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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SAN DIEGO DIVISION

IN RE: BANK OF AMERICA CALIFORNIA UNEMPLOYMENT BENEFITS LITIGATION	Case No. 3: 21-MD-02992-GPC-MSB **DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR CLASS DECERTIFICATION** Date: August 28, 2026 Time: 1:30 p.m. Ctrm: 12A – 12th Floor Judge: Hon. Gonzalo P. Curiel FILED PROVISIONALLY UNDER SEAL PURSUANT TO STIPULATED PROTECTIVE ORDER

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Last June, this Court certified several classes comprised of 109,414 EDD benefits cardholders alleging that Bank of America improperly denied their disputes of allegedly unauthorized ATM transactions. In opposing class certification, Bank of America showed that any damages award to these classes would *necessarily* result in cash payments to criminal fraudsters, including [redacted]

[redacted] ECF 350-8 ¶¶ 13–14.

The second group of criminals could not be identified by Bank of America at all, because the information necessary to investigate eligibility fraud for EDD benefits resided (and still resides) with the government authorities that actually qualify the benefits recipients and the recipients themselves—not with Bank of America. But we do know that there are a whole lot of them. California estimated over $32 billion was stolen by fraudulent benefits claimants in what it called a "criminal assault on the benefits system." ECF 349 at 1. The Department of Labor (DOL) estimated that more than a third of Pandemic Unemployment Assistance benefits claims were fraudulent, amounting to losses as high as $400 billion. *Id*. at 6. As to who, exactly, those criminals are, Bank of America informed the Court in its original opposition to class treatment:

> Applications and other eligibility information reside with EDD, and EDD still hasn't managed to sort it all out—as shown by the fact EDD is still retroactively disqualifying many cardholders each month. Criminal investigations continue, even with the pandemic and prepaid program behind us. The federal government concedes it has no way to assess whether or not the million or more people who defrauded EDD have or ever will be caught.

Id. at 36 (citations omitted), *see also* Declaration of Laura G. Brys (Brys Decl.), Ex. 1 at 11, 17–18 (Jan. 17, 2025 Hr'g Tr.). Thus, "EDD continue[s] to identify fraudsters in Plaintiffs' proposed classes years after the fact as investigations progress." *Id.* at 1.

The Court found that Plaintiffs had established predominance for class-certification purposes because "[t]here is no evidence that many unearthed fraudulent claims will arise." ECF 494 at 57–58. And Plaintiffs had based their class-certification motion on the notion that Bank of America had *already* identified every case of eligibility fraud. But that wasn't true. Bank of America never investigated (and *could* not investigate) unemployment insurance (UI) benefits eligibility fraud. And it could learn about new cases of eligibility fraud on any given day.

That day has come. As Bank of America recently informed the Court (*see* ECF 723, 723-1),[1] on May 8, 2026, [redacted]

And like the claims fraud examples, this only scratches the surface of the full extent of the eligibility fraud pervading the certified classes. [redacted]

[1] A newer Declaration of Jennifer Lennon addressing further developments since her May 19, 2026 Declaration (ECF 723-1) is concurrently filed in support of this Motion (Lennon Decl.).

[redacted]

This Court's reaction to these sobering data points was appropriate: [redacted] the Court remarked. Brys Decl., Ex. 2 at 5 (May 21, 2026 Hr'g Tr.). And the solution couldn't be so simple as merely removing them from the classes. For one thing, that would require Plaintiffs to proffer (and the Court to certify) a completely new class definition. More fundamentally, resolving questions over exactly whom to remove would itself be a daunting exercise. "The easy case," the Court questioned Plaintiffs, "is the situation where a fraudster is identified; both sides agree that he is a fraudster, and he is gone." *Id*. at 15. But the "ongoing process" was likely to "identif[y] individuals who it is not that clean, and those are then the ones that Bank of America will say, 'We have the right to have the jury decide whether or not they are in fact a fraudster,'" requiring "enough mini trials where the predominance can no longer be found to exist with respect to these claims." *Id.*

That was the appropriate question to pose. "[A] class cannot be certified on the premise that [the defendant] will not be entitled to litigate its [] defenses to individual claims." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011). For the same reason, the certification of the classes here cannot stand. Bank of America *does* have the right to have a jury decide who among the [redacted] of likely fraudsters are indeed fraudsters.

And this issue is not a peripheral one—it is "central to the validity of each one of the claims." *Id*. at 350. It goes, first of all, to standing—which will be Plaintiffs' burden to prove. Criminal fraudsters who had no legal right in the first place to the funds in dispute cannot possibly claim an Article III injury from the temporary loss of access to those funds at issue here. But Supreme Court and Ninth Circuit precedent firmly establish that "*[e]very* class member must have Article III standing in order to recover individual damages," and so the Court may not "order relief to any uninjured plaintiff, class action or not," unless Plaintiffs carry their burden of making this showing. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021) (internal quotations omitted). Thus, if these criminals are *part* of a class, they must be "winnow[ed] out" from it. *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 (9th Cir. 2022) (internal quotations omitted).

