive of interests and costs; any member of the class is a citizen of a state different from any defendant; and the "number of members of all proposed plaintiff classes" equals 100 or more when aggregated. 28 U.S.C. § 1332(d).

its own assertions, alleged complete diversity of citizenship, an aggregate amount in controversy exceeding $5 million, and a proposed class size greater than 100 persons. (NOR (Doc. 1) at 3-4.) Plaintiffs move this court under 28 U.S.C. § 1447(c) to remand the case on the grounds that the court lacks jurisdiction over the claims pursuant to the Rooker-Feldman doctrine. (Mot. to Remand (Doc. 11) at 1-2.)

II. BACKGROUND

Plaintiffs' Complaint seeks to set aside certain default judgments obtained by PRA in North Carolina state courts, and seeks to recover actual damages and civil penalties for alleged violations of N.C. Gen. Stat. §§ 58-70-115(7), 58-70-130, and 58-70-155. (Compl. (Doc. 3) at 1-2, 6-7, 12-17.)

PRA is a debt buyer and collection agency under North Carolina law. See N.C. Gen. Stat. §§ 58-70-15(b)(4), 58-70-155. As a debt buyer, PRA is required to file certain "properly authenticated" evidence with a court "[p]rior to entry of a default judgment" against a debtor. See id. § 58-70-155. Rule 55(b) of the North Carolina Rules of Civil Procedure also governs the entry of default judgments. Id. § 1A-1, Rule 55(b). When a plaintiff's claim is for a "sum certain or for a sum which can by computation be made certain," then the clerk has the authority to enter a default judgment. Id. § 1A-1, Rule 55(b)(1). Absent a sum certain, the default judgment must be entered by a judge. Id. § 1A-1, Rule 55(b)(2).

Since § 58-70-155 became effective in October 2009, PRA has filed thousands of lawsuits in North Carolina state courts in which it subsequently obtained default judgments. (Compl. (Doc. 3) ¶¶ 32-35.) PRA obtained default judgments against each of

the named plaintiffs in this action. (Id. ¶¶ 26-31.) Plaintiffs claim that "PRA failed to satisfy the [§] 58-70-155 prerequisites that required it to file properly authenticated business records providing an itemization of the amount claimed to be owed." (Id. ¶ 26.) Plaintiff Pia Townes has additionally filed and been granted a motion pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure to set aside her default judgment. (Id. ¶¶ 31, 39.)

Plaintiffs filed this action seeking relief on behalf of "[a]ll persons against whom PRA obtained a default judgment entered by a North Carolina court in a case filed on or after October 1, 2009." (See id. ¶ 15.) On behalf of all proposed class members whose default judgments have not yet been vacated, Plaintiffs' first claim ("Claim I") seeks a declaratory judgment that the default judgments violate § 58-70-155 (and, in some cases, Rule 55(b)(1)) and are void, and seeks an associated injunction requiring PRA to cease collection activity and file notices of vacatur. (Id. ¶¶ 50-57.)

On behalf of all class members, Plaintiffs' second claim for relief ("Claim II" or "statutory penalties claim") seeks statutory penalties authorized by N.C. Gen. Stat. § 58-70- 130(b). (Id. ¶¶ 58-63.) Section 58-70-130 imposes civil liability in the form of actual damages and statutory penalties on collection agencies that engage in prohibited practices, including specific "unfair practices." § 58-70-115. One such unfair practice is "[f]ailing to comply with Part 5 of this Article." Id. § 58-70-115(7). Part 5 includes § 58-70-155, entitled "Prerequisites to entering a default or summary judgment against a debtor under this Part." Id. § 58-70-155. Plaintiffs thus claim that PRA violated § 58-70-115(7) by "requesting and obtaining default

judgments" that do not conform to § 58-70-155's prerequisites, entitling them to statutory penalties under § 58-70-130(b). (Compl. (Doc. 3) ¶¶ 59-61.)

Similarly, Plaintiffs' third claim for relief ("Claim III" or "actual damages claim") seeks actual damages authorized by § 58-70-130(a) in the amount PRA has collected from the Plaintiffs' default judgments, on behalf of any proposed class members who made post-default-judgment payments to PRA. (Compl. (Doc. 3) ¶¶ 64-66.)

III. ANALYSIS

Plaintiffs argue that this court lacks subject matter jurisdiction over this action under the Rooker-Feldman [3] doctrine. (Plaintiffs' Brief in Support of Motion to Remand ("Pls.' Br.") (Doc. 12); Plaintiffs' Reply Brief in Support of Motion to Remand (Doc. 21).) The Rooker-Feldman doctrine is a jurisdictional doctrine that prohibits federal district courts from "'exercising appellate jurisdiction over final state-court judgments.'" See Thana v. Bd. of License Comm'rs, 827 F.3d 314, 319 (4th Cir. 2016) (quoting Lance v. Dennis, 546 U.S. 459, 463 (2006) (per curiam)). The presence or absence of subject matter jurisdiction under Rooker-Feldman is a threshold issue that this court must determine before considering the merits of the case. Friedman's, Inc. v. Dunlap, 290 F.3d 191, 196 (4th Cir. 2002).

Although Rooker-Feldman originally limited federal-question jurisdiction, the Supreme Court has recognized the applicability of the doctrine to cases brought under diversity jurisdiction:

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[3] D.C. Ct. of App. v. Feldman, 460 U.S. 462 (1983); Rooker v. Fid. Tr. Co., 263 U.S. 413 (1923).

> Rooker and Feldman exhibit the limited circumstances in which this Court's appellate jurisdiction over state-court judgments, 28 U.S.C. § 1257, precludes a United States district court from exercising subject-matter jurisdiction in an action it would otherwise be empowered to adjudicate under a congressional grant of authority, e.g., § 1330 (suits against foreign states), § 1331 (federal question), and § 1332 (diversity).

See Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 291-92 (2005). Diversity proceedings removed to federal court under CAFA, likewise, are within the doctrine's purview. See, e.g., Dell Webb Cmtys., Inc. v. Carlson, 817 F.3d 867, 872 (4th Cir.), cert. denied, ___U.S.___, 137 S. Ct. 567 (2016); Bergquist v. Mann Bracken, LLP, 592 F.3d 816, 818 (7th Cir. 2010); Murray v. Midland Funding, LLC, Civil No. JKB-15-0532, 2015 WL 3874635, at *1, *3-4 (D. Md. June 23, 2015).

Under the Rooker-Feldman doctrine, courts lack subject matter jurisdiction to hear "cases brought by [1] state-court losers complaining of [2] injuries caused by state-court judgments [3] rendered before the district court proceedings commenced and [4] inviting district court review and rejection of those judgments." Exxon, 544 U.S. at 284. The doctrine is "narrow and focused." Thana, 827 F.3d at 319. "[I]f a plaintiff in federal court does not seek review of the state court judgment itself but instead 'presents an independent claim, it is not an impediment to the exercise of federal jurisdiction that the same or a related question was earlier aired between the parties in state court.'" Id. at 320 (quoting Skinner v. Switzer, 562 U.S. 521, 532 (2011)). Rather, "any

tensions between the two proceedings should be managed through the doctrines of preclusion, comity, and abstention." Id. (citing Exxon, 544 U.S. at 292–93).

A. PRA's argument that a proposed threshold test must be met

PRA asserts that Exxon "established a two-part test" and argues that all of Plaintiffs' claims fail the first, "threshold" step of the test. (Brief in Opposition to Plaintiffs' Motion to Remand and Request for Oral Argument ("Def.'s Br.") (Doc. 17) at 4-11.) First, PRA asserts that void judgments are categorically carved out of the doctrine. (Id. at 5-6 (citing Rooker, 263 U.S. at 415-16).) At the outset, this court notes that it is not convinced that, even if Plaintiffs prove their claims, that the judgments they challenge are void. While this court must take Plaintiffs' factual allegations as true as this stage, it is not bound by Plaintiffs' legal conclusion — that § 58-70-155 is jurisdictional — that forms the basis of its voidness argument and vacatur request. Plaintiffs allege one fact in support of their legal conclusion: that PRA failed to file properly authenticated evidence of the debt in accordance with § 58-70-155 and, in certain cases, Rule 55(b)(1). But that fact alone is not necessarily enough to establish that the state courts lacked subject matter jurisdiction over the proceedings. Cf. Pak v. Unifund CCR Partners, No. 7:13-CV-70-BR, 2014 WL 238543, at *9 (E.D.N.C. Jan. 22, 2014) (describing § 58-70-155 as imposing "conditions").

