JOSEPH W. COTCHETT (SBN 36324)
jcotchett@cpmlegal.com
BRIAN DANITZ (SBN 247403)
bdanitz@cpmlegal.com
KARIN B. SWOPE (Pro Hac Vice)
kswope@cpmlegal.com
VASTI S. MONTIEL (SBN 346409)
vmontiel@cpmlegal.com
COTCHETT, PITRE & McCARTHY, LLP
840 Malcolm Road, Suite 200
Burlingame, CA 94010
Telephone: (650) 697-6000
Fax: (650) 697-0577

MICHAEL RUBIN (SBN 80618)
mrubin@altber.com
STACEY M. LEYTON (SBN 203827)
sleyton@altber.com
CONNIE K. CHAN (SBN 284230)
cchan@altber.com
CAROLINE HUNSICKER (SBN 356917)
chunsicker@altber.com
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Telephone: (415) 421-7151
Fax: (415) 362-8064

Co-Lead Counsel for Plaintiffs and the Proposed Class

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

IN RE BANK OF AMERICA CALIFORNIA UNEMPLOYMENT BENEFITS LITIGATION

This document relates to All Actions

Case No. 3:21-md-02992-GPC-MSB

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO STAY LITIGATION

Judge: Hon. Gonzalo P. Curiel
Ctrm: 2D – 2nd Floor
Date: March 28, 2025
Time: 1:30 PM

REDACTED PUBLIC VERSION

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I. INTRODUCTION

On January 17, 2025, the Court conducted an hour-long hearing on Plaintiffs' motion for class certification, after having circulated a thorough 96-page tentative ruling. ECF 408. Before the Court could issue its formal order, though, the Bank requested a stay of "all proceedings in this case, including the issuance of any order on class certification," first through a Notice of Supplemental Authority, ECF 409, and then through this motion, ECF 415 at 1. The Bank rests this sweeping stay request on its speculative assertion that the Supreme Court's grant of certiorari in *Laboratory Corp. of America Holdings v. Davis*, Sup. Ct. Case No. 24-0304 ("*LabCorp*"), will result in such a material change in existing law governing class certification under Rule 23(b)(3) that it would be a waste of judicial resources to allow this four-year-old litigation to continue pending the Supreme Court's decision.

The Bank's effort to further delay resolution of the state and federal law claims of the Plaintiffs and 109,000 putative class members fails at every level. The Bank's conjecture about what the Supreme Court might rule in *LabCorp* and how that ruling might affect the appropriateness of class certification is pure guesswork, and a remand for further consideration in *LabCorp* could leave the underlying issues unresolved for another year or more. Unless and until the Supreme Court holds otherwise, the long-settled law of this circuit is controlling. That law strongly supports Plaintiffs' class certification motion for the reasons this Court has tentatively recognized.

Even if the Supreme Court were to reverse the Ninth Circuit's decision in *LabCorp*, the facts and issues in that case are readily distinguishable from those here. As the Court observed at the hearing, (1) the Bank (which bears the burden of proof under the Electronic Fund Transfer Act ("EFTA"), 15 U.S.C. §1693g(b)) has not presented evidence of fraudsters lurking undetected amongst the approximately 109,000 individuals identified from the Bank's records as putative class members, even after four years of reconsideration, fraud investigation, and remediation efforts; and (2) in any event, individuals determined by the State or the Bank to be fraudsters are by definition excluded from the proposed classes. *See* 1/17/25 Hr'g Tr. 19:15-20:2, 21:4-22. Because there has been no showing that the proposed classes include individuals who lack Article III injury and, because in any event, any such individual would be definitionally excluded from the proposed classes, *LabCorp* should not affect the appropriateness of class certification in this case.