Separately, Plaintiffs cannot litigate their claims without carrying their burden on the essential element of actual damages. At the recent hearing, Plaintiffs made much of the fact that Bank of America's pending summary-judgment motion does not "seek summary judgment as to its liability under EFTA. It challenges damages." Brys Decl., Ex. 2 at 7. That is not the winning argument Plaintiffs think it is, as it *confirms* the centrality of the damages disputes to this case, which make up [redacted] of the relief Plaintiffs seek on behalf of the classes (excluding an alternative claim for a $500,000 EFTA penalty), [redacted]

That is not "a de minimis number." ECF 494 at 59. The resulting mini-trials would necessarily predominate. But they wouldn't necessarily be *mini*-trials. An adjudication of criminal fraud calls for a full-blown trial. And there is no way around them. Plaintiffs have never proposed any way to do this. Their best idea—which they concede is a "facile" one—is to postpone the winnowing-out exercise for *after* trial. Brys Decl., Ex. 2 at 16. But recent Ninth Circuit precedent, issued after the Court certified the classes (and after Bank of America moved for summary judgment), forecloses that idea. "*TransUnion* . . . requires unnamed members of a certified class for money damages to demonstrate standing at summary judgment," not merely "at the end of the life cycle of a class action" or "the time that individual money damages are awarded." *Healy v. Milliman, Inc.*, 164 F.4th 701, 705–06 (9th Cir. 2026).

Based on the new facts, and this new binding precedent, Bank of America respectfully submits that the winnowing-out process that would be required here warrants decertification of the classes.

BACKGROUND

A. The Department of Labor Benefits Fraud Investigation

On February 22, 2021, the Department of Labor's Office of Inspector General for Audit issued an Alert Memorandum informing the Department (and the public) that it had identified "$5.4 billion of potentially fraudulent UI benefits paid to individuals with social security numbers filed in multiple states, to individuals with social security numbers of deceased persons and federal inmates, and to individuals with social security numbers used to file for UI claims with suspicious email accounts" from March 2020 through October 2020.[2] It urged the Department "to take immediate action and increase its efforts to ensure [state workforce agencies] implement effective controls to mitigate fraud" and cautioned that it had "only capture[d] a subset of the potential fraudulent UI activities," and "expects that the actual amount of potential fraud is much larger." *Id*. at 1–2. It cited reports estimating that California had "paid at least 10 percent ($11 billion) of its UI benefits to fraudulent claims since the pandemic began and believes the amount could be as high as 27 percent ($29 billion)." *Id*. at 2.

Subsequent alerts continued ratcheting up the fraudulent payment estimates. On September 21, 2022, the DOL-OIG issued an alert stating its estimate of payments to potentially ineligible recipients now stood at $45.6 billion.[3] And it again warned

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[2] Brys Decl., Ex. 3 (*Alert Memorandum: The Employment and Training Administration (ETA) Needs to Ensure State Workforce Agencies (SWA) Implement Effective Unemployment Insurance Program Fraud Controls for High Risk Areas*, Report No. 19-21-002-03-315, at 1, U.S. Dep't of Labor, Office of Inspector General (Feb. 22, 2021), available at https://www.oig.dol.gov/public/reports/oa/2021/19-21-002-03-315.pdf).

[3] Lennon Decl., Ex. B (*Alert Memorandum: Potentially Fraudulent Unemployment Insurance Payments in High-Risk Areas Increased to $45.6 Billion*, Report No. 19-22-005-03-315, at 1 U.S. Dep't of Labor, Office of Inspector General (Sept. 21, 2022), available at https://www.oig.dol.gov/public/reports/oa/2022/19-22-005-03-315.pdf).

that this was only one small part of the full scope of the fraud. "Despite the OIG's continued efforts to identify potentially fraudulent payments to ineligible claimants," it stated, "we continue to experience delays in obtaining the needed UI data" from the state workforce agencies, "imped[ing] our ability to perform our statutory duty to effectively and timely conduct audits and investigations of the UI program." *Id*. at 2.

A January 30, 2026 alert from the DOL-OIG warned that state workforce agencies were continuing to fail at "fulfilling their programmatic responsibilities to prevent and detect improper payments," estimates of which had again risen considerably: "According to Inspector General Congressional Testimony, of the $888 billion in UI benefits, at least $191 billion could have been improper payments, including more than $76 billion paid to fraudsters."[4] The specific concern of the memorandum was a vast sum of unspent UI benefits still vulnerable to being "targeted by capable adversaries" or "escheated (surrendered) to state unclaimed property administrators, . . . further complicating potential overpayment recovery." *Id*. [redacted]—labeled in the memorandum as "Financial Institution 1"—was identified as one of four institutions still holding unspent funds in beneficiary accounts. *Id.* ¶ 4 & Ex. A at 3. The memorandum stated that the four institutions had been subpoenaed to produce records on "(1) all prepaid cards with remaining UI balances and (2) prepaid card balances already escheated to state unclaimed property administrators," and that [redacted] had complied with a records production in "late September 2025." *Id.*, Ex. A at 3. That production encompassed "more than 5 million prepaid card accounts" and over a billion dollars in affected funds, over $738 million of which had "not yet escheated." *Id*. at 3–4. The DOL-OIG found that the vast majority of that amount consisted of "potentially fraudulently obtained

[4] Lennon Decl., Ex. A (*Alert Memorandum: The Employment and Training Administration Needs to Ensure State Workforce Agencies Take Action to Recover Significant Unemployment Insurance Holdings Still Held by Financial Institution 1's Prepaid Card Program*, at 1–2, U.S. Dep't of Labor, Office of Inspector General (Jan. 30, 2026), available at https://www.oig.dol.gov/public/reports/oa/2026/50-26-001-03-315.pdf).

funds," totaling $714,626,297 across nearly 2.7 million prepaid card accounts, and across twelve state UI programs. *Id.* at 3–5; *see* Lennon Decl. ¶¶ 6, 12.