Moreover, the state court in each of Plaintiffs' cases made a finding that the personal and subject

matter jurisdiction requirements under state law were met before entering the default judgment. Perhaps, if this court were to review Plaintiffs' claims on the merits, it would find that the default judgments were merely voidable — that is, entered erroneously based on the sufficiency of the evidence PRA provided — and subject to reversal. In any event, courts applying Rooker-Feldman may not "challenge the state decision," see Davani v. Va. Dep't of Transp., 434 F.3d 712, 719 (4th Cir. 2006), including but not limited to entertaining a plaintiff's request to "declare void a state court judgment," see Horowitz v. Cont'l Cas. Co., 681 F. App'x 198, 200 (4th Cir. 2017) (per curiam); see also Chien v. Grogan, 710 F. App'x 600, 600-01 (4th Cir. 2018) (per curiam). Therefore, this court declines to adopt PRA's proposed rule.

PRA next argues that Rooker-Feldman is only applicable to claims implicating certiorari jurisdiction under 28 U.S.C. § 1257 and is therefore inapplicable to Plaintiffs' claims because they rest exclusively on state law grounds and are not "'a final judgment from the highest court of a State in which a decision could be had.'" (Def.'s Br. (Doc. 17) at 7-11 & n.6 (quoting Thana, 827 F.3d at 321).) While the Fourth Circuit in Thana emphasized the narrowness of Rooker-Feldman, that case dealt with review of the actions of a state administrative agency, not a state court, with the Court ultimately concluding that "[a]t bottom, . . . this federal action, commenced . . . under 42 U.S.C. § 1983 and alleging injury inflicted by actions of a state administrative agency, qualifies as an independent, concurrent action that does not undermine the Supreme Court's appellate jurisdiction over state court judgments[.]" Thana,

827 F.3d at 322–23. This court does not read Thana's holding to overrule its prior binding precedent that Rooker-Feldman may apply to final judgments from lower state courts. See Brown & Root, Inc. v. Breckenridge, 211 F.3d 194, 199 (4th Cir. 2000) (recognizing that Rooker-Feldman precludes review of lower court state judgments); see also Johnson v. Byrd, No. 1:16CV1052, 2016 WL 6839410, at *5–7 (M.D.N.C. Nov. 21, 2016), appeal dismissed, 693 F. App'x 219 (4th Cir. 2017) (per curiam). Courts routinely recognize that diversity cases may implicate Rooker-Feldman. See, e.g., Dell Webb Cmtys., 817 F.3d at 870-72 (analyzing whether Rooker-Feldman barred review of a suit brought under diversity jurisdiction and rejecting Rooker-Feldman's applicability on other grounds); see also Exxon, 544 U.S. at 291 (recognizing the applicability of Rooker-Feldman to diversity cases). The Fourth Circuit has declined to adopt a threshold test for any of the categories Defendant urges. See, e.g., Thana, 827 F.3d at 321-23; Dell Webb Cmtys., 817 F.3d at 872; Horowitz, 681 F. App'x at 200. This court accordingly declines to adopt Defendant's threshold test.

B. PRA's argument that *Rooker-Feldman* does not apply when the action would be allowed in state court

PRA argues that Plaintiffs' characterization of their Complaint as an independent action precludes application of Rooker-Feldman. (See Def.'s Br. (Doc. 17) at 16-17.)[4] At oral argument and in supplemental

[4] PRA also argues that this court should address PRA's pending Motion to Dismiss regardless of Rooker-Feldman. (Def.'s Br. (Doc. 17) at 15-16.) That motion remains under advisement, but because Rooker-Feldman is jurisdictional, this court notes

briefing, PRA reiterated its position that the doctrine does not apply where the action in federal court "would be allowed in the state court of the rendering state" because Plaintiffs could have brought (and did bring) their action in state court. (Transcript of Oral Argument ("Tr.") (Doc. 34) at 38:2-41:25); PRA's Supplemental Memorandum in Opposition to Plaintiffs' Motion to Remand ("Def.'s Suppl. Mem.") (Doc. 33) at 2-3 (quoting Davis v. Bayless, 70 F.3d 367, 376 (5th Cir. 1995)); PRA's Response to Plaintiffs' Supplemental Brief (Doc. 36) at 1-3.)

However, the cases cited by PRA were not, as outlined by Exxon, "brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." Exxon, 544 U.S. at 284. Therefore, the court finds them to be of limited utility in its analysis. See, e.g., Standard Oil Co. of Cal. v. United States, 429 U.S. 17, 17-19 (1976) (per curiam) (plaintiff's challenge was not to a state-court judgment); Yale v. Nat'l Indem. Co., 602 F.2d 642, 644-50 (4th Cir. 1979) (plaintiff was a state-court winner attempting to collect on a state-court judgment against a defendant insurer, who was not a party to the original state suit granting judgment against insureds); Westlake Legal Grp. v. Yelp, Inc., 599 F. App'x 481, 483 (4th Cir. 2015) (per curiam) (plaintiffs were state-court winners whose judgment defendants sought to set aside, removing the existing action to federal court); Fontana Empire Ctr., LLC v. City of Fontana, 307 3d 987, 995-96 (9th Cir. 2002)

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that it must address the doctrine's applicability before proceeding to the merits of any claims. See Friedman's, 290 F.3d at 196.

(plaintiffs did not seek to set aside foreclosure judgment but, according to state statute, sought to set aside the foreclosure sale, which would have revived the judgment); Davis v. Bayless, 70 F.3d at 371-72 (plaintiffs, who were not parties to the state-court case awarding a malpractice judgment and who lived with the judgment debtor, sought damages for actions, including a nonconsensual home search, taken by a court-appointed receiver and an attorney of the judgment creditor in attempts to collect on the judgment); Ill. Cent. R.R. Co. v. Harried, Civil Action No. 5:06CV160-DCB-JMR, 2010 WL 4553640, at *1, *4 (S.D. Miss. Nov. 3, 2010) (underlying state-court proceeding resulted in settlement so the plaintiffs were not state-court losers nor was there a state-court judgment). The court thus is not persuaded to adopt PRA's proposed rule.

Having rejected PRA's proposed rules, the court now turns to determine, as set out by Exxon, whether any of Plaintiffs' claims are "brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." Exxon, 544 U.S. at 284.

C. Claim I

Plaintiffs' first claim seeks a declaratory judgment that its proposed class members' default judgments violate § 58-70-155 and are void and seeks an injunction in part requiring PRA to file notices of vacatur in the state courts. (See Compl. (Doc. 3) ¶¶ 50-57.) With the exception of Plaintiff Pia Townes, no one disputes that for Claim I, Plaintiffs are state-court losers challenging state-court

judgments rendered before the district court proceedings commenced and that the injuries were caused by the state-court judgments. PRA argues, however, that Claim I fails to "invite the district court to conduct appellate review of the merits of the state-court judgments"[5] and instead simply "seeks a declaration interpreting the statute or rule at issue[.]" (Def.'s Br. (Doc. 17) at 11-12 (citing Feldman, 460 U.S. at 486-87); see also Def.'s Suppl. Mem. (Doc. 33) at 3-5.)

In Feldman, the plaintiffs brought a "general attack on the constitutionality of [a rule,]" asking the court to "assess [its] validity[.]" Feldman, 460 U.S. at 486-87. Plaintiffs here do not mount a general challenge to the statute; rather, they ask this court to apply the statute to vacate their state-court judgments. Moreover, PRA would have the court break Claim I's request for declaratory judgment into two claims: one requesting an interpretation of § 58-70-155 and another requesting a declaration that the default judgments violate § 58-70-155. But Plaintiffs are masters of their own complaint, see Johnson v. Advance Am., 549 F.3d 932, 937 (4th Cir. 2008), and both Claim I and the Complaint's prayer for relief ask this court to declare that individual default judgments obtained by PRA "violate [§] 58-70-155 and are void[,]" (Compl. (Doc. 3) at 15-16.) This court declines to construe the Complaint otherwise, and the cases PRA cites do not compel a different conclusion. See, e.g., Skinner, 562 U.S. at 532 (plaintiff did not challenge the adverse state-court decisions); Adkins v. Rumsfeld, 464 F.3d 456, 460,

[5] PRA asserts in passing that this argument applies to all of Plaintiffs' claims but only develops the argument for Claim I. (Def.'s Br. (Doc. 17) at 11-12.)