Just as important, a motion for a stay of litigation implicates the equitable authority of the Court, and the Bank has failed to present *any* evidence of hardship if this litigation were to proceed (other than the ordinary costs of litigation, which for the next several months will principally be expert witness costs that would be required whether the class were certified or not). In contrast, Plaintiffs and putative class members would be enormously prejudiced by further delay, as many have been waiting since the Fall of 2020 to be fully compensated as the law requires for the Bank's EFTA, CCPA, UCL, due process, and common law violations.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Class Certification

Plaintiffs seek certification of five classes of unemployed Californians, based on the Bank's wrongful use of its Claim Fraud Filter Indicator 1 ("CFF-1") to summarily deny every unauthorized-ATM withdrawal claim by class members from late September 2020 until the Bank's challenged conduct was enjoined in early June 2021. ECF 324-1 at 2-4. As Plaintiffs have demonstrated, the Bank uniformly applied the same policies and practices to all members of the narrowly defined classes, depriving them of several state and federal statutory and common law rights. *Id.* at 1.

Unable to dispute its common application of the challenged policies, the Bank principally opposed Rule 23(b)(3) certification on predominance grounds, insisting (without proof) that the proposed classes were teeming with criminals and that extensive, individualized inquiries would be required at trial to identify which class members, due to their supposed criminal activities, suffered no actual harm as a result of the Bank's concededly classwide implementation of its automated CFF-1 as the basis for denying claims instead of conducting the required good faith investigation. ECF 349 at 34-37.[1] The Bank argued that its right to conduct these inquiries *at trial* would defeat predominance, and that it expected to uncover an untold number of such criminals through further investigations. *See id.* at 34-36. As the Court pointed out at the hearing, though, the proposed class definitions expressly exclude individuals determined by the State or by the Bank to be fraudsters, and the Bank failed to present any evidence in its voluminous opposition to class certification that such criminals were hidden within the class; and even though the Bank asserted it had found [redacted] individuals whose claims could not be validated, Plaintiffs demonstrated—without contradiction—that the Bank had not shown that how many, if any, of those individuals were actual class members. *Id.* at 1-2; 1/17/25 Hr'g Tr. 10:15-11:5. Nor did the Bank present evidence that anyone beyond these [redacted] individuals presented any indicia of fraud. Moreover, even if the Bank had some basis for contending that a handful of class members suffered no legal injury, *but see* ECF 324-1 at 2; *infra* at 9-11 (noting distinction between legal injury and cognizable damages), controlling Ninth Circuit law does not preclude "certification of a class that potentially includes more than a de minimis number of uninjured class members." *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 (9th Cir. 2022) (en banc); ECF 324-1 at 19-20.

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[1] The Bank also argued that those who "disputed their own transactions by honest mistake" lacked Article III standing, ECF 349 at 35; ECF 415-1 at 2, but as Plaintiffs explained on reply, even those who suffered no monetary *damages* as a result of the Bank's wrongful denial of their claims based on CFF-1 still suffered a legal injury of their EFTA and due process rights, *see, e.g.*, ECF 378 at 4 n.3 (citing cases); and those who are members of the Customer Service class also suffered damages as a result of the Bank's extraordinarily long call center wait times, *see id.* at 21. Equally meritless is the Bank's argument that those "already compensated for their potential injuries" lack Article III standing, ECF 349 at 35; ECF 415-1 at 2, as it is well established that reimbursement of actual damages does not moot claims for punitive and treble damages. *See, e.g.*, ECF 378 at 18 (citing cases).

