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14 **UNITED STATES DISTRICT COURT**
15 **SOUTHERN DISTRICT OF CALIFORNIA**
16 **SAN DIEGO DIVISION**

17 IN RE: BANK OF AMERICA
18 CALIFORNIA UNEMPLOYMENT
19 BENEFITS LITIGATION

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

**DEFENDANT BANK OF
AMERICA, N.A.'S REPLY IN
SUPPORT OF 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

1 Bank of America, N.A. (“BANA”) moved to stay proceedings pending the
2 Supreme Court’s decision in *Laboratory Corp. of America Holdings v. Davis*, No.
3 24-0304, for basic reasons of judicial economy. *See* Dkt. No. 415 (“Mot.”). Plaintiffs’
4 opposition (“Opp.,” Dkt. No. 427) misconstrues the standard for a stay, ignores all
5 possible outcomes in *Laboratory Corp.*, further ignores the undisputed record
6 evidence of putative class members who plainly lack standing under Article III, and
7 instead focuses on irrelevant factual distinctions between this case and *Laboratory*
8 *Corp.* Plaintiffs also misstate the length and definition of the requested stay, and
9 severely overstate the harm associated with briefly delaying the receipt of *additional*
10 payments above and beyond the remedial and compensatory monies BANA has
11 already paid. For these reasons, and those in the Motion, the Court should stay
12 proceedings in this matter pending the Supreme Court’s decision in *Laboratory Corp.*

13 **I. Plaintiffs Ignore the Likely Impact of *Laboratory Corp.***

14 As an instant matter, Plaintiffs mischaracterize and overstate the standard for
15 a *Landis* stay, arguing that BANA must demonstrate that “this case and [*Laboratory*
16 *Corp.*] are factually and legally similar in all material respects.” Opp. at 5–6. The
17 relevant question under *Landis* is simply whether a stay will simplify the issues
18 before the Court, which courts assess by considering whether “the two cases factually
19 and/or legally overlap.” *United Specialty Ins. Co. v. Bani Auto Grp. Inc.*, 2018 WL
20 5291992, at *6 (N.D. Cal. 2018); *see also Lockyer v. Mirant Corp.*, 398 F.3d 1098,
21 1110 (9th Cir. 2005) (among the “competing interests” to be weighed in considering
22 a *Landis* stay is “the orderly course of justice measured in terms of the simplifying
23 or complicating of issues, proof, and questions of law”) (quoting *CMAX, Inc. v.*
24 *Hall*, 300 F.2d 265, 268 (9th Cir. 1962)).

25 Against this standard, the Supreme Court’s decision in *Laboratory Corp.* is
26 certain to inform on the key issue underlying Plaintiffs’ motion for class
27 certification—whether, and to what extent, a class can be certified if it includes
28 uninjured members. *See* Mot. at 5–8. Plaintiffs’ position that “nothing but

1 speculation” suggests that the Supreme Court’s ruling in *Laboratory Corp.* will affect
2 this case (Opp. at 6) is simply untrue. The Court granted *certiorari* to answer a
3 question that will determine whether the legal standard the Ninth Circuit announced
4 in *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651
5 (9th Cir. 2022), is correct. This Court expressly based its tentative order on *Olean*.
6 So there is nothing “speculative” about the notion that *Laboratory Corp.* will control
7 here, whatever its outcome.

8 Plaintiffs concede that there are a “range of possible outcomes” in *Laboratory*
9 *Corp.* (Opp. at 6), but they say nothing about the “possible outcomes” that would
10 preclude certification of their class, or at least require the Court to reassess Plaintiffs’
11 arguments for certification against a different standard than the one the Court applied
12 in its tentative order.