464 (4th Cir. 2006) (plaintiffs did not challenge the state-court judgments but rather sought only a declaratory judgment); Morrison v. City of New York, 591 F.3d 109, 112-15 (2d Cir. 2010) (declining to adopt defendant's "illegal interpretation" of ambiguous state-court order and construe plaintiff's complaint as attacking the order).

Any statutory interpretation this court would have to undertake to interpret § 58-70-155 as jurisdictional or not would be in service of deciding Plaintiffs' challenge to the individual state-court decisions, which is outside the court's jurisdiction pursuant to Rooker-Feldman. See, e.g., Davani, 434 F.3d at 718-19; Horowitz, 681 F. App'x at 200; Murray, 2015 WL 3874635, at *3; Radisi v. HSBC Bank USA, Nat'l Ass'n, No. 5:11CV125-RLV, 2012 WL 2155052, at *4 (W.D.N.C. June 13, 2012), aff'd, 479 F. App'x 468 (4th Cir. 2012) (per curiam). As a result, except for Plaintiff Townes, this court lacks jurisdiction to hear Plaintiffs' Claim I.

D. Claim II

Plaintiffs assert that because their statutory penalties claim only became cognizable "as a result of" the state courts' entries of default judgment, that this claim is "inextricably intertwined" with the default judgments and outside the court's jurisdiction. (Pls.' Br. (Doc. 12) at 12-14.) However, as the Fourth Circuit has explained, post-Exxon:

> Feldman's "inextricably intertwined" language does not create an additional legal test for determining when claims challenging a state-court decision are barred, but merely states a conclusion: if the state-court loser seeks redress in the federal district court for

> the injury caused by the state-court decision, his federal claim is, by definition, "inextricably intertwined" with the state-court decision, and is therefore outside of the jurisdiction of the federal district court.

Davani, 434 F.3d at 719 (citations omitted). The relevant question, then, is whether the injuries in Plaintiffs' remaining claims are caused by the default judgments themselves, "fairly alleg[ing] injury caused by the state court in entering [the] order." Vicks v. Ocwen Loan Servicing, LLC, 676 F. App'x 167, 169 (4th Cir. 2017) (per curiam). PRA contends that Plaintiffs' statutory penalty claim stems from "litigation conduct occurring during the course of obtaining a judgment" and is merely an allegation of "unfair or deceptive acts or practices" under § 58-70-130. (Def.'s Br. (Doc. 17) at 13.)

The court first notes that it is not aware of, and the parties have not cited to, any case analyzing whether Rooker-Feldman bars review of a claim for statutory penalties or actual damages, where the statutory violation giving rise to the penalty or damages is the entry of a state-court default judgment. While PRA correctly points out that civil penalties for pre- or post-judgment litigation conduct are not within Rooker-Feldman's purview, see, e.g., Elyazidi v. SunTrust Bank, 780 F.3d 227, 232–33 (4th Cir. 2015), PRA fails to account for the fact that here the particular conduct challenged is "requesting and obtaining default judgments in violation of [§] 58-70-155." (Compl. (Doc. 3) ¶ 59 (emphasis added).)

There are any number of instances where determining whether a defendant incurred liability under § 58-70-130 may not invite review and

rejection of a state-court judgment and where the state-court judgment itself is not the source of a plaintiff's injury. For example, prohibited practices incurring liability under § 58-70-130 include collecting a debt "by means of any unfair threat, coercion, or attempt to coerce," § 58-70-95, "unreasonably publiciz[ing] information regarding a consumer's debt," id. § 58-70-105, or communicating with a consumer the collection agency knew was represented by an attorney, id. § 58-70-115(3). Here, however, § 58-70-155 is not simply an unfair practice that a debt buyer commits in attempting to collect a debt; rather, the statute sets specific requirements for what the debt buyer and the court must do when entering a default judgment. § 58-70-155 ("Prior to entry of a default judgment . . . against a debtor in a complaint initiated by a debt buyer, the [debt buyer] shall file evidence with the court . . . ." (emphasis added)). Plaintiffs' Complaint alleges that § 58-70-155 would not be violated until the entry of default judgment, a theory reiterated by Plaintiffs' counsel at the October 5 hearing. (Tr. (Doc. 34) 8:19-9:15; Compl. (Doc. 3) ¶ 59.)

Davani, upon which Defendant's rely, is inapposite — there, the plaintiff appealed his employment termination to a state court, where the appeal was dismissed. 434 F.3d at 715. Davani sued his former employer and supervisors in district court, bringing discrimination claims, federal retaliation claims, and a state law claim relating to conspiracy to injure his reputation. Id. Unlike in Davani, where the plaintiff "d[id] not challenge the state decision[,]" id. at 719, Plaintiffs' specific injury here stems only from the allegedly unlawful entry of default judgment, which gives rise to the claim for a statutory penalty.

The unfair practice itself results from, at a minimum, a combination of Defendant's conduct (the filing of the allegedly inadequate business records) and the state court's conduct (entering of the default judgment in the absence of the adequate business records). Therefore, this court finds the injuries asserted in Claim II to be caused, at least in part, by the state-court judgments. As a result, except with respect to Plaintiff Townes, this court lacks jurisdiction to hear Plaintiffs' Claim II.

E. Claim III

Plaintiffs' last claim seeks actual damages authorized by § 58-70-130(a) in the amount PRA has collected from Plaintiffs, on behalf of any proposed class members who made post-default- judgment payments to PRA. (Compl. (Doc. 3) ¶¶ 64-66.) The theory behind the actual damages claim is the same as that of the statutory penalties claim. (Id. ¶ 66 ("Post-judgment payments on debt established by PRA default judgments in cases filed on or after October 1, 2009, including assets lost through the execution process, are 'actual damages sustained by [class members] as a result of [PRA's] violation,' as these payments resulted from the default judgments PRA obtained in violation of [§] 58-70-155.").) Plaintiffs assert that the damages sought "would effectively annul PRA's state-court default judgments by requiring that payments on the default judgments be returned." (Pls.' Br. (Doc. 12) at 15.)

Defendant asserts that "[p]aying a valid debt" cannot be an injury arising from a judgment and that, like for Claim II, payments rendered and any PRA's actions to collect on the judgments are "post-judgment collection activities[.]" (Def.'s Br. (Doc. 17)

at 13-14); Def.'s Suppl. Mem. (Doc. 33) at 5-7.) However, none of the cases Defendant cite involve statutorily authorized damages for violating a statute prescribing prerequisites for entry of default judgment. See Johnson v. Pushpin Holdings, LLC, 748 F.3d 769, 770 (7th Cir. 2014) (asserting damages claim against debt collector for operating without a license and common law torts for actions in collecting the debts); Fontana Empire Ctr., 307 F.3d at 995-96 (seeking, as authorized by state law, to revive a foreclosure judgment by separately challenging the foreclosure sale); Khath v. Midland Funding, LLC, C.A. No. 14-14184-MLW, 2016 WL 1275606, at *1, *3 (D. Mass. Mar. 30, 2016) (alleging that debt collector operated without a license and seeking damages for allegedly unlawful debt collection based on an unjust enrichment theory); Sheenan v. Mortg. Elec., Registration Sys., Inc., Civil No. 10-6837 (RBK/KMW), 2011 WL 3501883, at *4 (D.N.J. Aug. 10, 2011) (challenging post-judgment payoff calculations).

Here, Plaintiffs do not seek to recover from PRA because of PRA's licensure status or the nature of PRA's conduct in collecting on the debts. They challenge the debts themselves as resulting from a judgment allegedly entered in violation of a statute prescribing prerequisites to entering that judgment; the damages they estimate amount to the debt collected on the judgment because they challenge the judgment itself. Like in Claim II, the injury stems from the entry of the judgment. Because this court finds that Claim III complains of injuries caused by the state-court judgments and invites district court review and rejection of that judgment, this court finds

that, except with respect to Plaintiff Townes, this court lacks jurisdiction to hear Plaintiffs' Claim III.