B. Case Schedule

This litigation brought by unemployed Californians against Bank of America has been pending since January 2021. In June 2021, Judge Chhabria entered a preliminary injunction enjoining the Bank's continued use of its Claim Fraud Filter to decision class members' unauthorized-transaction claims and requiring the Bank to reopen those claims, recognizing that "[t]he class is comprised of people who depend on unemployment benefits to get through the pandemic," "continued denial of these benefits will seriously hinder the ability of many class members to feed their families and keep a roof over their heads," "[t]he harm being suffered by the class members is irreparable," and "[t]he balance of hardships and the public interest almost certainly support some form of preliminary injunctive relief." ECF 324-73 at 2-3; ECF 324-74. However, the pleadings were not settled in this MDL until August 15, 2024, when the Bank finally filed its Answer and Affirmative Defenses to Plaintiffs' Second Amended Master Consolidated Complaint. ECF 316.[2]

The current case schedule will enable this Court to resolve the remaining issues in this case in less than a year, consistent with the goals it expressed at the class certification hearing. *See* 1/17/25 Hr'g Tr. 51:24-52:3; 54:5-7 ("Given that this is a 2021 case, I'm eager to move this forward as quickly… as is prudent."). That schedule sets deadlines for initial expert disclosures (March 4, 2025), rebuttal expert disclosures (March 28, 2025), expert discovery (April 25, 2025), and pretrial motions (May 28, 2025). ECF 417. Summary judgment motions, which both sides indicated they are likely to file this Spring, 1/17/25 Hr'g Tr. 55:1-6, may resolve all or significant portions of this case within the next several months.

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[2] After the hearing on the Motion for Class Certification, Plaintiffs filed a Third Amended Master Consolidated Complaint ("TAMCC"), ECF 406, and on February 7, 2025, Defendant filed a supplemental answer to respond to the few additions in the TAMCC. ECF 414.

III. ARGUMENT

A. Legal Standard

Courts should only grant a stay of litigation pending the outcome of another proceeding "in rare circumstances," *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936), and only when resolution of the other matter will have a "direct impact" on the issues presented. *Mendez v. Optio Sols., LLC*, 239 F.Supp.3d 1229, 1232 (S.D. Cal. 2017); *Landis*, 299 U.S. at 255 (holding "[o]nly in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both"). Such a stay should only be granted if the other proceedings will conclude within a "reasonable time in relation to the urgency of the claims presented." *Mendez*, 239 F.Supp.3d at 1232 (citing *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 864 (9th Cir. 1979)). Other factors that may be considered include: (1) the possible damage resulting from granting a stay; (2) the hardship or inequity the moving party will suffer if the case proceeds; and (3) the degree to which issues or questions of law may be simplified or complicated as the result of a stay. *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005) (citing *Landis*, 299 U.S. at 256-57; *CMAX, Inc v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962)); *Mendez*, 239 F.Supp.3d at 1232. The moving party bears the heavy burden of establishing the necessity for a stay. *Landis*, 299 U.S. at 255.

B. The Stay Should Be Denied.

1. The Bank has not shown that a stay is likely to result in simplifying the issues before this Court.

The Bank argues that the Supreme Court's decision in *LabCorp* could resolve an important issue in this case, ECF 415-1 at 6, yet the Bank offers no reasoned analysis to support its assertion that the Supreme Court will overturn existing Ninth Circuit law. Nor does the Bank explain how its hoped-for result in *LabCorp* would affect this Court's class certification ruling, given the different factual record and legal arguments in these cases. As the moving party, the Bank has the affirmative burden to demonstrate, as a threshold matter, that this case and *LabCorp* are factually and legally similar in all material respects, and that the anticipated end-of-Term decision in *LabCorp* is "likely" to "dispose of" any overlapping claims in this Court. *Healthcare Ally Mgmt. of Cal., LLC v. Stroock & Stroock & Lavan LLP*, No. cv-22-4829-MWF(RAOX), 2023 WL 5667565, at *4 (C.D. Cal. July 11, 2023) (denying stay where "the facts [of the case at issue] [were] distinguishable from [the other proceeding]" and defendant failed to show the appeal in the other proceeding would be decided in its favor); *Lockyer*, 398 F.3d at 1113 (denying stay where other proceeding was "unlikely to decide, or to contribute to the decision of, the factual and legal issues before the district court"). The Bank has not met and cannot meet its burden as to either point.