13 Critically, Plaintiffs have no response at all to the fact that one way the
14 Supreme Court could decide the question before it is to embrace the strict
15 interpretation of Article III adopted by the Second and Eighth Circuits, where “no
16 class may be certified that contains members lacking Article III standing.” *Denny v.*
17 *Deutsche Bank AG*, 443 F.3d 253, 263 (2d Cir. 2006); *see also Johannesson v.*
18 *Polaris Indus. Inc.*, 9 F.4th 981, 987 (8th Cir. 2011) (“If members who lack the ability
19 to bring a suit themselves are included in a class, the court lacks jurisdiction over
20 their claims.”). Such a decision would preclude certification of Plaintiffs’ putative
21 class here, and that preclusion of a class action would obviously “simplify[] issues”
22 before the Court. *Lockyer*, 398 F.3d at 1110.

23 Plaintiffs claim that BANA “has not presented any evidence that any of the
24 class members present any indicia of fraud” such that they lack standing (Opp. at 9),
25 but this assertion is demonstrably false. BANA’s class certification brief cited
26 multiple examples of individuals identified as putative class members by Plaintiffs’
27 own expert who engaged in fraudulent conduct, including uncontested evidence that
28 these individuals themselves made the ATM transactions that they later reported to

1 BANA as unauthorized. *See* Dkt. No. 349 at 19–23. BANA’s Motion further set forth
2 evidence that many more fraudsters than those explicitly highlighted in its class
3 certification brief are included in the proposed class. *See* Mot. at 3. The record
4 demonstrates that Plaintiffs’ putative class contains *some number* of fraudsters as the
5 most dramatic examples of individuals who lack Article III standing.¹ Plaintiffs do
6 not dispute this. Plaintiffs’ response to BANA’s showing was *not* that these people
7 do not exist, but rather that the number of them is low enough that their inclusion in
8 the class does not create “any realistic possibility that individualized inquiries into
9 class member injury will predominate at trial.” Opp. at 8. It is theoretically possible
10 that the Supreme Court will decide *Laboratory Corp.* in a way that will let Plaintiffs
11 obtain class certification on this basis. But it is also possible that it won’t. *See*
12 Petitioner’s Reply to Brief in Opposition, at 2 (identifying a “divergence [] across
13 some circuits that frame the issue of uninjured class members through the lens of
14 Article III and those that view the issue of uninjured class members through the prism
15 of Rule 23(b)(3) predominance”) (cleaned up).

16 There are myriad possible outcomes in *Laboratory Corp.* The petitioners are
17 asking the Supreme Court to overrule *Olean*. If the Court does so, in whole or in part,
18 this Court would need to reassess class certification against whatever legal standard
19 takes its place. There is only *one* possible outcome that would have no effect at all
20 on this case. That would be a full adoption by the Supreme Court of the *Olean*
21 standard with no further explication on how it might be applied. The *certiorari* grant
22 itself is reason to suspect this is not the likeliest of all possible outcomes. The
23 question in *Laboratory Corp.* as to the permissibility of uninjured persons in a class
24 under Article III and Rule 23(b)(3) is a request to overturn relevant, binding Circuit
25 law. The Supreme Court’s answer to the question presented will not be limited to the

26 ¹ Plaintiffs’ reliance on *In re Morning Song Bird Food Litig.*, 320 F.R.D. 540 (S.D.
27 Cal. 2017) is misplaced. *See* Opp. at 8. There, the court denied the stay because there
28 was no evidence that there were uninjured members in the class. *Morning Song*, 320
F.R.D at 545. In contrast, here, Plaintiffs cannot seriously dispute that their class
includes some number of class members who lack standing.

1 facts of *Laboratory Corp.*, but will be instructive for any pending and future class
2 actions where the issue of uninjured class members is in dispute, including this one.
3 Given this, it is not mere “speculation” that *Laboratory Corp.* will “likely provide
4 this Court with substantial guidance, if not new law, that will materially impact the
5 Court’s decisions in this matter.” *Skulevold v. SD&A Teleservices, Inc.*, 2020 WL
6 771834, at *6 (C.D. Cal. Nov. 18, 2020) (granting stay).