F. Plaintiff Pia Townes

The court concludes based on the above analysis that all named Plaintiffs except Pia Townes are "state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." Exxon, 544 U.S. at 284. Townes, however, is not a state-court loser — her default judgment has been vacated by the state court. (Compl. (Doc. 3) ¶¶ 31, 39.) Because Townes is not a state-court loser, her claims cannot be barred by Rooker-Feldman. This puts the court in the position of evaluating a case where most Plaintiffs are state-court losers, whose claims the court lacks subject matter jurisdiction over pursuant to Rooker-Feldman, and where one Plaintiff is not a state-court loser, whose claims the court does have subject matter jurisdiction over provided that the jurisdictional requirements of CAFA are met.

"Because 'no antiremoval presumption attends cases invoking CAFA . . . a defendant's notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold.'" Scott v. Cricket Commc'ns, LLC, 865 F.3d 189, 194 (4th Cir. 2017) (quoting Dart Cherokee Basin Operating Co. v. Owens, ___U.S.___, ___, 135 S. Ct. 547, 554 (2014) (citations omitted)). "If the plaintiff challenges removal, however, the defendant 'bears the burden of demonstrating that removal jurisdiction is proper.'" Id. (emphasis removed)

(quoting Strawn v. AT & T Mobility LLC, 530 F.3d 293, 297 (4th Cir. 2008)). In determining CAFA jurisdiction in response to a challenge, courts look to the plaintiff's complaint and to the proposed class as defined by the plaintiff in her complaint. See Strawn, 530 F.3d at 298–99.

Plaintiffs have indeed challenged removal with their Motion to Remand but do not challenge any of PRA's assertions as to the threshold requirements triggering CAFA jurisdiction. Plaintiff Townes brings all claims on behalf of certain groups of the proposed class, (Compl. (Doc. 3) ¶¶ 15, 50-66), and these aggregated claims undisputedly meet CAFA's requirements. Therefore, this court concludes that it has CAFA jurisdiction over the claims of Plaintiff Pia Townes. See Bartels ex rel. Bartels v. Saber Healthcare Grp., LLC, No. 16-2247, No. 16-2416, 2018 WL 503173, at *3 n.2 (4th Cir. Jan. 23, 2018) ("Because the plaintiffs do not challenge the defendants' calculations, the defendants adequately established that the amount in controversy exceeds $5 million.").[6]

[6] Plaintiff Townes does not have a default judgment nor has she alleged that she made post-default-judgment payments to PRA. Therefore, she brings claims on behalf of two proposed class groups to which she herself is not similarly situated. (See Compl. (Doc. 3) ¶¶ 50-57, 64-66.) Moreover, any proposed class members who are state-court losers (i.e., whose default judgments have not been vacated), would find their claims unable to be heard in this court due to the court lacking subject matter jurisdiction under Rooker-Feldman. Although a representative party must "fairly and adequately protect the interests of the class" and the representative's claims must be "typical of the claims by the class[,]" Fed. R. Civ. P.23(a)(3)-(4), questions about the suitability of Townes as class

IV. CONCLUSION

For the reasons set forth herein, this court lacks jurisdiction over the claims of Plaintiffs Iris Pounds, Carlton Miller, Vilayuan Sayaphet-Tyler, and Rhonda Hall pursuant to the Rooker-Feldman doctrine. **IT IS HEREBY ORDERED** that Plaintiffs' Motion to Remand (Doc. 11) is **GRANTED IN PART and DENIED IN PART.** The claims of Plaintiffs Pounds, Miller, Sayaphet-Tyler, and Hall are **REMANDED** to the General Court of Justice, Superior Court Division, Durham County, North Carolina, for further disposition. The motion is **DENIED** as to the claims of Plaintiff Pia Townes.

IT IS FURTHER ORDERED that the Clerk of Court is directed to send a certified copy of this Memorandum Opinion and Order to the Clerk of Superior Court in Durham County.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Expedited Determination of Motion to Remand (Doc. 22) is **DENIED AS MOOT**.

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representative and the definition of any potential class are more appropriately addressed during the class certification process.

Bergquist v. Mann Bracken, LLP, 592 F.3d 816 (7th Cir. 2010), is instructive on this point. There, a plaintiff sought to have state-court judgments confirming unfavorable arbitral awards vacated on behalf of proposed class members, even though her own state-court judgment confirming her unfavorable arbitral award had already been set aside. Id. at 817-19. The Seventh Circuit directed the district court to define the proposed class to include only claims typical of the named plaintiff (which would exclude claims seeking to set aside state-court judgments, since the named plaintiff no longer had a state-court judgment). See id. at 819-20.

IT IS FURTHER ORDERED that Plaintiffs' Motion to Defer Time to File Federal Motion for Class Certification (Doc. 27) is **GRANTED** as to Plaintiff Pia Townes and **DENIED AS MOOT** as to remaining Plaintiffs**.** Plaintiff Townes shall have sixty (60) days from the date of this Order to file any motion for class certification as prescribed by LR 23.1 and Fed. R. Civ. P. 23(c)(1).

This the 28th day of March, 2018.

William L. Osteen, Jr.

United States District Judge

[ENTERED DECEMBER 9, 2016]

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
16-CVS005190

NORTH CAROLINA

COUNTY OF DURHAM

IRIS POUNDS, CARLTON MILLER, VILAYUAN SAYAPHET-TYLER, RHONDA HALL and PIA TOWNES, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

PORTFOLIO RECOVERY ASSOCIATES, LLC,

Defendant.

CLASS ACTION COMPLAINT

Iris Pounds, Carlton Miller, Vilayuan Sayaphet-Tyler, Rhonda Hall and Pia Townes (collectively "plaintiffs" or the "named plaintiffs"), on behalf of themselves and on behalf of the proposed class, for their claims against Portfolio Recovery Associates, LLC ("PRA") arising :from default judgments obtained by PRA in violation of North Carolina law, allege and say:

SUMMARY

1. Since October 1, 2009, G.S. 58-70-155 has prohibited debt buyers, such as defendant PRA, from obtaining default judgments against North Carolina consumers without submitting evidence establishing the nature and amount of the debt claimed to be owed. Section 155 explicitly provides that the only evidence sufficient for this purpose consists of "properly authenticated business records" that meet the requirements of Rule 803(6) of the North Carolina Rules of Evidence and that itemize the charges and fees claimed to be owed. With clear knowledge of these requirements-which section 155 identifies as "prerequisites" to the entry of default judgment-PRA has willfully sought and obtained default judgment against the named and unnamed class members without complying with G.S. 58-70-155.

2. Plaintiffs seek a declaratory judgment that all default judgments entered in North .Carolina courts in favor of PRA, in cases filed on or after October 1, 2009, have been obtained in violation of G.S. 58-70-155 and are void. Plaintiffs request injunctive relief barring further PRA collections on the default judgments and requiring PRA to provide notices of vacatur in court files, to class members, to sheriffs and other officers attempting to enforce collection of the judgments, and to credit-reporting agencies.

3. Plaintiffs further seek monetary relief under the statutory penalty provisions of G.S. 58-70-130(b), and, for those persons who made payments following entry of a PRA default judgments (such as named plaintiffs Carlton Miller and Iris Pounds), the

recovery of post-judgment payments as actual damages under G.S. 58-70-130(a).

4. Plaintiffs are filing with this Complaint their Motion for Preliminary Injunction, which seeks to halt PRA's collections on default judgments, and plaintiffs' Motion for Class Certification. The motions are supported by Exhibits in Support of Plaintiffs' Motion for Preliminary Injunction and Plaintiffs' Motion for Class Certification ("Exhibits"), also filed herewith.

PARTIES

Named Plaintiffs

5. Named plaintiff Iris Pounds, a citizen and resident of Durham County, is a single mother with two children who works as a clinical-research coordinator. Ms. Pounds was the defendant in a civil action instituted by PRA in the District Court of Durham County, case no. 15-CVD-4120, in which PRA obtained a default judgment.

