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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SAN DIEGO DIVISION

IN RE: BANK OF AMERICA CALIFORNIA UNEMPLOYMENT BENEFITS LITIGATION

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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO STAY PENDING SUPREME COURT REVIEW

Date: April 25, 2025
Time: 1:30 P.M.
Ctrm: 2D – 2nd Floor
Judge: Hon. Gonzalo P. Curiel

As the Court is aware, this multidistrict litigation involves Plaintiffs' challenge to a short-lived anti-fraud strategy that Bank of America N.A. ("BANA") used to respond to the massive explosion of fraud in connection with the prepaid debit cards that BANA issued to Plaintiffs and class members pursuant to a contract with California's Employment Development Department ("EDD"). On August 29, 2024, Plaintiffs filed a motion for class certification (Dkt. 324), which was argued before the Court on January 17, 2025 (Dkt. 408).

On January 24, 2025—only one week after the Court's hearing on Plaintiff's motion—the United States Supreme Court granted certiorari to review the Ninth Circuit's decision in *Laboratory Corp. of America Holdings v. Davis*, No. 24-0304. The Court specified that it will decide this question: "Whether a federal court may certify a class action pursuant to Federal Rule of Civil Procedure 23(b)(3) when some members of the proposed class lack any Article III injury." 2025 WL 288305 (U.S. Jan. 24, 2025). At a minimum, the outcome of *Laboratory Corp.* will be relevant to the pending motion due to BANA's argument that the presence of uninjured class members precludes certification when the process of identifying them before judgment would predominate over individual issues (Dkt. 349, at 34–35), and Plaintiffs' response that Rule 23 "does [not] preclude certification of a class that potentially includes more than a de minimis number of uninjured class members" (Dkt. 378, at 3). Briefing in *Laboratory Corp.* will be complete by April 21, 2025, meaning the case will be argued in April and decided by June 2025 (before the end of the Supreme Court's current Term).

Therefore, given both the imminent Supreme Court guidance that has the potential to reverse the course of this litigation and the short delay involved, this Court should exercise its discretion and stay all proceedings in this case, including the issuance of any order on class certification, pending the Supreme Court's decision in *Laboratory Corp*.

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BACKGROUND

I. BANA's Opposition to Plaintiffs' Motion for Class Certification

BANA's opposition to Plaintiffs' motion for class certification ("Opposition" or "Opp.") argued that the Supreme Court's decision in *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021), precludes class certification in this case. Dkt. 349, at 34–35. Specifically, BANA argued that *TransUnion* established that "[e]very class member must have Article III standing"—*i.e.*, a "concrete injury in fact"—"in order to recover individual damages," and that "Plaintiffs' putative classes include multiple types of cardholders with no injury," including: "(i) criminals who defrauded the EDD with fraudulent benefits claims; (ii) legitimate beneficiaries and criminals alike who defrauded BANA with fraudulent transaction disputes; (iii) legitimate cardholders who disputed their own transactions by honest mistake; and (iv) legitimate cardholders already compensated for their potential injuries." *Id.* (citing *TransUnion*, 594 U.S. 413, 431–33). BANA further argued that the consumer-specific evidentiary process required to distinguish class members who were actually injured from those who were not "defeats predominance," and therefore precludes certification of the class. *Id.*

In support of these arguments, BANA cited multiple reports from government bodies regarding the rampant and unprecedented rates of benefits fraud infiltrating the system at the time, including the California State Auditor's determination that this "criminal assault on the benefits system" involved more than *$32 billion* in stolen funds (*id.* at 1, citing DX 11[1]) and the U.S. Government Accountability Office's report that 11 to 15% of unemployment benefits paid during the pandemic were fraudulent, and that the Pandemic Unemployment Assistance program, in particular,

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[1] "DX" refers to documents cited in the Appendix of Exhibits to the Declaration of Laura Brys in Support of Defendant's Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Class Certification, Dkt. 350-1.

had an improper payment rate of *35.9%* (*id.* at 6, citing DX 14).[2] BANA also directed the Court to various examples of class members as to whom BANA has compelling evidence that they lack injury sufficient to support standing, including photographs of putative class members making the transactions that they denied making. *See id.* at 19–23, 34–37; *see also* DX 3; DX 7; DX 55; DX 56; DX 57; DX 58; DX 59; DX 60; DX 61; DX 62.