7 Indeed, proceeding with class certification now, based on the *Olean* standard
8 cited in the tentative order, when there is a significant chance that the *Olean* standard
9 will be overruled or modified, would introduce needless confusion and inefficiency
10 to this already complex case. If the Court issues a class certification order now, it will
11 trigger Plaintiffs’ obligation to provide notice to the class. *See* Fed. R. Civ. P.
12 23(c)(2)(B). If any further class proceedings occur following the Supreme Court’s
13 decision in *Laboratory Corp.*, there will likely need to be supplemental or corrective
14 notices that will be confusing to the class and create unnecessary work for the parties
15 and the Court, at a minimum. The high potential for class confusion, and the brief
16 duration of the requested stay, weigh in favor of postponing class certification—and
17 the resulting notice—until after the Supreme Court’s decision.

18 Plaintiffs’ long recitation of differences between the factual record here and in
19 *Laboratory Corp.* misses the point. *See* Opp. 7–8. Whatever factual differences exist
20 between this case and *Laboratory Corp.* are irrelevant. The single legal issue before
21 the Supreme Court is whether the *Olean* standard that the Ninth Circuit applied in
22 that case—and that this Court is set to apply here—is a correct interpretation of
23 Article III and/or Rule 23(b)(3). Should the *Olean* standard be overturned or
24 modified, this Court will be required to reconsider its tentative decision on class
25 certification. For this reason, Plaintiffs’ citation to *Wolf v. Carpenter Hazlewood*
26 *Delgado & Bolen LLP* (Opp. at 7) does not help them. There, the court declined to
27 issue a stay pending the Supreme Court’s resolution of *TransUnion LLC v. Ramirez*
28 because it determined that the case before it was governed by a different Ninth Circuit

1 ruling than the one being challenged at the Supreme Court. *See Wolf*, 2021 WL
2 487889, at *2 (D. Ariz. Feb. 10, 2021). As discussed above, Plaintiffs and this Court
3 both rely explicitly on *Olean*, which the Supreme Court is poised to review.

4 As a final backstop to BANA’s arguments on judicial economy and efficiency,
5 Plaintiffs incorrectly argue that this case will be unaffected by *Laboratory Corp.*
6 because even “under the standard articulated by the petitioner in [*Laboratory Corp.*],
7 Plaintiffs have met their burden of showing class wide legal ‘injury.’” Opp. at 10. As
8 already noted, however, that is contrary to the arguments they made in urging the
9 Court to certify the class, and indeed contrary to the arguments Plaintiffs made three
10 pages earlier in the same brief, where they recognized the need for individual
11 inquiries into class member injuries and merely insisted those inquiries would not
12 predominate. Opp. at 8. Regardless, Plaintiffs’ certification motion relied on the
13 *Olean* standard, not on “the standard articulated by the petitioner” in *Laboratory*
14 *Corp.* See Dkt. No. 324 at 15–16; Dkt No. 378 at 2–3, 14–15, 22–24. And their
15 Opposition further notes that Ninth Circuit cases “such as *Olean* . . . remain the law
16 and are controlling.” Opp. at 7. The tentative order indicates that the Court is set to
17 apply *Olean* in deciding this question here, not some other standard that the Supreme
18 Court may adopt in *Laboratory Corp.* See Tentative Order at 59. Thus, the question
19 whether Plaintiffs have met their burden under any alternative standard has not been
20 briefed by either party or addressed by the Court.²

21
22 ² In any event, Plaintiffs are wrong on the law about whether or not they have met
23 the burden articulated by the Petitioner in *Laboratory Corp.* EFTA does not, as
24 Plaintiffs suggest (Opp. at 9–10), create statutory and constitutional claims even in
25 the absence of an injury. *See TransUnion LLC v. Ramirez*, 594 U.S. 413, 426 (2021)
26 (“[T]his Court has rejected the proposition that a plaintiff automatically satisfies the
27 injury-in-fact requirement whenever a statute grants a person a statutory right and
28 purports to authorize that person to sue to vindicate that right.”) (internal quotations
omitted). Plaintiffs’ citation to *Merisier v. Bank of Am., N.A.* (Opp. at 10) is
particularly puzzling. The court there merely noted that certain provisions of EFTA
“that did apply to [plaintiff’s] claims” were “promptly complied with.” 688 F.3d
1203, 1210 n.10 (11th Cir. 2012). Nothing in the footnote Plaintiffs cite, or elsewhere
in the *Merisier* opinion, stands for the proposition that Plaintiffs can assert an injury-
in-fact under Article III based on alleged procedural violations of EFTA as to
fraudulently submitted claims.