[redacted] The alert memorandum and subpoenas weren't concerned with clawing back fraudulent benefits payments that were already spent ([redacted]). They were concerned exclusively with funds *still held* in beneficiaries accounts at risk of escheatment and recently escheated funds that could still be recoverable from the respective state unclaimed-property agencies. [redacted]

[redacted]

Bank of America promptly notified the Court of this development with a May 19, 2026 Notice of New Evidence Concerning Class Members (ECF 723) supported by a declaration from Bank of America executive Jennifer Lennon [redacted] (ECF 723-1). The Court in response vacated a planned hearing on pending summary-judgment and *Daubert* motions to convene a status conference to address the effect of the Notice of New Evidence on the pending motions. ECF 725 at 1.

B. The May 21, 2026 Hearing

At the status conference, the Court, as noted, expressed that [redacted] and asked Plaintiffs' counsel to address it. Brys Decl., Ex. 2 at 5. Plaintiffs' response was to insist that "the bank has the burden of demonstrating that one or more of these class members should be excluded because they are, themselves, criminals," [redacted] *Id*. at 8, 12–13. Then Plaintiffs' counsel attempted to deflect from the merits and discredit the DOL-OIG investigation with *ad hominem* attacks, attributing it (without support) to "an effort by the [Trump] administration to find fraud committed in blue states" and asking, "[W]hy was all this triggered in January of 2026 by the then Secretary of Labor, Ms. Chavez-DeRemer? We don't know." *Id*. at 12.

That wasn't true, of course, however much the truth might have been obscured by Plaintiffs' just-asking-questions tactic. As set forth above, none of this was "triggered in January 2026"—it dates back at least as far as the DOL-OIG's original alert in February 22, 2021, under President Biden's administration, and its reports dating back to 2023 that hundreds of billions of UI funds were fraudulently obtained yet remained unrecovered. *See supra* n.2; ECF 590 (RJN 12 at 6, 22, 27).[5] And the DOL-OIG's focus is not on blue states, but on fraudulently obtained UI funds nationwide. [redacted][6]

The only thing new in January 2026 was the DOL-OIG's report on its efforts

[5] *See also OIG Oversight of the Unemployment Insurance Program*, U.S. Dep't of Labor, Office of Inspector General, available at https://www.oig.dol.gov/doloiguioversightwork.htm.

[6] Bank of America administered prepaid debit cards for UI in 12 states. [redacted]

to prevent the permanent loss of funds by escheatment. That was not "triggered" by former Secretary of Labor Chavez-DeRemer, either. The alerts came from the DOL-OIG. Federal OIG offices are independent of the agencies they oversee with independent leadership appointed "without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations." 5 U.S.C. § 403(a). [redacted] *See* Lennon Decl. ¶¶ 8, 14 & Exs. B & C.

Politics aside, the Court then questioned Plaintiffs' counsel how they proposed to handle the situation where "it is not that clean" who is a fraudster, where "Bank of America will say, 'We have the right to have the jury decide whether or not they are in fact a fraudster,'" with the result of "having enough mini trials where the predominance can no longer be found to exist with respect to these claims." Brys Decl., Ex. 2 at 15. Plaintiffs gave two responses. First, they said, "[t]he facile response is you can easily bifurcate a case like this and have any individual adjudications as to damages resolved later, once you determine the class-wide liability." *Id*. at 16. Second, they doubled down on the claim that "the bank has an affirmative burden that it doesn't satisfy merely by showing that there's a potential that certain class members are fraudsters." *Id*.

But that is not where the burden lies.

STANDARD OF LAW

Class-certification orders are "inherently tentative" procedural orders that "may be altered or amended" at any time "before entry of a final judgment." *Officers for Just. v. Civ. Serv. Comm'n of City & Cnty. of S.F.*, 688 F.2d 615, 633 (9th Cir. 1982); FED. R. CIV. P. 23(c)(1)(C). "The Court has a continuing duty to ensure compliance with class action requirements pursuant to Rule 23, and therefore may decertify a class at any time." *Ugas v. H&R Block Enters., LLC*, 2012 WL 5230297, at *2 (C.D. Cal. July 9, 2012). Motions to decertify are reviewed under "the same . . . standard used in evaluating a motion to certify; namely, whether the requirements of Rule 23 are met." *Cruz v. Dollar Tree Stores, Inc.*, 270 F.R.D. 499, 502 (N.D. Cal. 2010). "On a motion for decertification, the burden remains on the plaintiffs to demonstrate 'that the requirements of Rule 23(a) and (b) are met.'" *Ries v. Ariz. Beverages USA LLC*, 2013 WL 1287416, at *3 (N.D. Cal. Mar. 28, 2013) (quoting *Marlo v. UPS*, 639 F.3d 942, 947 (9th Cir. 2011)); *see also*, *e.g.*, *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 275 (2014) (plaintiff must "prove—not simply plead—that their proposed class satisfies each requirement of Rule 23").