First, the Bank has nothing but speculation to support its assertion that the Supreme Court's ruling in *LabCorp*—a case that has not been argued and as to which not a single merits brief has been filed—would require this Court to decide the "predominance" prong of Rule 23(b)(3) differently than current Ninth Circuit law requires. All the Bank can point to is the grant of certiorari itself, coupled with conjecture about what the Court "may" "give guidance on" in deciding the case. ECF 415-1 at 7. As the briefs filed in support of, and opposition to, certiorari demonstrate, there is a range of possible outcomes in *LabCorp*, including many that unquestionably would not have any impact here. For example, the Court could confirm the longstanding principle that Article III is satisfied in a class action if a single plaintiff has standing at the outset of the case, Respondents' Brief in Opposition ("BIO") at 3, or could confirm, on the record presented, that the class definition in *LabCorp* (or a modified class definition that the plaintiffs in that case could propose on remand) would be sufficient to satisfy Article III concerns. BIO at 9. Further, the Supreme Court could agree with the Ninth Circuit in *Olean* and other cases that LabCorp's arguments do not implicate Article III at all, only Rule 23(b)(3) predominance, and that district courts continue to have considerable discretion in determining in the first instance whether individualized questions about class member "injury" will likely predominate. BIO at 24-25. The Court could also adopt a *de minimis* rule, with or without providing specific guidance for determining how many or what percentage of class members constitute a *de minimis* number, or in which factual contexts a defendant's inquiry at trial into non-injured class members begins to predominate over common, classwide inquiries.

Mere speculation about how *LabCorp* may be decided is inadequate justification to shut down this litigation. *See, e.g., Torrent v. Ollivier*, No. cv-15-02511 DDP (JPRx), 2015 WL 6394468, at *2 (C.D. Cal. Oct. 22, 2015) (denying stay where defendant failed to counter possibility that appellate "holding may well be limited" and "not… particularly instructive in this case"; although appellate court "might conceivably issue a ruling that would affect this case, the chances of such an outcome are too speculative at this stage to warrant [a] stay"). In the meantime, Ninth Circuit cases such as *Olean* and *Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125 (9th Cir. 2016), remain the law and are controlling. It is well established that "once a federal circuit court issues a decision, the district courts within that circuit are bound to follow it and have no authority to await a ruling by the Supreme Court before applying the circuit court's decision as binding authority." *Yong v. I.N.S.*, 208 F.3d 1116, 1119 n.2 (9th Cir. 2000).

Second, even if *LabCorp* were to overturn *Olean* in whole or in part, this case is readily distinguishable from *LabCorp* and certification would still be proper under Rule 23(b)(3). *See, e.g.*, *Wolf v. Carpenter Hazlewood Delgado & Bolen LLP*, No. cv-20-00957-PHX-DLR, 2021 WL 487889, at *2 (D. Ariz. Feb. 10, 2021) (holding "[t]he [c]ourt merely finds that the allegations in this case are sufficiently distinguishable from the facts in *Ramirez* that the Supreme Court's forthcoming decision, even if favorable to TransUnion, will not meaningfully impact this litigation").