1 Given the likely effect of any outcome in *Laboratory Corp.* on the class
2 certification decision in this case, the interests of judicial economy and efficiency
3 weigh in favor of a brief stay.

4 **II. Plaintiffs Misstate the Equities of the Requested Stay.**

5 Plaintiffs' arguments that the requested stay would be anything other than short
6 and definite are belied by the facts. The Supreme Court set *Laboratory Corp.* for oral
7 argument on April 29, 2025.³ Based on the Court's historical practices, it is nearly
8 certain that the Court will issue its opinion before the Term concludes at the end of
9 June 2025, only four months from now.⁴

10 Plaintiffs express concern about whether the stay would be extended if the
11 Supreme Court remands *Laboratory Corp.* to the Ninth Circuit. *See* Opp. at 11. These
12 concerns are overwrought. If a remand is required, it would mean the Supreme Court
13 has issued an opinion overturning or modifying the *Olean* standard on which the
14 Ninth Circuit's decision in *Laboratory Corp.* is based, and a brief delay to ensure that
15 the correct standard is applied is an obvious example of judicial efficiency. Plaintiffs
16 do not provide any reason that this Court would need to wait for the Ninth Circuit to
17 resolve the remanded appeal in *Laboratory Corp.* before applying the Supreme
18 Court's instructions to this case; BANA has not asked for that at this time, and has
19 expressly requested a stay only pending the issuance of the *Supreme Court's* opinion.
20 Plaintiffs' citation to *Yong v. I.N.S.* (Opp. at 13, n. 4) underscores that it is BANA's
21 request—not Plaintiffs' dramatic interpretation—that the Court must assess in
22 deciding whether the requested stay is appropriate. There, the Ninth Circuit rejected
23

24 ³ *See* Calendar of Oral Arguments for the Session Beginning April 21, 2025, available
25 at https://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalApril2025.pdf.

26 ⁴ *See e.g., Dep't of State v. Munoz*, 602 U.S. 899 (2024) (argued April 23, 2024,
27 decided June 21, 2024); *Starbucks Corp. v. McKinney*, 602 U.S. 399 (2024) (argued
28 April 23, 2024, decided June 13, 2024); *Moyle v. U.S.*, 603 U.S. 324 (2024) (argued
April 24, 2024, decided June 27, 2024); *Trump v. U.S.*, 603 U.S. 593 (2024) (argued
April 25, 2024, decided July 1, 2024).

1 a stay pending the resolution of a different appeal before it. *See* 208 F. 3d 1116, 1118
2 (9th Cir. 2000). Because the district court had stayed proceedings pending the
3 “resolution of the [related] appeal,” the Ninth Circuit found that the stay was too
4 indefinite, as it was not tied to the issuance of an opinion and would remain in effect
5 through a potential appeal of the related action to the Supreme Court *and* any
6 subsequent remand proceedings. *Id.* at 1119. By contrast, BANA does not seek a stay
7 pending the “resolution” of Laboratory Corp.’s appeal, but only pending the issuance
8 of the Supreme Court’s opinion in that case (*see* Mot. at 1, 10), which is almost
9 certain to happen within four months.