ARGUMENT

[redacted] "[A] court must consider whether the possible presence of uninjured class members means that the class definition is fatally overbroad. When 'a class is defined so broadly as to include a great number of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct, the class is defined too broadly to permit certification.'" *Olean*, 31 F.4th at 669 n.14 (quoting *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 824 (7th Cir. 2012)). That is because the exercise of "winnow[ing] out" the uninjured cannot possibly occur without individual mini-trials where individual issues would predominate. *Id*. at 669. Plaintiffs' inability to propose any alternative requires decertification of their classes.

I. Plaintiffs cannot carry their Rule 23 burden with a fraud-infested class.

As this Court has recognized, the "plaintiff bears the burden of proving that the class meets all four requirements of Rule 23(a) . . . by a preponderance of the evidence." ECF 494 at 37 (citing *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 979–80 (9th Cir. 2011); *Olean*, 31 F.4th at 665). That does not, under current Ninth Circuit law, require them to prove that their class is *entirely* free of criminal fraudsters. But it *does* require Plaintiffs to prove that their class can be *made* entirely free of criminal fraudsters before trial. *See TransUnion*, 594 U.S. at 431; *Olean*, 31 F.4th at 669; *Healy*, 164 F.4th at 705 (holding that "the logic of *TransUnion* . . . requires unnamed members of a certified class for money damages to demonstrate standing at summary judgment"). Plaintiffs have neither done so, nor proposed any Rule 23-compliant *method* for doing so.

A. The burden of proof remains with Plaintiffs.

Plaintiffs' argument that "the bank has an affirmative burden that it doesn't satisfy merely by showing that there's a potential that certain class members are fraudsters," (Brys Decl., Ex. 2 at 16), is wrong and misconceived on multiple levels. The "affirmative burden" here rests with the Plaintiffs, not the bank. *See Ries*, 2013 WL 1287416, at *3. And the "potential that certain class members are fraudsters" is *exactly* the kind of showing that would impose on Plaintiffs the burden of proving that those class members can be identified and removed from the class with common evidence and no prospect of individualized inquiries predominating. *See*, *e.g.*, *Van v. LLR, Inc.*, 61 F.4th 1053, 1068–69 (9th Cir. 2023). As the Ninth Circuit explained in *Van*, once the defendant "invoked an individualized issue . . . and provided evidence that at least some class members lack meritorious claims because of this issue," "the spectre of class-member-by-class-member adjudication" required vacating class certification. *Id*. at 1069.

Plaintiffs appear to conflate the burden of proof applicable to Bank of America's affirmative defenses to the burdens of proof that fall on them when it comes to standing, actual damages, and class certification. It is true that the Court has held that Bank of America will carry the burden of proof on its EFTA defenses to Plaintiffs' liability claims if this case goes to trial. *See* ECF 494 at 46–47. But it is *not* true that Bank of America will need to carry the burden of disproving actual damages on Plaintiffs' damages claims. Supreme Court precedent, Ninth Circuit law, and EFTA itself are all clear: it is Plaintiffs' burden to prove their standing and "actual damages" to recover *any* monetary damages on behalf of the classes—including the EFTA treble damages that make up over [redacted] of the relief they seek. *See*, *e.g.*, *TransUnion*, 594 U.S. at 431 ("*plaintiff* must demonstrate standing") (emphasis added); *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1026 (9th Cir. 2011) ("*plaintiff must show* that the claimed actual damages were 'as a result of the violation'") (emphasis added), *abrogated on other grounds by Comcast Corp. v. Behrend*, 569 U.S. 27 (2013). And it is *not* true, as Plaintiffs contend, that "the bank has an affirmative burden" at the *certification* (or decertification) stage—much less that this "affirmative burden" extends to requiring Bank of America "to demonstrate who is in fact a criminal" at the certification stage (or at any other point before trial) in order to defeat Plaintiffs' liability case. Brys Decl., Ex. 2 at 8, 16. That is true for at least two reasons.

First is the principle that "a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its [] defenses to individual claims." *Wal-Mart*, 564 U.S. at 367. So, regardless *which* side has the burden of proof on one issue or another, the burden of showing that issue will not present predominating individual inquiries rests on Plaintiffs, *not* Bank of America. *See*, *e.g.*, *Brown v. DirecTV, LLC*, 562 F. Supp. 3d 590, 612 (C.D. Cal. 2021) ("And on a class certification motion, the Court does not necessarily have to assess the merits of the affirmative defenses to the underlying claim. It assesses whether common questions predominate, whether a class action is superior, etc. If [Defendant] did raise the statute of limitations defense at class certification, the question would not be whether the defense has merit, but whether it involves a common question for class adjudication.”). (Bank of America, as noted, will *never* have the burden to prove who is or is not a criminal to defeat Plaintiffs’ damages claims. It is indisputably Plaintiffs’ burden to establish “actual damages” under EFTA to recover any of the damages they seek. *See Stearns*, 655 F.3d at 1026.)