In *LabCorp*, the plaintiffs sought to certify a damages class of "[a]ll legally blind individuals who visited a LabCorp patient service center with a LabCorp Express Self-Service kiosk in California during the applicable limitations period and who, due to their disability, were unable to use the LabCorp Express Self-Service kiosk." Petition for a Writ of Certiorari ("Pet. Cert.") at 8 (quoting Pet.App.63a). The defined class included individuals who did not want to use a kiosk, whom defendant argued did not suffer a cognizable injury under the ADA and other applicable statutes. *Id.*; *see* Petitioner's Reply to Brief in Opposition ("Reply to BIO") at 8. Here, by contrast, the proposed classes have been narrowly defined to *exclude* anyone who "(i) has been disqualified by the [S]tate [of California] from Program eligibility" or whom the Bank has determined "(ii) has previously engaged in fraudulent Program conduct, such as submission of fraudulent claims or other abuses of the claims process." ECF 386-1 at 2; *see* 1/17/25 Hr'g Tr. 21:18-22. This definition—coupled with the Bank's nearly four-year investigation into class member eligibility, as mandated by the June 2021 preliminary injunction and the July 2022 Consent Order, *see infra* at 9—eliminates any realistic possibility that individualized inquiries into class member injury will predominate at trial. As another court in this District recognized when facing similar circumstances in an earlier case, such factual differences weigh in favor of the conclusion that "any ruling is unlikely to alter the [c]ourt's analysis." *In re Morning Song Bird Food Litig.*, 320 F.R.D. 540, 545 (S.D. Cal. 2017) (denying motion to stay pending Supreme Court review of certification of a different class including "numerous class members [who] suffered no injury," where the class definition at issue was limited "to only those who purchased the tainted wild bird food, and therefore suffered an injury" and thus distinguishable).

A decision in *LabCorp* that specifies the percentage of uninjured class members permissible under a Rule 23(b)(3) predominance analysis, or that explains when evidence that must be presented *at trial* is sufficient to overcome predominance, could not affect certification here. After all, the Bank has not presented *any* evidence of actual uninjured class members let alone that *any* significant amount of trial time should be devoted to the Bank's efforts to identify such individuals. The record in *LabCorp* was very different, as LabCorp presented "[u]nrebutted record evidence show[ing] that nearly *one-fourth* of all LabCorp PSC [Patient Service Center] visitors prefer to check in at the front desk; and another *tenth* preferred to do so online," Pet. Cert. at 9, and the only way to determine class member preference would be to examine each of them at trial. In stark contrast, the Bank here has not only failed to present [redacted] of criminal class members, but it has not presented evidence that any such individuals remain to be discovered or that *any* trial time (in contrast to its own, unilateral, pre-trial investigative time) would be required to identify them. *See* 1/17/25 Hr'g Tr. 11:2-5; 21:8-18.

The Bank has had considerable, legally mandated opportunities since June 2021 to identify any class members who were not damaged by the Bank's wrongful conduct, including (in addition to its own reconsideration process) the preliminary injunction in *Yick* and the CFPB/OCC Remediation Plan, pursuant to which the Bank [redacted] 1/17/25 Hr'g Tr. 42:3-43:12. The Bank has not presented any evidence that any of the class members present any indicia of fraud, let alone that such issues would predominate at trial. The Bank's four-year investigation, coupled with the express exclusion of fraudsters from the class definitions, make the factual record in this case far different from *LabCorp*, where defendant contends that, short of individual examination at trial, it would be impossible to determine which class members would have chosen to use accessible kiosks had they been provided.