6. On August 2, 2016, Ms. Pounds' automobile was seized by the Durham County Sheriff's Office pursuant to a writ of execution. In order to secure the release of her automobile, which she depended upon to get to and from work and to provide for her family's transportation needs, Ms. Pounds borrowed the sum of $1,525 and paid it to the Durham County Sheriff.

7. Named plaintiff Carlton Miller, a citizen and resident of Durham County, is a practicing medical doctor. Dr. Miller was the defendant in a civil action instituted by PRA in the District Court of Durham County, case no. 14-CVD-2019, in which PRA obtained a default judgment.

8. In July of 2016, Dr. Miller's bank, BB&T, acting at the request of the Durham County Sheriff's Office to satisfy a writ of execution issued on PRA's default judgment, placed a freeze on the funds in the account that Dr. Miller shares with his wife. BB&T paid $1,541.76 of the Millers' account funds to the Durham County Sheriff.

9. Named plaintiff Vilayuan Sayaphet-Tyler, a citizen and resident of Guilford County, is currently employed as an adult caregiver. Ms. Sayaphet-Tyler and her husband have two minor children, whom they support. Ms. Sayaphet-Tyler was the defendant in two civil actions instituted by PRA in the District Court of Guilford County, case no. 15-CVD-5238 and case no. 15-CVD-9301. PRA obtained default judgments against Ms. Sayaphet-Tyler in both cases.

10. Ms. Sayaphet-Tyler received a letter dated July 11, 2016 from the Guilford County Sheriff's Office stating that she owes $4,829.88 to PRA on the judgment in case no. 15- CVD-5238. The letter directs her to contact the Sheriff, and states that proceedings to sell her property will be started if she does not do so. Ms. Sayaphet-Tyler and her family have limited income and limited financial resources, and her ability to work and provide for her children would be substantially and adversely affected if her automobile were to be seized, as she depends on her car to get to her place of employment.

11. Named plaintiff Rhonda Hall, a citizen and resident of Mecklenburg County, moved to Mecklenburg County after she and her husband lost their jobs in California during the economic

downturn. Ms. Hall currently works as an accounts-receivable clerk, but she and her husband have limited income and financial resources. Ms. Hall was the defendant in a civil action instituted by PRA in the District Court of Mecklenburg County, case no. 15-CVD-1907, in which PRA obtained a default judgment.

12. Ms. Hall is at risk of having her property seized to satisfy the judgment. Her financial condition would become precarious if her bank account was frozen or her car was seized. Without a car, she would be in jeopardy of losing her job, and without a job she could not afford to pay her rent.

13. Named plaintiff Pia Townes, a citizen and resident of Mecklenburg County, is a teacher in the Charlotte-Mecklenburg school system. Ms. Townes lives with her disabled brother and elderly mother. Ms. Townes was the defendant in a civil action instituted by PRA in the District Court of Mecklenburg County, case no. 15-CVD-1909, in which PRA obtained a default judgment.

14. Subsequently Ms. Townes sought and obtained an order vacating the default judgment, whereupon PRA immediately took a voluntary dismissal.

Plaintiff Class

15. The proposed plaintiff class is:

> **All persons against whom PRA obtained a default judgment entered by a North Carolina court in a case filed on or after October 1, 2009.**

The reference to "a case filed on or after October 1, 2009" reflects the effective date of S.L. 2009-573, "The Consumer Economic Protection Act of 2009," which enacted G.S. 58-70-155 and related statutes.

16. The proposed plaintiff class numbers substantially in excess of 1,000 persons.

Portfolio Recovery Associates, LLC

17. Defendant PRA is in the business of purchasing and collecting nonperforming consumer loans. PRA is one of the nation's largest buyers of defaulted loans, which it purchases for three to eleven cents on the dollar, but which it seeks to collect in full.

18. PRA engages in substantial debt-collection activity in North Carolina. In the years 2008-2015, PRA purchased approximately 925,000 North Carolina consumer accounts, representing debt purportedly owed by North Carolina consumers of more than $1.8 billion.

19. PRA collects debts from North Carolina consumers by using the mails and the telephone, and by using the North Carolina court system. In the years 2008-2015, PRA filed tens of thousands of civil actions in the District Court Division of the North Carolina courts, seeking to obtain judgments against North Carolina residents for amounts allegedly owed on credit cards and "other consumer accounts.

20. PRA is a "collection agency" and "debt buyer" within the meaning of those terms as defined and used in G.S. 58-70-15(b)(4) and G.S. 58-70-155.

21. In each of its cases brought against the Named Plaintiffs and against the members of the plaintiff class, PRA brought suit in its capacity as

a purchaser of consumer debt. Because PRA was not involved in the transactions that gave rise to the alleged debt claimed to be owed to the original creditor, PRA did not create or maintain any of the business records associated with that alleged debt. PRA and its employees therefore had and have no knowledge regarding the creation and maintenance of any business records associated with the charges, fees, payments and interest accruals to the original creditor that allegedly gave rise to the amounts PRA claimed to be owed.

THE CONSUMER ECONOMIC PROTECTION ACT OF 2009

22. In 2009 the General Assembly enacted S.L. 2009-573, titled "The Consumer Economic Protection Act of 2009." Section 8 of this legislation created a new Part 5 of Article 70 of Chapter 58, titled "Special Requirements in Actions Filed by Collection Agency Plaintiffs." One of the three statutes in Part 5 is G.S. 58-70-155, titled "Prerequisites to entering a default or summary judgment against a debtor under this Part."

23. Section 155 applies in cases "initiated by a debt buyer." G.S. 58-70-155(a); *see also* G.S. 58-70-15(b)(4) (defining "debt buyer"). Debt buyers were in 2009, and are today, a subject of particular concern within the debt-collection industry. In February of 2009, seven months prior to the enactment of S.L. 20_09-573, the Federal Trade Commission published a report, "Collecting Consumer Debts: The Challenges of Change" ("FTC

Report")[1] in which the FTC stated: "The most significant change in the debt collection business in the past decade ... has been the advent and growth of debt buying (i.e., the purchasing, collecting, and reselling of debts in default)." FTC Report at 13; *see also id.* at iv (same).

24. Section 155 imposes requirements that must be met before a debt buyer can obtain a default judgment. The 2009 FTC report stated "[p]erhaps the most significant issue related to debt collection litigation is the prevalence of default judgments." *Id.* at 57. PRA relies heavily on the default judgment process. In 2015, the Consumer Financial Protection Bureau took action against PRA for using deceptive tactics to collect bad debts. The September 2015 CFPB Consent Order issued against PRA concluded, among its many findings: "Consumers respond to less than six percent of [PRA's] actions." Exhibit 49, ¶ 44.

25. In order to protect consumers at risk of default judgments, section 155 establishes "prerequisites" for default judgments in cases brought by debt buyers:

> § **58-70-155.** ***Prerequisites*** **to entering a default or summary judgment against a debtor under this Part.**
>
> (a) *Prior to entry of a default judgment* or summary judgment against a debtor in a complaint initiated by a debt buyer, *the plaintiff shall file* evidence with the court to establish the amount and nature of the debt.

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[1] Available from the Federal Trade Commission website at https:// www.ftc.gov/ sites/default/files /documents/ reports/ collecting-consumer-debts-challenges-change-federal-trade-commission-workshop-report/dcwr.pdf.

> (b) *The only evidence sufficient to establish the amount and nature of the debt shall be properly authenticated business records* that satisfy the requirements of Rule 803(6) of the North Carolina Rules of Evidence. The *authenticated business records shall include at least* all of the following items: .. .
>
> (4) *An itemization of charges and fees claimed to be owed. . . .*
>
> (8) *The amount of interest claimed and the basis for the interest charged.*

G.S. 58-70-155 (emphasis added.) Thus, in order for the court to enter a default judgment on behalf of a debt buyer, the debt buyer must file properly authenticated business records that provide an itemization of the amount claimed to be owed.

PRA'S DEFAULT JUDGMENTS

Default Judgments Against the Named Plaintiffs

26. PRA obtained default judgments against the Named Plaintiffs. In each case, PRA failed to satisfy the G.S. 58-70-155 prerequisites that required it to file properly authenticated business records providing an itemization of the amount claimed to be owed. The court files for PRA's default judgment cases against the Named Plaintiffs are Exhibits 6-11.