Second, the issue of which class members are criminal fraudsters does not merely implicate Bank of America’s EFTA statutory defenses. As this Court recognized when it ordered a stay of this case pending the Supreme Court’s ruling in *Lab’y Corp. of Am. Holdings v. Davis*, No. 24-0304, “criminals who defrauded the EDD with fraudulent benefits claims” have no Article III standing. ECF 448 at 5, 7. Plaintiffs effectively conceded the same, when they told the Court at the recent status hearing that “the existence or nonexistence of fraudsters is not a question of whether there’s a violation of EFTA. It is really a question of, what is the class size? Who does this affect? Who is in and who is out?” Brys Decl., Ex. 2 at 7. Consistent with this, *TransUnion* and *Olean* establish the least of what Plaintiffs must accomplish: “winnow out” the “non-injured subset of class members.” *Olean*, 31 F.4th at 669. And if they cannot propose some method for doing so that satisfies Rule 23 predominance, the class must be decertified. *See id.* at 668 (“When 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.”).

Plaintiffs cannot shift this burden *back* to Bank of America by arguing that Bank of America has not done enough at the current stage [redacted] As a threshold matter, “because ‘[Article III] presume[s] that federal courts lack jurisdiction unless the contrary appears affirmatively from the record,’ the party asserting federal jurisdiction when it is challenged has the burden of establishing it." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006) (quoting *Renne v. Geary*, 501 U.S. 312, 316 (1991). Bank of America has challenged the Article III standing of the criminals in this class and the consequent existence of subject-matter jurisdiction over their claims. That puts the burden on Plaintiffs to show who is injured, not on Bank of America to show who is not. And they must do it *now*, not merely "at the end of the life cycle" of the case. *Healy*, 164 F.4th at 705–06.

The constitutional issue aside, the same result follows by application of the standard Rule 23 burdens. The case of *Mabanta v. Prime Now LLC*, 2022 WL 1601415 (N.D. Cal. Feb. 28, 2022), is apropos. *Mabanta* was a wage-and-hour case alleging that Amazon workers were entitled to be paid for time spent scheduling their shifts. *Id.* at *1. The plaintiff proffered the workers' alleged entitlement to be "on the clock" while scheduling shifts as the common question purportedly justifying class treatment, but the defendants argued that the putative class necessarily included workers who *were* "on the clock" when they scheduled their shifts (and were therefore uninjured). *Id.* at *3-4. The plaintiff made precisely the same protest as Plaintiffs here: "Plaintiff submits that 'there is no reason or evidence to believe that any class member only scheduled shifts while on the clock'" and that "'defendants . . . have not pointed to one example of a class member that only scheduled shifts on the clock.'" *Id.* at *5 (brackets omitted). The Court rejected that argument, ruling:

> Plaintiff's assertions neglect that it is his burden, on a motion for class certification, to demonstrate compliance with Rule 23's requirements. As such, he, not defendants, must show 'that the class members have suffered the same injury.' He has not done so here. Thus, contrary to plaintiff's belief, it is not defendants' burden to disprove plaintiff's theory that class members commonly selected shifts off the clock.

Id. (quoting *Wal-Mart*, 564 U.S. at 349–50; citations omitted). It was immaterial that the defendant could not show *which* class members had no claim. It was sufficient for the defendant to establish that there were some. And the fact that there were some, coupled with the fact "it is impossible to know, without individual inquiries," who they were, defeated commonality and predominance. *Id*. (quoting *Heredia v. Eddie Bauer LLC*, 2020 WL 127489, at *1 (N.D. Cal. Jan. 10, 2020)) (decertifying class on the same ground).

Heredia is also instructive, especially given the decertification context. There, the plaintiff had achieved certification of a class of Eddie Bauer retail employees claiming a right to be "on the clock" during security inspections when they left the stores. 2020 WL 127489, at *1. The court had been satisfied that the existence and legality of an offending policy were common questions, and rejected Eddie Bauer's protests that the class included members who *had* been on the clock during security checks, because Eddie Bauer "presented the Court with 'no evidence of any of these "on-the-clock" employees.'" *Id*. at *2. But then the record "significantly developed." *Id.* Eddie Bauer had an expert capture video footage of 620 employee exits, 137 of which "captured all aspects of the exit inspection," including the security check and the employee's clocking out. *Id*. "Of those 137 fully-observed exits, 80.3% were on the clock." *Id*. The Court then decertified the class because "the class includes employees who did not suffer any harm or injury," and it was "impossible to know, without individual inquiries, which employees" were unharmed, even though it knew there were plenty. *Id*. at *5–6. Further, the record furnished no way to do those inquiries short of "ask[ing] each employee individually" about their experiences. *Id*. at *5. The Court concluded that "the jury would necessarily have to decide whether each employee experienced uncompensated exit inspections. Class actions are not appropriate where the resolution of the case would require numerous mini trials." *Id*. at *6.