Third, it bears repeating that in this case, unlike in *LabCorp*, Plaintiffs' statutory and constitutional claims raise procedural rights, under which concrete harm arises from liability the moment the Bank violates those rights. *See* ECF 378 at 4 n.3 (citing *Bisbey v. D.C. Nat'l Bank*, 793 F.2d 315, 318 (D.C. Cir. 1986) (bank liable under EFTA although plaintiff suffered no damages); *Burns v. First Am. Bank*, No. 04-cv-7682, 2006 WL 3754820, at *6, 9 (N.D. Ill. 2006) (certifying EFTA statutory damages class because "[e]ach class member's claim requires proof only that EFTA was violated"); *Cobb v. PayLease LLC*, 34 F.Supp.3d 976, 984 (D. Minn. 2014) (allowing EFTA claim to proceed despite reimbursement)); *see also Merisier v. Bank of Am., N.A.*, 688 F.3d 1203, 1210 n.10, 1211 (11th Cir. 2012) (confirming Bank's duty to follow error resolution procedures under Regulation E, even though it was determined at trial that plaintiff submitted a fraudulent claim); *Carey v. Piphus*, 435 U.S. 247, 266 (1978) (holding "by making the deprivation of [due process] rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed"). Another material distinction is that EFTA creates a presumption of claim validity and places the burden on the Bank to prove with evidence that the consumer in fact authorized the transaction. *See* 15 U.S.C. §1693g(b); 1/17/25 Hr'g Tr. 19:15-20:2, 21:4-22 ("Plaintiff's burden is to establish that the elements [] exist which would not include identifying people who aren't entitled to some remedies, … that falls on the defense either by virtue of the statute placing the burden on the defense, or to the extent that it's part of an affirmative defense …. [P]laintiffs offer a prima facie case."). Even under the standard articulated by the petitioner in *LabCorp*, Plaintiffs have met their burden of showing classwide legal "injury" under their theory of liability. Reply to BIO at 11 (acknowledging "[a]t [the class certification] stage, a plaintiff's burden is threefold. At minimum, it must (i) define the class in a way that does not include those lacking an Article III injury; (ii) plausibly establish that all class members have been so harmed; and (iii) show that they can prove, through common evidence, that all class members were in fact injured by the at-issue conduct"). The Bank does not dispute that every class member was subject to the same Bank policies and practices, which means that, if Plaintiffs' theory of liability is accepted, each class member suffered an injury upon the alleged violations of their EFTA rights to a reasonable and timely investigation and written findings and their due process rights to adequate notice and opportunity to be heard. *See* ECF 386-2 at 20-25; ECF 378 at 3-9; 1/17/25

Hr'g Tr. at 43:23-44:9. No ruling in *LabCorp* will call into question this basic premise; concrete injury here is liability, and Plaintiffs have met their burden at class certification to show that liability as to all class members can be established with common evidence.

2. A stay will prejudice class members, while the Bank will suffer only the routine costs of litigation if the case proceeds.

Equitable factors also weigh against a stay, as most members of the putative classes have already been waiting more than four years for complete relief. The Bank argues that Plaintiffs cannot show prejudice because the proposed stay is likely to extend only to late June 2025 and would only delay monetary, not prospective, relief. ECF 415-1 at 9. As a threshold matter, no merits briefs in *LabCorp* have been filed and no argument date has been set for this Term or next; nor is there any way to predict what the Supreme Court will rule in *LabCorp* or whether the Court's ruling would require a remand to the Ninth Circuit for further proceedings that would greatly extend the delay before a definitive ruling is announced. Moreover, even stays of a few months "should not be granted unless it appears likely the other proceedings will be concluded within a reasonable *time in relation to the urgency* of the claims presented to the court." *Leyva*, 593 F.2d at 864 (emphasis added). While delay of monetary relief may not "on its own" justify denying a stay, "it does not follow that a delay in monetary recovery… does not constitute even *some* damage to Plaintiff and putative class members." *D.C. by & through Garter v. County of San Diego*, No. 15-cv-1868-MMA (NLS), 2017 WL 1365693, at *4 (S.D. Cal. Apr. 14, 2017) (emphasis added) (denying stay where "contact information for putative class members continues to become outdated with time … [t]his could potentially result in denial of monetary recovery to those class members").[3] The Bank's requested stay would have significant

[3] Courts in the Ninth Circuit have interpreted *Landis* to permit consideration of harm caused by delayed monetary relief. *See, e.g.*, *Dowkin v. City & County of Honolulu*,