These examples were illustrative, but not exhaustive. BANA has reason to believe many more criminal fraudsters are embedded in Plaintiffs' proposed class for multiple reasons. The first is the extremely high levels of benefits enrollment fraud that the state and federal agencies determined occurred but has not been and may never be caught. *Id.* at 36 (citing DX 79). BANA also opposed Plaintiffs' notion that all of these people have already been filtered out by virtue of the claims process in the regulatory settlement on several grounds. As discussed at length in the Opposition and during argument, many of the class member claims were paid for reasons *other* than individual determinations that the claims were valid. *Id.* at 3, 13. In many other cases, the evidence available is not as conclusive as the cases where fraudsters were caught on camera: photographs are not always available. So while photographs can implicate some class members as fraudsters, the lack of photographs does not *exonerate* anybody or legitimize their claims. The borderline cases where the parties would have to litigate whether the class member is a fraudster or not based on disputed evidence obviously require even more extensive individual mini-trials than those where the existing evidence is conclusive.

[2] *See also*, *e.g.*, DX 13 (Jan. 26, 2021 report by California Legislative Analyst); DX 14 (Sept. 10, 2024 report by U.S. House Oversight Committee); DX 16 (June 2021 report by EDD to California Legislature); DX 17 (Nov. 19, 2020 letter from California State Auditor); DX 54 (Dec. 15, 2023 report by U.S. Office of Inspector General); DX 79 (Feb. 8, 2023 testimony by U.S. Inspector General); DX 87 (May 2022 report by U.S. Government Accountability Office); DX 88 (Jan. 2021 report by California State Auditor); and DX 89 (Jan. 2021 report by California State Auditor).

II. Plaintiffs' Reply Brief

Plaintiffs responded to BANA's argument by directing the Court repeatedly to the Ninth Circuit's decision in *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651 (9th Cir. 2022) (*en banc*). *See, e.g.*, Dkt. 378 at 2, 3, 15. Plaintiffs argued, based on *Olean*, that in this Circuit, "Rule 23 does not preclude 'certification of a class that potentially includes more than a de minimis number of uninjured class members.'" *Id.* at 2 (quoting *Olean*, 31 F.4th at 669).

When presented with airtight evidence that their class as defined includes not just members lacking Article III injury but *actual criminal fraudsters*, Plaintiffs argued that the presence of these fraudsters "would not be enough to preclude certification under Rule 23(b)(3)." *Id.* at 15 (citing *Olean*, 31 F.4th at 669). In Plaintiffs' view, false claimants "can be managed through Phase 2 proceedings or a claim administration process, after a classwide trial on the predominating common issues." *Id.* at 2.

III. The Supreme Court's Grant of Certiorari in *Laboratory Corp.*

The Supreme Court is now primed to decide whether the rule of law adopted by the Ninth Circuit in *Olean* is correct. In *Laboratory Corp.*, the Supreme Court will hear and decide "[w]hether a federal court may certify a class action pursuant to Federal Rule of Civil Procedure 23(b)(3) when some members of the proposed class lack any Article III injury."[3] The Supreme Court further set an expedited schedule for briefing in *Laboratory Corp.*, ordering the petitioner's brief to be filed by March 5, 2025, the respondent's brief to be filed by March 31, 2025, and the petitioner's reply brief to be filed by April 21, 2025, setting the case up for oral argument in the session that ends April 30, 2025, and a decision before the end of the Supreme Court's current Term in June 2025. *See id.*

[3] *Laboratory Corp.*, 2025 WL 288305.

ARGUMENT

I. Legal Standard

This Court has broad discretion to stay proceedings under its inherent authority. "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). This power includes the power to stay proceedings "pending resolution of independent proceedings which bear upon the case." *Leyva v. Certified Grocers of Cal. Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979). Exercising this discretion is appropriate when the resolution of another matter will directly affect the issues before the court. *Mediterranean Enters v. Ssangyong Corp.*, 708 F.2d 1458, 1465 (9th Cir. 1983); *San Diego Padres Baseball P'ship v. United States*, 2001 WL 710601, at *1 (S.D. Cal. May 10, 2001).

The propriety of a "*Landis* Stay" requires the court to weigh "the competing interests which will be affected by the granting or refusal to grant a stay." *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005) (quoting *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962)). These competing interests include "the possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay." *Id.* (quoting *CMAX, Inc.*, 300 F.2d at 268).