10 Plaintiffs also complain about “further delay injected into the proceedings”
11 (Opp. at 11–12), but fail to reconcile their own contribution to the delay so far via
12 repeated requests to extend discovery and time to prepare their motion for class
13 certification. For example, at Plaintiffs’ request, BANA agreed to two joint motions
14 to extend the deadline for Plaintiffs to file their motion for class certification,
15 extending their deadline for a total of approximately eight months, from January to
16 August 2024 (*twice* the amount of the time of the requested stay). *See* Dkt. Nos. 197,
17 274. And the second joint motion was agreed to only after Plaintiffs unilaterally
18 sought and obtained a second extension of their deadline to file their motion for class
19 certification over BANA’s strenuous objections. *See* Dkt. Nos. 226, 229. Plaintiffs
20 further ignore that *they* sought the multi-district consolidation that has caused this
21 case to move slowly from inception, again, over BANA’s objection. *See In re Bank*
22 *of Am. Cali. Unemployment Benefits Litig.*, MDL No. 2992, Dkt. No. 54 (J.P.M.L.
23 June 4, 2021). The fact that Plaintiffs have made choices that have had the result of
24 prolonging the path of this case towards trial is no reason not to grant the brief
25 requested stay in the interest of judicial economy here.

26 Further, Plaintiffs fail to address BANA’s argument that there is no clear
27 prejudice from delaying additional relief here given that, as defined, the class consists
28 of people who have *already been reimbursed* for their unauthorized transaction

claims and who have *already received additional compensation* in a manner approved by two different federal regulators. Mot. at 9. Instead, Plaintiffs make empty references to the “economic vulnerabilities” of the class and the apparent “urgency” of these claims (Opp. at 12–13), without acknowledging that what is being “delayed” here is limited to Plaintiffs’ claimed entitlement to treble and punitive damages, not remedial measures. *See* Mot. at 9; *see also Vasquez v. Allstate Ins. Co.*, 2008 WL 2518734, at *1 (E.D. Wash. June 20, 2008) (noting that “statutory treble damages are essentially punitive damages”); *Morris v. Parke*, 573 F. Supp. 1324, 1326 (C.D. Cal. 1983) (“Of the numerous functions commonly attributed to punitive damages, the two most frequently named are *punishment* and *deterrence*,” not remediation or compensation.) (emphasis in original). Plaintiffs cannot seriously claim that a delay in effectuating a punitive remedy against BANA by four months will “cause enormous hardship to [putative] class members” (Opp. at 13), who have already been made whole. Indeed, none of their cited cases support such a proposition.⁵

⁵ In *Behar v. Northrup Grumman Corp.* (Opp. at 12), the relief requested went beyond money damages, and related to the release of toxic chemicals near class members’ homes. *See* 2024 WL 5275027, at *1 (C.D. Cal. Dec. 3, 2024) (harm to defendant is outweighed by “the need for class members to receive clear and prompt notice of the *relevant environmental* issues raised in this action”) (emphasis added). In *D.C. ex re. Garter v. County of San Diego* (Opp. at 11), the court was concerned about the impact of a delay on the ability to provide notice to class members exposed to the defendants’ allegedly illegal conduct over the span of *twenty years*. *See* 2017 WL 1365693, at *3 (S.D. Cal. Apr. 14, 2017). By contrast, the conduct here occurred only a few years ago, and over the span of only nine months, and any risk of any present contact information growing stale is significantly lower given the short nature of the stay requested. And in Plaintiffs’ remaining cases, the courts denied the stays as contrary to judicial efficiency and economy, *not* solely due to prejudice suffered by non-movants from delayed money damages. *See Dowkin v. City & Cnty. of Honolulu*, 2014 WL 4904952, at *7 (D. Haw. Sept. 30, 2014) (denying stay where the relevant appeal “[did] not present any . . . legal issues that will control the result of the instant case”); *Campbell v. Pricewaterhouse Coopers, LLP*, 2008 WL 2345035, at *2 (E.D. Cal. June 5, 2008) (denying stay of class notice based on potential consolidation because “consolidation is a purely ministerial act” and “would not affect the scope of the class that had already been certified.”). As described *supra*, the judicial efficiency and economy interests in this case weigh heavily in favor of granting the stay.