impacts on the case schedule, delaying class certification, dispositive motions, and trial for a substantial and potentially indefinite period of time. After more than four years of litigation, the 109,000 members of the proposed classes will be severely prejudiced by having such further delay injected into the proceedings, as witness memories continue to fade and the ability to reach class members to inform them of their class action rights diminishes with each passing month. *See, e.g.*, *Behar v. Northrup Grumman Corp.*, No. 2:21-cv-03946-HDV-SK, 2024 WL 5275027, at *1 (C.D. Cal. Dec. 3, 2024) (denying stay where case already pending for four years, citing "need for class members to receive clear and prompt notice of the … issues raised in this action"); *Dowkin*, 2014 WL 4904952, at *6 (denying stay where "[p]laintiffs filed this action over four-and-a-half years ago," and asking them to wait longer "to resolve their claims and potentially obtain redress for their injuries is unreasonable"); *Campbell v. Pricewaterhouse Coopers, LLP*, No. cv-S-06-2376 LKK/GGH, 2008 WL 2345035, at *2 (E.D. Cal. June 5, 2008) (denying stay of class notice despite potential that pending proceeding could impact certification because "any benefit gained by staying class notice must be weighed against the prejudice to plaintiffs in delaying the prosecution of their case").

The proposed delay is particularly unreasonable because of class members'

No. cv-10-00087 LEK-RLP, 2014 WL 4904952, at *6 (D. Haw. Sept. 30, 2014) (holding "[t]he fact that [p]laintiffs are not seeking injunctive relief does not negate [p]laintiffs' interest in obtaining relief within a reasonable time"); *Reed v. Autonation, Inc.,* No. cv-16-08916-BRO (AGRx), 2017 WL 10592157, at *3 (C.D. Cal. Mar. 6, 2017) (similar). The type of relief sought is not determinative; the Bank's cases confirm that the moving party must still assert a greater hardship if the stay is denied. *Nguyen v. Marketsource, Inc.*, No. 17-cv-02063-AJB-JLB, 2018 WL 2182633, at *6 (S.D. Cal. May 11, 2018) (granting stay to protect defendant from deprivation of Federal Arbitration Act rights while awaiting decision on class waiver law); *Frantz v. Force Factor, LLC*, No. 20-cv-1012-MMA (KSC), 2020 WL 8666386, at *4 (S.D. Cal. Nov. 16, 2020) (granting stay to prevent defendant from answering bulk of its discovery obligations while awaiting other proceeding).

economic vulnerabilities and the length of time their claims have been pending.[4] In *Leyva*, the Ninth Circuit directed the district court to weigh the length of delay against circumstances indicating urgency of claims, such as the "statutory right to minimum compensation" and "congressional policy favoring prompt payment of wages." 593 F.2d at 864. The statutory, constitutional, and common law rights here are just as important.[5]

While further delaying relief will cause enormous hardship to class members, the only impact to the Bank of denying the stay are the costs of litigation—which as a practical matter, will mostly focus in the next few months on expert discovery, which would be required even if this MDL litigation proceeded on behalf of hundreds

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[4] The Bank claims the stay is for a "definite" period, ECF 415-1 at 9, but of course, that assumes the *LabCorp* ruling would provide definitive guidance and not simply remand to the Ninth Circuit for further consideration—as the Supreme Court often does. *See, e.g., TransUnion LLC v. Ramirez*, 594 U.S. 413, 418 (2021) (remanding); *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 284 (2014) (same); *Tyson Foods*, 577 U.S. at 462 (same). If that occurs, it could take years before the applicable standards are finally resolved. *Cf. Yong v. I.N.S.*, 208 F.3d 1116, 1119 (9th Cir. 2000) (vacating stay that "could remain in effect for a lengthy period of time, perhaps for years if our decision in *Ma* is reversed and the case is remanded for further proceedings"). The Bank's other case on this point is distinguishable, since Plaintiffs here have already faced significant delay. *See Fernandez v. CoreLogic Credco, LLC*, No. 3:20-cv-1262-JM-(AGS), 2021 WL 1311270, at *1 (S.D. Cal. Apr. 8, 2021) (granting stay pending Supreme Court review of a related question where class complaint had only been pending for approximately six months, not several years).