II. The Court Should Stay This Action Pending the Supreme Court's Ruling in *Laboratory Corp.*

The interests of efficiency and judicial economy will be served if the Court exercises its discretion to stay this case, including deferring any entry of an order on Plaintiffs' motion for class certification, pending the Supreme Court's ruling in *Laboratory Corp*. Given that the Supreme Court's decision is expected by the end of the Term in June, the short pause will not cause any undue hardship to Plaintiffs, and would prevent both parties from expending substantial resources on proceedings that may need to be re-litigated, or may even be rendered unnecessary, based on the Supreme Court's decision.

First, a stay will promote judicial economy because the Supreme Court's decision in *Laboratory Corp.* will resolve a critical—and potentially case dispositive—issue before this Court. As the grant of certiorari reflects, the Courts of Appeals are divided on the question of whether a class that includes members lacking Article III standing can be certified under Rule 23(b)(3). The Ninth Circuit is in the minority in taking the view that the presence of even a significant number of uninjured class members does not prohibit certification.[4] Other Circuits require the number of uninjured class members to be *de minimis*.[5] And some hold that a class may not be certified at all if it includes any members who have suffered no Article III injury.[6] Before *Olean*, that was the rule in this Circuit, too. *See Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012) ("'[No] class may be certified that contains members lacking Article III standing.'") (quoting *Denny*, 443 F.3d at 264).

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[4] *Olean*, 31 F.4th at 669; *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1267 (11th Cir. 2019).

[5] *E.g.*, *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619, 624–25 (D.C. Cir. 2019) (affirming denial of class certification where evidence showed 12.7% of proposed class members were uninjured); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 30–32 (1st Cir. 2015) (affirming certification of class where "the number of uninjured members [] is not so large as to render the class impractical or improper, or to cause non-common issues to predominate").

[6] *Denny v. Deutsche Bank AG*, 443 F.3d 253, 263 (2nd Cir. 2006) ("no class may be certified that contains members lacking Article III standing"); *Halvorson v. Auto-Owners Life Ins. Co.*, 718 F.3d 773, 778 (8th Cir. 2013); *Johannessohn v. Polaris Indus. Inc.*, 9 F.4th 981, 987 (8th Cir. 2021) ("If members who lack the ability to bring a suit themselves are included in a class, the court lacks jurisdiction over their claims.").

Under this Circuit's current approach—exemplified by the *Laboratory Corp.* decision—a district court could certify a class that includes even large numbers of uninjured members. *See Olean*, 31 F.4th at 669 (Rule 23(b)(3) "permit[s] the certification of a class that potentially includes more than a de minimis number of uninjured class members"). But there are limits to this. Under *Olean*, "[w]hen individualized questions relate to the injury status of class members, Rule 23(b)(3) requires that the court determine whether individualized inquiries about such matters would predominate over common questions." *Id*. at 668. Thus, while the Court may attempt to "winnow out those non-injured members at the damages phase of the litigation," *Ruiz Torres v. Mercer Canyons, Inc.*, 835 F.3d 1125, 1137 (9th Cir. 2016), if the individualized inquiries necessary to do so are likely to predominate, certification is not appropriate. *Accord*, *e.g.*, *Rail Freight*, 934 F.3d at 627 ("Given the need in this case for at least 2,037 individual determinations of injury . . ., the district court did not abuse its discretion in denying class certification on the ground that common issues do not predominate.").

Which of these competing views the Supreme Court ultimately adopts will bear directly on the course of this action. BANA has demonstrated that there are uninjured criminal fraudsters in Plaintiffs' proposed class as defined. *See* Dkt. 349 at 19–23, 34–37; *see also* DX 3; DX 7; DX 55; DX 56; DX 57; DX 58; DX 59; DX 60; DX 61; DX 62. Plaintiffs do not dispute that these class members lack injury or standing under Article III—they just claim it "would not be enough to preclude certification" and is a "tiny percentage," anyway. Dkt. 378 at 15. The Supreme Court is certain to address whether Plaintiffs are correct on whether this is "enough to preclude certification." And, depending on the answer to that question, it may yet also give guidance on whether the "percentage" makes a difference and what percentage, if any, is too "tiny" to matter. In that event, the parties would likely need to present supplemental briefing and argument on the new legal standard and the percentages of the uninjured—or on the evidentiary inquiries needed even to estimate the percentages of the uninjured.