The instant case is directly analogous, except that the record here is even more decisively in Bank of America's favor. Plaintiffs do not deny "that there's a potential that certain class members are fraudsters." Brys Decl., Ex. 2 at 16. Nor could they: [redacted]

[redacted] Plaintiffs insist the "affirmative burden" is on Bank of America to show which class members are fraudsters, and that Bank of America can't carry that burden [redacted] *Id*. at 16, 18. Plaintiffs are wrong on both counts.

"[I]t is not defendants' burden to disprove" class members' standing—it is Plaintiffs' burden to prove it. *Mabanta*, 2022 WL 1601415, at *5. And it is not the defendant's burden to "f[i]nd anyone obvious" who lacks an injury. *See Heredia*, 2020 WL 127489, at *5–6.[7] It is sufficient to show that the class includes some, even if it "impossible to know" who "without individual inquiries." *Id*. at *5. Bank of America has done that—and more. In *Mabanta* and *Heredia*, the defendants had no evidence specific to any class member, [redacted]

That is sufficient under Ninth Circuit law to defeat class certification. The defendant has no burden to demonstrate *which* class members must be removed from the class. It need only show that there are "at least some." *Van*, 61 F.4th at 1067. That "rais[es] the spectre of class-member-by-class-member adjudication of the issue." *Id*. "If the defendant provides evidence that a valid defense—affirmative or otherwise—will bar recovery on some claims, then the district court must determine, based on the particular facts of the case, whether individualized questions will overwhelm common ones and render class certification inappropriate." *Id*. (quoting *Olean*, 31 F.4th at 669; *Halliburton*, 573 U.S. at 276) (alterations omitted); *accord, e.g.*, *Hernandez v. WM Wholesale, LLC*, 2025 WL 2556591, at *2-3 (C.D. Cal. Aug. 18, 2025) (finding "the spectre of class-member-by-class-member adjudication" raised where defendant showed variances that "could significantly affect how the claims of

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[7] It is not true that Bank of America [redacted] the current motion is not based on those cases of claims fraud. [redacted]

various [class members] are resolved," even though "the applicability . . . to the core dispute has not been determined") (internal quotations omitted).

B. The need for [redacted] of individual mini- (or full trials) requires decertification.

Bank of America has provided evidence that constitutional standing defenses and statutory actual damages defenses bar recovery for [redacted] *See* Lennon Decl. ¶ 9 & Ex. D. Perhaps this evidence [redacted] will not *conclusively* resolve those claims, but it is, at the least, *evidence*—evidence that could only be parried (or corroborated) with *more* individual evidence, like written discovery, deposition, and cross-examination testimony. Perhaps those individual inquiries would show that the actual proportion of criminal fraudsters is less (or perhaps more). But it is already more than just "some," and it is more than "mere speculation." *Van*, 61 F.4th at 1068. [redacted] And Plaintiffs have proposed no way to litigate those cases with common evidence.

That is dispositive. In *Van*, the Ninth Circuit deemed the defendant's evidence of "13,680 discounts [] provided to class members" sufficient to show that "some class members [were] uninjured." *Id.* at 1069. Even though the evidence "consisted of only a small number of invoices, [it] was sufficient to prove that an inquiry into the circumstances and motivations behind each of the 13,680 discounts might be necessary," and that inquiry "could potentially involve up to 13,680 depositions and months of trial." *Id.* That was enough to warrant vacating the class certification order in *Van*. The evidence is far greater and stronger here [redacted], and would require [redacted] depositions and months of trial here.

Similarly, in *Bowerman v. Field Asset Servs., Inc.*, 60 F.4th 459 (9th Cir.

2023), the Ninth Circuit decertified a class on finding "the damages phase of this class action [] far messier than promised by plaintiffs' counsel when the case was certified," because "proof by the testimony of individual [class members] is necessary." *Id*. at 469 (alterations omitted); *see also*, *e.g.*, *Heredia*, 2020 WL 127489, at *5 (decertifying the class because identifying class members "who did not suffer any harm" required testimony from "each [class member] individually"). That is exactly the problem here. Plaintiffs cannot deny they will bear the burden to prove Article III standing and "actual damages" in order to recover the EFTA treble damages and other money damages that make up [redacted] of the relief they seek.[8] But Plaintiffs have offered no way to prove their standing and actual damages classwide without resorting to bifurcation and mini-trials that would descend into full-blown trials and require discovery and testimony from [redacted] of individual class members.

The necessary discovery and testimony by itself defeats predominance. Confronted with a scenario where statistical evidence indicated that "approximately ten percent of class members had not been injured," the First Circuit rejected the feasibility of relying on "testimony" from class members to satisfy predominance:

> The aim of the predominance inquiry is to test whether any dissimilarity among the claims of class members can be dealt with in a manner that is not "inefficient or unfair." Inefficiency can be pictured as a line of thousands of class members waiting their turn to offer testimony and evidence on individual issues. Unfairness is equally well pictured as an attempt to eliminate inefficiency by presuming to do away with the rights a party would customarily have to raise plausible individual challenges on those issues.

In re Asacol Antitrust Litig., 907 F.3d 42, 46–47, 51–52 (1st Cir. 2018) (citation omitted). The evidence here, of course, is more than just statistical. [redacted] But Plaintiffs have given the Court that same choice between inefficiency and unfairness. The first offends Rule 23. The second offends due process.