27. PRA commenced *Portfolio Recovery Associates, LLC v. Iris Pounds,* Durham County case no. 15-CVD-4120, on August 5, 2015. A default judgment was entered in favor of PRA and against Ms. Pounds by an assistant clerk of court, on October 12, 2015. *See* Exhibit 6.

28. PRA commenced *Portfolio Recovery Associates, LLC v. Carlton Miller,* Durham County case no. 14-CVD-2019, on February 7, 2014. A default judgment was entered in favor of PRA and against Dr. Miller by Hon. James T. Hill, District Court Judge, on May 2, 2014. *See* Exhibit 7.

29. PRA commenced *Portfolio Recovery Associates, LLC v. Vilayuan Sayaphet-Tyler,* Guilford County case no. 15-CVD-5238, on April 27, 2015. A default judgment was entered in favor of PRA and against Ms. Sayaphet-Tyler by an assistant clerk of court on July 2, 2015. On November 2, 2015, PRA commenced *Portfolio Recovery Associates, LLC v. Vilayuan Sayaphet-Tyler,* Guilford County case no. 15-CVD-9301. A default judgment was entered in favor of PRA and against Ms. Sayaphet-Tyler by an assistant clerk of court on January 8, 2016. *See* Exhibits 8 and 9.

30. PRA commenced *Portfolio Recovery Associates, LLC v. Rhonda Hall,* Mecklenburg County case no. 15-CVD-1907, on January 30, 2015. A default judgment was entered in favor of PRA and against Ms. Hall by an assistant clerk of court, on July 8, 2015. *See* Exhibit 10.

31. PRA commenced *Portfolio Recovery Associates, LLC v. Pia Townes,* Mecklenburg County case no. 15-CVD-1909, on January 30, 2015. A default judgment was entered in favor of PRA and against Ms. Townes by an assistant clerk of court, on April 1, 2015. *See* Exhibit 11. Following the date on which Exhibit 11 was copied, further proceedings occurred in the case, as a result of which the default judgment was vacated. *See* ¶ 39, below, and Exhibit 28 (vacatur order).

Default Judgments Against the Class

32. Since October 1, 2009, the effective date of G.S. 58-70-155, PRA has filed tens of thousands of civil actions against North Carolina defendants in the District Court Division of the North Carolina courts. In thousands of these post-October 1, 2009 cases, PRA has obtained default judgments.

33. Because G.S. 58-70-155 provides that debt buyers "shall file" certain documents as a prerequisite to obtaining a default judgment, PRA's compliance with G.S. 58-70-155 can be determined by reviewing the court file in a case in which PRA has obtained a default judgment.

34. PRA used the same small law firm to prosecute all of its collection actions in North Carolina and obtained default judgments using common practices and by filing standardized forms of affidavit.

35. According to a review of a sample of 367 PRA default judgment case files, PRA failed to comply with the G.S. 58-70-155 "prerequisites" in all 367 cases. *See* Exhibit 15 (Summary of Eight-County Sample: Authentication); Exhibit 14, ¶ 4 (explanation of entries); *see also* Exhibits 16 and 17 (summaries for Itemization and Sessoms Attorney Affidavits).

PREVIOUS LEGAL RULINGS HOLDING PRA'S DEFAULT JUDGMENTS TO BE VOID

36. Counsel for the Named Plaintiffs, who now seek appointment as class counsel in the instant case, have challenged PRA's default judgment practices in seven prior cases in North Carolina state courts. In each case, the court ruled that

PRA's default judgments were void because of PRA's failure to satisfy the G.S. 58-70-155 prerequisites. The seven vacatur orders are Exhibits 24-30.

37. In *Portfolio Recovery Associates v. Brady,* Chatham County case no. 15-CVD.,44, PRA obtained a default judgment against defendant Robert Brady. Mr. Brady filed a Rule 60(b) motion to set aside the PRA default judgment. By order entered December 18, 2015, the Chatham County District Court (Judge Charles T.L. Anderson) ruled:

> 8. Because PRA's motion seeking a default judgment failed to show a "sum certain," proceedings for entry of a default judgment were not within the jurisdiction of the clerk of court. Because the clerk lacked jurisdiction to enter the default judgment, the Judgment by Default is void and is subject to being set aside under Rule 60(b)(4)....
>
> 9. Because N.C.G.S. § 58-70-155's requirements are identified as "prerequisites," a default judgment that fails to comply with these prerequisites is void and subject to being set aside under Rule 60(b)(4).

Exhibit 24, Conclusions of Law, ¶¶ 8, 9.

38. In *Portfolio Recovery Associates v. Peach,* Wake County case no. 15-CVD-4745, PRA obtained a default judgment against defendant Reba Peach. Ms. Peach filed a Rule 60(b) motion to set aside the PRA default judgment. By order entered March 29, 2016, the Wake County District Court (Judge Debra Sasser) ruled:

> 7. N.C.G.S. § 58-70-155 requires, as a "prerequisite" to the entry of a default judgment in a debt buyer case against a debtor, that the debt buyer plaintiff file authenticated business records containing, among other things, an itemization of the charges and fees claimed to be owed and the amount and basis for claimed interest.
>
> 8. PRA failed to comply with all the "prerequisites" of N.C.G.S. § 58-70-155.
>
> 9. PRA's filings, including the Complaint, Affidavit and Motion for Entry of' Default and Judgment by Default, failed to meet the requirements of Rule 55(b)(1) of a "sum certain or for a sum which can by computation be made," which is a prerequisite to the Clerk having jurisdiction to enter a Default Judgment in this matter.

Exhibit 25, Conclusions of Law**,** ¶¶ 7-9.

39. The defendants in five cases in Mecklenburg County[2] filed Rule 60(b) motions to set aside default judgments that had been obtained by PRA. By orders entered June 8, 2016 in each case, the Mecklenburg County District Court (Judge Rebecca T. Tin) ruled as follows:

> 14. PRA failed to comply with the "prerequisites" of N.C.G.S. § 58-70-155,

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[2] The five Mecklenburg County cases are *Portfolio Recovery Associates v. Spector,* 14-CVD-22005, *Portfolio Recovery Associates v. Pledger,* 14-CVD-22008, *Portfolio Recovery Associates v. Townes,* 15-CVD-1909, *Portfolio Recovery Associates v. Walters,* 15-CVD-2893, and *Portfolio Recovery Associates v. Walls,* 15-CVD-15284.

> because PRA did not submit account statements or other business records that "itemized" the amount claimed to be due and the amount and basis for the interest charged.
>
> 15. PRA also failed to comply with the "prerequisites" of N.C.G.S. § 58-70- 155, because PRA did not authenticate account statements or other business records. No affidavit was offered from any person claiming familiarity with the circumstances under which the statements and other documents were created and maintained by the alleged original creditor.
>
> 16. The Court concludes that N.C.G.S. § 58-70-155 is a jurisdictional statute, meaning that default judgments entered in violation of the statute are void....

Exhibits 26-30, each at, ¶¶ 14-16. Pia Townes, who obtained the order of vacatur in *Portfolio Recovery Associates LLC v. Townes,* Mecklenburg County case no. 15-CVD-1909, is one of the Named Plaintiffs in the instant case.

40. Counsel for defendant invited PRA to pursue appellate review of any legal conclusions with which it disagreed. Instead, following the district courts' vacatur of the default judgments and entries of default, PRA took voluntary dismissals. *See* Exhibits 35-39.

41. Despite the seven vacatur orders holding that PRA default judgments were void, PRA has continued to employ the judicial process to conduct asset seizures in order to collect on default

judgments that are void for the same reasons as the default judgments that were the subject of the seven vacatur orders. Named plaintiffs Pounds and Miller have been the subject of asset seizures and named plaintiffs Sayaphet-Tyler and Hall currently are at risk of asset seizures based on default judgments that PRA obtained without complying with the same prerequisites as in the default judgments at issue in the seven vacatur orders.