No matter how the Supreme Court resolves this issue, it will heavily inform the Court's resolution of a key dispute between the parties. It makes little sense for either the parties or the Court to expend resources on upcoming motions that may be impacted by the Supreme Court's forthcoming decision in just a few months. *See Fernandez v. CoreLogic Credco*, 2021 WL 1311270, at *4 (S.D. Cal. Apr. 8, 2021) (holding that proceeding with a class action when an impending Supreme Court decision may "shed[] light on Rule 23 or Article III standing requirements" is "at odds with the judicial principles of efficacy"); *Ludlow v. Flowers Foods, Inc.*, 2020 WL 773253, at *3 (S.D. Cal. Feb. 18, 2020) (holding that stay is appropriate where proceeding without stay "could result in the Parties unnecessarily expending resources engaging in motion practice and planning and preparing for trial . . . based on the wrong standard") (internal quotations omitted). Given that class certification orders are "inherently tentative" and subject to amendment or reconsideration "at any time" before judgment, it likewise makes little sense for the Court to invest resources into issuing a class certification order that it may very well need to reconsider or revise under a new legal standard after *Laboratory Corp.* is decided. *Davidson v. O'Reilly Auto Enters., LLC*, 968 F.3d 955, 964 n.7 (9th Cir. 2020) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.11 (1978)). Thus, the interests of judicial economy and efficiency are best served here by a stay pending clarity from the Supreme Court on this critical issue.

Second, a brief stay here would be equitable and result in no undue hardship to Plaintiffs. Courts in this district regularly grant requests for brief stays of proceedings when the outcome of a pending appeal is likely to clarify key issues in the case, recognizing that a short, time-limited stay poses little or no risk of prejudice to the non-moving party. *See, e.g.*, *Frantz v. Force Factor, LLC*, 2020 WL 8666386, at *5 (S.D. Cal. Nov. 16, 2020) (granting stay pending outcome of U.S. Supreme

Court case); *Nguyen v. Marketsource, Inc.*, 2018 WL 2182633 (S.D. Cal. May 11, 2018) (same); *Ludlow*, 2020 WL 773253, at *2 (granting stay pending resolution of question certified to the California Supreme Court). In *Nguyen*, the district court explained that "the possible prejudice or harm to [p]laintiff from granting a stay under these circumstances is slight," given that such a stay "would not be open-ended and will likely be relatively short." 2018 WL 2182633, at *6; *see also Ludlow*, 2020 WL 773253, at *2 (no prejudice from stay where the "wait for an answer to [the] important issue would be neither indefinite nor unreasonable"). An opinion in *Laboratory Corp.* is anticipated in June 2025, so the requested stay here would similarly be of a brief, definite duration.[7]

Given that Plaintiffs seek only monetary damages on behalf of the class and not injunctive or other equitable relief, any harm from delaying that potential recovery does not justify denying the stay. Indeed, Plaintiffs' putative class is defined to include only those people who have *already been reimbursed* for their unauthorized transaction claims, and who have *already received additional consequential harm payments* pursuant to BANA's regulatory remediation plan. Dkt. 324, at 15. A stay here would briefly delay only Plaintiffs' attempts to treble those damages they have already been paid. *See Ludlow*, 2020 WL 773253, at *2 ("Mere delay in receiving damages is an insufficient basis to deny a stay."); *see also Nguyen* 2018 WL 2182633, at *6 (plaintiff "will [] not be unduly prejudiced or harmed by a delay in receiving monetary relief"). Plaintiffs also cannot point to any risk of harm the requested stay poses to evidence and discovery, given that fact discovery is nearly complete. *Cf. Frantz*, 2020 WL 8666386, at *3 (even where discovery is ongoing, a brief stay "minimally delay[ing] discovery" pending a

[7] If this motion is granted, either BANA or the parties jointly will notify the Court within seven (7) days of the issuance of the *Laboratory Corp.* opinion so that the Court can set a status conference to discuss lifting the stay and the effect of the opinion on class certification and subsequent proceedings.

relevant Supreme Court decision is appropriate). Plaintiffs thus face no harm from the brief stay requested here.

CONCLUSION

For the forgoing reasons, BANA respectfully requests that the Court grant this motion and stay all proceedings in this action, including the entering of an order on Plaintiffs' motion for class certification, pending the Supreme Court's decision in *Laboratory Corp*. BANA or the parties jointly will alert the Court within seven (7) days of the opinion's issuance, so that the Court can set a status conference.

Dated: February 7, 2025

Respectfully submitted,

By: <u>*s/ James W. McGarry*</u>

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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 7, 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 7, 2025 *s/ James W. McGarry*