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[8] Without proof of actual damages, the most Plaintiffs can recover on behalf of their EFTA classes, if they prove their liability case, is the capped statutory penalty of $500,000. *See* 15 U.S.C. § 1693m(a)(2)(B).

This Court expressed the concern that "we are still left with generalities and the lack of something more individualized" [redacted]. Brys Decl., Ex. 2 at 32. [redacted] is already far more individualized and less generalized than the evidence courts have found sufficient to destroy the cohesion of a class in the above cases. *See also*, *e.g.*, *Brown v. Google, LLC*, 2022 WL 17961497, at *19 n.2 (N.D. Cal. Dec. 12, 2022) (finding that "Google's evidence . . . establishes that individual and subjective interactions require individualized inquiries" even though its "data is not connected to any particular class member, but general data that shows that class members have differing experiences"). [redacted] Lennon Decl. ¶ 13 & Ex. D.

Thus, this Court was correct to apprehend why the inefficient course of [redacted] of individual mini- or full-blown trials is unavoidable. There will be no "easy case" where "a fraudster is identified; both sides agree that he is a fraudster, and he is gone." Brys Decl., Ex. 2 at 15. [redacted], and they do not concede that any of them are "gone." Rather, they have proposed the mini-trial route. *See id*. at 16. And they have maintained that if these mini-trials "can prove actual fraud, then the person is out" of the class, because their "class definition expressly excludes class members who commit fraud." *Id*. at 8, 18. They consider that class definition "a mechanism in place" for ensuring that "fraudsters . . . are out of the class." *Id*. at 8. But it is not a "mechanism" that satisfies Rule 23 predominance.

There is, in fact, a name for such a "mechanism." It is called a fail-safe class, and it is unlawful in this Circuit (and most others). "A court may not . . . create a 'fail safe' class that is defined to include only those individuals who were injured by the allegedly unlawful conduct. 'Such a class definition is improper because a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment.'" *Olean*, 31 F.4th at 669 n.14 (quoting *Messner*, 669 F.3d at 825) (citation omitted).

The other problem is that the class definition is not actually a "mechanism" for removing *anyone* from the class. Class definitions are not self-executing. Defining uninjured cardholders out of the class does not actually accomplish it; it simply begs the question of *how* to identify the uninjured cardholders to remove from the class. And Plaintiffs still carry the burden of doing so without "individualized inquiries about such matters." *Olean*, 31 F.4th at 668. But as Plaintiffs admitted via their self-confessed "facile" proposal to "bifurcate [the] case . . . and have any individual adjudications as to damages resolved later," they have *no* mechanism for carrying their burden. Brys Decl., Ex. 2 at 16.

II. This Court did not, and cannot, certify a "bifurcated" class.

Plaintiffs' proposal to "bifurcate [the] case" implicitly invokes Rule 23(c)(4). They had previously made the suggestion in a footnote in their class-certification motion with no elaboration. *See* ECF 324-1 at 4 n.2. The Court did not accept the invitation then, and should not now.

Rule 23(c)(4) provides that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." That merely prompts the question of when it is "appropriate." *See*, *e.g.*, *Saavedra v. Eli Lilly & Co.*, 2014 WL 7338930, at *10 (C.D. Cal. Dec. 18, 2014) (noting that while "[t]he Ninth Circuit has approved the use of issue classes," "neither the Ninth Circuit nor the Supreme Court has established when certification of an issue class is appropriate"). The Ninth Circuit *has* established that "Rule 23(c)(4) certification is not a consolation prize" to be given regardless whether it "advance[s] the litigation as a whole." *Pennington v. Tetra Tech, Inc.*, 2024 WL 5213095, at *6 (N.D. Cal. Dec. 23, 2024). Nor is it a magic bullet for eliminating predominance problems on the premise that every individual issue can be dealt with separately. *See Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1229–30 (9th Cir. 1996) (vacating class-certification grant bifurcating liability issues from individual damages determinations because "the court did not discuss whether the adjudication of the certified issues would significantly advance the resolution of the underlying case, thereby achieving judicial economy and efficiency").

Thus, "a district court is not bound to certify a liability class merely because it is permissible to do so under Rule 23(b)(3). The language of Rule 23(c)(4) speaks of certifying as to particular issues 'when appropriate,' meaning that courts should use Rule 23(c)(4) only where resolution of the particular common issues would materially advance the disposition of the litigation as a whole." *Rahman v. Mott's LLP*, 2014 WL 6815779, at *9 (N.D. Cal. Dec. 3, 2014) (internal quotations and alterations omitted). A class trial on Plaintiffs' liability theories would not "materially advance the disposition of the litigation as a whole." The overwhelming majority of what Plaintiffs hope to recover here presupposes proof of standing and actual damages, and for the "disposition" of these issues to "advance," [redacted] of mini- or full-blown trials to determine class membership, injury, and Article III standing must still follow. *Rahman*, 2014 WL 6815779, at *9; *see also, e.g., Bowerman*, 60 F.4th at 470 (Ninth Circuit decertifying class because "proof by the testimony of individual [class members] is necessary" for damages); *Heredia*, 2020 WL 127489, at *5–6 (decertifying class because identifying class members "who did not suffer any harm" required testimony from "each [class member] individually"). And it would violate *Healy*'s rule that "the standing inquiry for unnamed class members" cannot "wait until the final stage of a damages action." 164 F.4th at 708.