CLASS ALLEGATIONS

42. The default judgments entered in cases filed by PRA in North Carolina state courts on or after October 1, 2009, were obtained by PRA without filing "properly authenticated business records" with the court providing the "itemization of charges and fees claimed to be owed" and the "amount of interest claimed and the basis for the interest charged." G.S. 58-70-The filing of such records is, by statute, a "prerequisite" for default judgments in cases brought by debt buyers. *Id.*

43. As a consequence of this common failure, the default judgments must be vacated, and PRA must pay the penalty prescribed by G.S. 58-70-130(b) and refund post-judgment payments as actual damages under G.S. 58-70-130(a).

44. Upon information and belief, the class is so numerous, in excess of 1,000 members, that joinder would be impractical.

45. For the reasons set forth in plaintiffs' Motion for Class Certification, filed herewith, and Plaintiffs' Brief in Support of Motion for Class Certification, served herewith, a "class" exists: the

named plaintiffs and the unnamed members of the proposed class share the same legal claims and have a common interest in the resolution of the same issues. These issues predominate. Common questions include:

- Whether PRA's default judgments violate G.S. 58-70-155;
- Whether PRA's default judgments are void;
- Whether PRA is liable for the statutory penalty prescribed by G.S. 58-70-130(b).
- Whether PRA is liable for payments made by class members following entry of a default judgment under G.S. 58-70-BO(a).

46. The named plaintiffs are willing and able to act as class representatives and will fairly and adequately represent the interests of the class. There is no conflict between the named plaintiffs and the members of the proposed class. Counsel for plaintiffs and the proposed class are not subject to any conflict and may appropriately be appointed as class counsel.

47. This case would be manageable as a class action. This case should be particularly manageable because G.S..58-70-155 requires that certain documents be filed by a debt buyer with the court, thereby allowing PRA's compliance with G.S. 58-70-155 to be easily determined by a review of the court file, and because a review *of* a sample of PRA court files shows that PRA uniformly failed to comply with the G.S. 58-70-155 prerequisites. *See* Exhibits 13-17, 19- 22.

48. A class action is superior to other available methods for the fair and effective adjudication of the controversy.

49. PRA has acted or refused to act and will continue to do so on grounds generally applicable to the class thereby making injunctive or declaratory relief appropriate with respect to the class as a whole.

FIRST CLAIM FOR RELIEF
(For Vacatur of Default Judgments, Declaratory and Injunctive Relief)

50. Plaintiffs assert this First Claim for Relief on behalf of all members of the proposed class as to whom PRA's default judgments have not already been vacated. The allegations of all other paragraphs of this Complaint are incorporated by reference.

51. The default judgments PRA obtained against the named plaintiffs and the members of the plaintiff class were obtained in violation of G.S. 58-70-155.

52. PRA violated G.S. 58-70-155 by seeking and obtaining the default judgments without filing "properly authenticated business records" that provided, among other requirements, "[a]n itemization of charges and fees claimed to be owed" and the "amount of interest claimed and the basis for the interest charged." PRA's violations of G.S. 58-70-155 are identified at length in the seven vacatur orders. *See* ¶¶ 36-39, above.

53. All of PRA's default judgments in cases filed on or after October 1, 2009 are void because G.S. 58-70-155 is jurisdictional: PRA's uniform failure to comply with the "prerequisites" prescribed by G.S. 58-70-155 deprived courts of jurisdiction to enter default judgments in favor of PRA.

54. As to PRA's default judgments that were entered by clerks of court or their assistants (such as for named plaintiffs Iris Pounds, Rhonda Hall, Pia Townes and Vilayuan Sayaphet-Tyler, and for most of the members of the proposed plaintiff class), these clerk-entered judgments are void for an additional reason: Rule 55(b)(l) grants clerks jurisdiction to enter default judgments only when the plaintiff has presented evidence showing a "sum certain." G.S. 58-70-155 prescribes what evidence is required for a debt buyer to make that showing. PRA uniformly failed to present evidence to support the exercise of "sum certain" jurisdiction by the clerk.

55. Because of the lack of subject matter jurisdiction, the default judgments are void and may be attacked by independent action. *See* Rule 60(b) ("The procedure for obtaining any relief from a judgment, order, or proceeding shall be by motion as prescribed in these rules *or by an independent action")* (emphasis added); *see, e.g., In re Webber,* 201 N.C. App. 212,220, 689 S.E.2d 468, 474-75 (2009) ("A judgment or order that is void, as opposed to voidable, is subject to collateral attack. A lack of subject matter jurisdiction renders the judgment or order void.") (citations omitted).

56. Plaintiffs ask that the court enter a declaratory judgment that PRA's default judgments obtained in cases filed in North Carolina courts on or after October 1, 2009 violate G.S. 58-70-155 and are void. This declaratory judgment is sought pursuant to the North Carolina enactment of the Uniform Declaratory Judgments Act, G.S. 1-253 *et seq.,* which grants courts "power to declare rights, status, and other legal relations."

57. Plaintiffs further ask that the court issue an injunction requiring PRA to: (1) cease collection activity on the default judgments; (2) file notices of vacatur in the court files; and (3) give notice of vacatur to the members of the class, to sheriffs and any persons who may be involved in attempting to collect the default judgments, and to credit-reporting agencies.

SECOND CLAIM FOR RELIEF
(For Statutory Penalty under G.S. 58-70-130(b))

58. Plaintiffs assert this Second Claim for Relief on behalf of all members of the proposed class. The allegations of all other paragraphs of this Complaint are incorporated by reference.

59. PRA violated G.S. 58-70-115(7) by requesting and obtaining default judgments in violation of G.S. 58-70-155.

60. As a direct consequence of PRA's violations of G.S. 58-70-155 as alleged above, each of the class members has suffered actual injury in that each of the class members has a judgment entered against him or her that does not comply with North Carolina law.

61. Because of PRA's violations of North Carolina law as alleged above, each class member is entitled to recover from PRA, pursuant to G.S. 58-70-130(b), "a penalty in such amount as the court may allow, which shall not be less than five hundred dollars ($500.00) for each violation nor greater than four thousand dollars ($4,000) for each violation."

62. In connection with determining the amount of the penalty, plaintiffs allege that PRA's violations as hereinabove alleged were done willfully and knowingly.

63. For each class member, plaintiffs seek an award of $4,000 per default judgment entered against the class member and in favor of PRA in violation of G.S. 58-70-155.

THIRD CLAIM FOR RELIEF
(For Recovery of Amounts Paid to PRA After Entry of Default Judgments)

64. Plaintiffs assert this Third Claim for Relief on behalf of those members of the proposed class who made any post-default-judgment payments to PRA, such as named plaintiffs Iris Pounds and Carlton Miller. The allegations of all other paragraphs of this Complaint are incorporated by reference.

65. Because of PRA's violations of North Carolina law as alleged above, each class member is entitled to recover from PRA, pursuant to G.S. 58-70 130(a), "any actual damages sustained by the debtor as a result of the violation."

66. Post-judgment payments on debt established by PRA default judgments in cases filed on or after October 1, 2009, including assets lost through the execution process, are "actual damages sustained by [class members] as a result of [PRA's] violation," as these payments resulted from the default judgments PRA obtained in violation of G.S. 58-70-155.

WHEREFORE, in addition to the relief sought in their Motion for Preliminary Injunction and Motion for Class Certification, filed herewith, the named plaintiffs pray that the Court grant them and the proposed plaintiff class the relief requested herein:

(i) that the Court issue a declaratory judgment, declaring that default judgments PRA has obtained in cases filed in North Carolina courts on or after October 1, 2009, violate G.S. 58-70-155 and are void;

(ii) that the Court issue an injunction requiring PRA to cease its collection activity on the default judgments, to file notices of vacatur in the court files, and to give notice of the vacatur to the members of the class, to sheriffs and any persons who may be involved in attempting to collect the default judgments, and to credit reporting agencies;

(iii) that the Court award each of the members of the class a statutory penalty in the amount of $4,000 for each default judgment entered against them and in favor of PRA;

(iv) that the Court award, to those members of the class who made post-default- judgment payments, actual damages equal to the amounts of the payments;

(v) that the Court award attorney fees pursuant to G.S. 75-16.1 and any other fee- shifting authority that may be relevant in the circumstances of the present case;

(vi) that the Court tax all costs, including all costs of class notice and court-appointed experts and professionals, to PRA; and

(vii) that the Court grant plaintiffs TRIAL BY JURY ON any issues that may properly be the province of a jury.