1 Finally, Plaintiffs contend that BANA has failed to show it would face
2 sufficient hardship if the stay is denied. *See Opp.* at 13–14. But the Court’s discretion
3 under *Landis* is not guided by the establishment of some threshold of harm alone, but
4 rather in part by demonstration that the balance of equities tilts in the movant’s favor.
5 *See Lockyer*, 398 F.3d at 1112 (analyzing the “balance of hardships between the
6 parties”); *see also Wolf v. Lyft, Inc.*, 2015 WL 4455965, at *2 (N.D. Cal. July 20,
7 2015) (granting stay despite finding that factor of “hardship or inequity” to moving
8 party did not weigh in favor of the stay under *Landis*). Further, BANA is only
9 required make out a “clear case of hardship or inequity” where “there is even a fair
10 possibility that the stay . . . will work damage to some one else.” *Lockyer*, 398 F.3d
11 at 1110 (quoting *Landis*, 299 U.S. at 255). Plaintiffs have not shown that a delay in
12 receiving their claimed treble damages constitutes prejudice, so on balance, the
13 equities favor a stay.

14 In any event, courts in the Ninth Circuit have held that the burden of
15 proceeding with motion practice and trial preparation in this scenario is sufficient to
16 justify a stay. *See e.g., Goro v. Flowers Foods, Inc.*, 2020 WL 804841, at *3 (S.D.
17 Cal. Feb. 2020) (granting stay where movant faced possibility of “unnecessarily
18 expending resources engaging in motion practice and planning and preparing for trial
19 based on the wrong standard”) (internal quotations omitted); *In re Taco Bell Wage*
20 *and Hour Actions*, 2011 WL 3846727, at *4 (E.D. Cal. Aug. 30, 2011) (same). In the
21 next four months before the Supreme Court issues its opinion in *Laboratory Corp.*,
22 the applicable case schedule requires the parties to complete expert discovery (by
23 April 25, 2025), and file all dispositive and pretrial motions (by May 28, 2025). Dkt.
24 417. It makes no sense for either party to invest significant resources in these
25 workflows without the benefit of the Supreme Court’s views on the key issue of
26 whether Plaintiffs’ class can even be certified as defined.

1 Plaintiffs do not sufficiently rebut BANA's arguments that the balance of
2 equities between the parties tips in its favor, and that, together with the interests of
3 judicial efficiency and economy, warrants the requested stay.

4 **CONCLUSION**

5 For the foregoing reasons and the reasons set out in its Motion, BANA
6 respectfully requests that the Court grant its motion and stay all proceedings in this
7 action, including the entering of an order on Plaintiffs' motion for class certification,
8 pending the Supreme Court's decision in *Laboratory Corp.*⁶ BANA or the parties
9 jointly will alert the Court within seven (7) days of the opinion's issuance, so that the
10 Court can set a status conference.

11 Dated: February 28, 2025 Respectfully submitted,

12
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27 ⁶ BANA maintains that the current expert discovery deadlines should be stayed to
28 prevent costly and potentially unnecessary work that may need to be revised in light
of the Supreme Court's decision. At a minimum, the Court should stay or extend all
deadlines in the matter other than the expert deadlines, including the current pretrial
motion deadline, because the Court's application of the forthcoming decision in
Laboratory Corp. will necessarily impact arguments and evidence that may be
presented at summary judgment. See *Poe v. Nw. Mut. Life Ins. Co.*, 2023 WL
4695898, at *3 (C.D. Cal. July 11, 2013) ("district courts generally do not grant
summary judgment on the merits of a class action until the class has been properly
certified and notified") (internal quotations omitted). Indeed, it makes little sense for
the parties to move for summary judgment before the standard governing certification
is announced less than a month after the current May 28, 2025 pre-trial motion
deadline. Plaintiffs cannot seriously argue that the putative class members—each of
whom has already been more than fully compensated for any alleged harm—would
be unfairly prejudiced by such a brief extension.

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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 28, 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 28, 2025

s/ James W. McGarry