[5] The Bank cites *Ludlow v. Flowers Foods, Inc.*, No. 18-cv-1190 JLS (JLB), 2020 WL 773253 (S.D. Cal. Feb. 18, 2020), for the proposition that "[m]ere delay" in treble damages does not constitute harm. ECF 415-1 at 9. But plaintiffs in *Ludlow* did not demonstrate the same urgency of relief as is established by this case. 2020 WL 773253, at *2 (noting "the fact that Plaintiffs have not moved for a preliminary injunction to stop the alleged harm and did not file their case for several years after the alleged harm began lessens the [c]ourt's concerns…"). Here, claims were brought shortly after CFF-1 was implemented, and Plaintiffs sought and obtained a preliminary injunction in June 2021, demonstrating severity and urgency of harm reduction. ECF 324-74; *see supra* at 4.

of individual plaintiffs rather than five certified classes. Moreover, "being required to defend a suit, without more, does not constitute a 'clear case of hardship or inequity' within the meaning of *Landis*." *Lockyer*, 398 F.3d at 1112; *see also Mendez*, 239 F.Supp.3d at 1234-35 (denying stay where defendant only identified hardship of engaging in additional litigation); *Doe #1 v. City of San Diego*, No. 17-cv-1581-BAS-WVG, 2019 WL 3068235, at *2 (S.D. Cal. July 12, 2019) (same). The Bank raises the possibility that it may have to re-brief issues after *LabCorp*, ECF 415-1 at 6, but that bears no weight in the hardship analysis. *Appel v. Bos. Nat'l Title Agency, LLC*, No. 18-cv-873-BAS-MDD, 2019 WL 1923934, at *2 (S.D. Cal. Apr. 30, 2019) (denying motion to stay where "pointing to inevitable discovery and motion practice, even if there is a possibility some of the litigation may be unnecessary," did not satisfy defendant's burden to show hardship).

In the unlikely event that *LabCorp* affects this Court's class certification ruling, Rule 23(c)(1)(C) already allows orders to be "altered or amended" any time before judgment. Judicial economy is better served in this already four-year-old litigation by proceeding under current Ninth Circuit law and, if necessary, filing supplemental pleadings after *LabCorp*. *See In re Morning Song Bird Food Litig.*, 320 F.R.D. at 545-56 (recognizing a district court "retains discretion to revisit class certification throughout the legal proceedings and may rescind, modify, or amend the class certification in light of subsequent developments").

IV. CONCLUSION

The Bank has failed to meet its heavy burden of demonstrating that this is one of those rare cases in which plaintiffs should have justice delayed while another proceeding runs its course. There is no evidence to indicate *LabCorp* is likely to change the outcome of this Court's class certification decision, nor is there any other reason to ignore controlling Ninth Circuit law in the meantime. The Bank has also failed to show any hardship justifying extending for an indefinite period this consolidated MDL action, which has been pending for more than four years, whereas a stay would prejudice Plaintiffs and putative class members. Class certification has been fully briefed and argued before this Court. Judicial economy would not be furthered by delaying the Court's ruling. For the foregoing reasons, the stay should be denied.

Respectfully submitted,

Dated: February 21, 2025

COTCHETT, PITRE & McCARTHY, LLP

By: */s/ Brian Danitz*
JOSEPH W. COTCHETT
BRIAN DANITZ
KARIN B. SWOPE
VASTI S. MONTIEL

Dated: February 21, 2025

ALTSHULER BERZON LLP

By: */s/ Michael Rubin*
MICHAEL RUBIN
STACEY M. LEYTON
CONNIE K. CHAN
KATHERINE G. BASS
COLIN C. JONES
CAROLINE HUNSICKER

Co-Lead Counsel for Plaintiffs and the Proposed Class

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the clerk of the court for the United States District Court for the Southern District of California by using the CM/ECF system on February 21, 2025. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. I certify under penalty of perjury that the foregoing is true and correct.

Executed: February 21, 2025 *<u>/s/ Michael Rubin</u>*