This, the 21st day of November, 2016.

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[ENTERED DECEMBER 9, 2016]

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
NORTH CAROLINA
DURHAM DIVISION**

CASE NO: 1:16-cv-1395

IRIS POUNDS, CARLTON MILLER, VILAYUAN SAYAPHET-TYLER, RHONDA HALL and PIA TOWNES, on behalf of themselves and all others similarly situated,

Plaintiff,

v.

PORTFOLIO RECOVERY ASSOCIATES, LLC,

Defendant.

NOTICE OF REMOVAL
28 U.S.C. §§ 1332, 1446, 1453

Durham County Superior Court
Case No. 16 CVS 5190

TO: THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

Pursuant to 28 U.S.C. §§ 1332, 1441, 1446, and 1453, Defendant Portfolio Recovery Associates, LLC (PRA), removes this action from the General Court of Justice, Superior Court Division, County of Durham, North Carolina, where it was filed by Plaintiffs on November 21, 2016, and assigned Case No. 16 CVS

5190, to the United States District Court for the Middle District of North Carolina, Durham Division. In accordance with 28 U.S.C. § 1446(a), attached hereto as Exhibits A through U are copies of the process, pleadings, and orders served upon Defendant.

In support of removal, PRA states as follows:

Nature of Plaintiff's Allegations

1. Plaintiffs allege that PRA obtained default judgments against them in cases brought in North Carolina courts to collect on nonperforming consumer loans. Plaintiffs claim that these default judgments do not comply with North Carolina's statutory requirements. Plaintiffs seek to represent the class of all persons against whom PRA obtained a default judgment entered by a North Carolina court in a case filed on or after October 1, 2009. ¶ Compl.15.

2. Plaintiffs allege that the default judgments obtained by PRA do not comply with N.C. Gen. Stat. § 58-70-155. Plaintiffs seek (1) a declaratory judgment, declaring that PRA's default judgments obtained in cases filed in North Carolina courts on or after October 1, 2009, violate N.C. Gen. Stat. § 58-70-155 and are void; (2) an injunction barring PRA from collecting on the judgments and requiring that PRA file and serve notices of vacatur; (3) statutory penalties of $4,000 per default judgment; and (4) to recover amounts collected by PRA from the class on the default judgments.

Removal Is Timely

3. The time within which PRA is permitted to file this notice of removal under 28 U.S.C. § 1446

has not expired as of the time of the filing and service of this notice of removal. Less than thirty days have passed since PRA received a copy of the initial pleading setting forth the claim for relief upon which this action is based. *See* 28 U.S.C. § 1446(b)(1).

4. Upon information and belief, PRA was served on November 21, 2016, based on the representations of counsel for Plaintiffs.

Basis for Removal: Diversity Jurisdiction

5. Pursuant to 28 U.S.C. § 1332(d), federal jurisdiction exists over this case because: (a) the named Plaintiffs are completely diverse from PRA, and therefore members of the proposed class are citizens of a State different from PRA; (b) the amount in controversy exceeds $5 million, exclusive of interest and costs; and (c) the proposed class includes more than 100 people.

6. With respect to diversity, Plaintiffs are citizens and residents of North Carolina.Compl. ¶¶ 5, 7, 9, 11, 13. PRA, a limited liability company, is not a citizen or resident of North Carolina. PRA's principal place of business is in Virginia, and it is organized under the laws of Delaware. In addition, PRA has one member: PRA Group, Inc. PRA Group, Inc. is incorporated in Delaware and has its headquarters in Virginia.

7. The amount in controversy exceeds $5 million because Plaintiffs seek an award of $4,000 per default judgment on behalf of a proposed class that consists of more than 1,250 default judgments. Plaintiffs seek an award of $4,000 per default judgment in the proposed class. Compl. ¶ 62. The

complaint alleges that PRA has obtained default judgments in "thousands" of cases against North Carolina defendants during the class period. Compl. ¶ 32; *see also* Compl. ¶ 16 (alleging that the proposed class numbers "substantially in excess of 1,000 persons"). Moreover, PRA has obtained more than 1,250 default judgments from North Carolina courts during the class period. The claims of each member of the proposed class are aggregated to determine the amount in controversy. 28 U.S.C. § 1332(d)(6). Accordingly, Plaintiff's claim for statutory penalties under N.C. Gen. Stat. § 58-70-130(b) exceeds the jurisdictional amount.

8. Plaintiffs seek other relief that further confirms that the jurisdictional amount requirement is met. Plaintiffs seek to recover, on behalf of the proposed class, amounts paid to PRA after entry of default judgments. Compl. ¶ 66. Plaintiffs also seek an injunction requiring PRA to cease its collection activity on the default judgments that PRA has obtained against members of the proposed class. Compl. at 16 (ad damnum clause (ii)). The value of this relief, including the injunctive relief, is also part of the amount-in-controversy. *S. Florida Wellness, Inc. v. Allstate Ins. Co.*, 745 F.3d 1312, 1315-16 (11th Cir. 2014).

9. Under Rule 8 of the North Carolina Rules of Civil Procedure, Plaintiff is not permitted to state a specific demand for monetary relief in the Complaint. N.C. Gen. Stat. § 1A- 1, Rule 8(a)(2). In light of this pleading restriction, however, this Court employs common sense in evaluating whether the aggregate amount-in-controversy exceeds the jurisdictional amount. *See Dash v. FirstPlus Home Loan Owner Trust 1996-2*, 248 F. Supp. 2d 489, 496-99 (M.D.N.C.

2003) (noting that in light of North Carolina pleading laws that require for claims to be pled "in excess of ten thousand dollars ($10,000)," the federal court should apply its own "common sense" to determine whether the amount in controversy exceeds the jurisdictional amount); *see also Hoffman v. Vulcan Materials Co.*, 19 F. Supp. 2d 475, 478, 482-83 (M.D.N.C. 1998) (aggregating three claims pled to be "in excess of $10,000" and a claim for injunctive relief to reach jurisdictional limit).

10. Applying common sense to Plaintiff's factual allegations, multiple claims, and significant categories of compensatory damages and other relief listed in the Complaint, it is apparent that the amount-in-controversy exceeds $5,000,000.

11. With respect to the size of the proposed class, the complaint alleges that the proposed class includes more than one hundred people. The complaint in fact alleges that the proposed class numbers "substantially in excess of 1,000 persons." Compl. ¶ 16.

Venue Is Proper

12. Removal to this district and division is proper under 28 U.S.C. § 113(b) because this is the district and division embracing the place where the action is pending. 28 U.S.C. § 1441(a).

Notice Has Been Given

13. Pursuant to 28 U.S.C. § 1446(d), written notice of the filing of this Notice of Removal is being properly given to the Plaintiff by mailing a copy to her attorney of record.

14. Also pursuant to 28 U.S.C. § 1446(d), a Notice of Filing of Notice of Removal to federal court is

being promptly filed with the Clerk of the Superior Court, Durham County, North Carolina.

Non-Waiver of Defenses

15. Nothing in this Notice of Removal shall be interpreted as a waiver or relinquishment of PRA's rights to assert any defense or affirmative matter including, without limitation, the defenses of (1) lack of jurisdiction over the person; (2) improper venue; (3) insufficiency of process; (4) insufficiency of service of process; (5) failure to state a claim; or (6) any other procedural or substantive defense available under state or federal law.

WHEREFORE, Defendant PRA respectfully removes this action from the General Court of Justice, Superior Court Division, Durham County, North Carolina, to this Court and requests that this Court assume jurisdiction over this action to proceed to final determination thereof. If any question arises as to the propriety of the removal of this action, PRA respectfully requests the opportunity to present a brief and oral argument in support of its position that this case is removable.

This the 9th day of December, 2016.

/s/ Jon Berkelhammer
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Attorney for Defendant
Portfolio Recovery Associates, LLC

CERTIFICATE OF SERVICE

This is to certify that the foregoing has been duly served by depositing a copy thereof in the United States mail, first class, postage pre-paid addressed to the following counsel of record:

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This the 9th day of December, 2016.

/s/ Jon Berkelhammer
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Attorney for Defendant Portfolio Recovery Associates, LLC