And, lastly, Rule 23(c)(4) certification is not warranted just because a plaintiff asks for it. The burden is on Plaintiffs "to show that Rule 23(c)(4) certification was 'appropriate.'" *Reitman v. Champion Petfoods USA, Inc.*, 830 F. App'x 880, 882 (9th Cir. 2020). The "vague" suggestion that the "Court should reserve the question of how damages should be adjudicated until the liability phase is complete" does not carry that burden when doing so "would simply postpone [tens of thousands of] jury trials on damages, not eliminate the need for them." *D.C. ex rel. Garter v. Cnty. of San Diego*, 2018 WL 692252, at *3-4 (S.D. Cal. Feb. 1, 2018) (denying certification because "Plaintiff has not devised a plan to resolve this case after the liability phase"), *aff'd*, 783 F. App'x 766 (9th Cir. 2019). The same is true of the [redacted] of trials needed here.

III. This case cannot play out with common inquiries predominating.

"Under the predominance inquiry, a district court must formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case." *Herskowitz v. Apple, Inc.*, 301 F.R.D. 460, 469 (N.D. Cal. 2014) (internal quotation marks omitted). This is how standing issues will play out here.

Plaintiffs will argue, as they have, that the fact that [redacted] to all of the class members" is evidence that they all had an injury warranting compensation. Brys Decl., Ex. 2 at 16. And Bank of America will argue otherwise, as it has also done. Plaintiffs concede that "[t]here is a question as to the legal significance" [redacted]. *Id.* As Bank of America has shown, [redacted]. *See* ECF 349 at 3–5, 13–14. [redacted]. Bank of America "never attempted to sort out eligible benefits recipients from every person who defrauded EDD" because all the "eligibility information reside[s] with EDD" and the beneficiaries themselves, not the bank, "and *EDD* still hasn't managed to sort it all out—as shown by the fact EDD is still retroactively disqualifying many cardholders each month." *Id.* at 35–36. [redacted]

[redacted]

Plaintiffs will protest that it is too late, and this evidence should have been presented earlier. Bank of America will point out that the evidence did not exist until last month—[redacted]—and it doesn't matter anyway, because the Court "may decertify a class at any time." *Ugas*, 2012 WL 5230297, at *2. It is not Bank of America's fault that [redacted] and no justification to prejudice Bank of America just because material evidence arose later than might have been maximally convenient. More might still arise. [redacted], and on May 28, 2026, subsequent to the status conference, the DOL-OIG issued another fraud alert "assess[ing] that an opportunity exists . . . to[] ensure SWAs finalize and remit their fraud findings for all [BANA] UI prepaid card accounts" to the DOL. Lennon Decl. ¶¶ 4, 13; Brys Decl., Ex. 5.

Regardless, at this point, there is either no competent evidence of the suspected fraudsters' Article III standing (destroying the cohesion of the class, and warranting decertification on that basis alone), or there is *disputed* evidence of the suspected fraudsters' standing, with only a jury capable of deciding whom to believe—Plaintiffs, or Bank of America (and the DOL-OIG).

From there, perhaps the Court accepts Plaintiffs' proposal "to reopen discovery," so they "can respond factually" to the DOL-OIG's conclusions. Brys Decl. Ex. 2 at 6. If so, Bank of America would have the same opportunity in reopened discovery to adduce evidence supporting the DOL-OIG's conclusions as Plaintiffs would to seek evidence rebutting them. Disputes will inevitably follow about what written discovery and how many absent class member depositions Bank of America should be allowed to take.

Regardless, Bank of America will remain "entitled to litigate its [] defenses to individual claims"—if not through depositions, written discovery, and subpoenas, then at least at trial. *Wal-Mart*, 564 U.S. at 367. And if the testimony of individual class members will help resolve the factual dispute [redacted], then Bank of America will be entitled to take that testimony, [redacted]. *See Bowerman*, 60 F.4th at 470; *Asacol*, 907 F.3d at 51–52; *Heredia*, 2020 WL 127489, at *5–6. And the jury will be entitled to evaluate the plausibility of each suspected fraudster's story one-by-one. Whether this occurs in the course of a class trial, or after one, is immaterial. It will still have to occur, and the class portion would not "materially advance the disposition of the litigation as a whole" with all the individual hearings on standing still to come. *Rahman*, 2014 WL 6815779, at *9.

CONCLUSION

The Court certified Plaintiffs' claims for class treatment on the premise, argued by Plaintiffs, that Bank of America "has cited only a de minimis number of uninjured class members which does not defeat predominance." ECF 494 at 55. Bank of America disagrees, but even if that were so, the "de minimis" examples Bank of America cited last year were just that—examples, not exhaustive: the mere tip of the proverbial iceberg. Now, much more of the iceberg is in sight. [redacted], and the [redacted] more who will likely follow upon further investigation, are not a "de minimis" number, and the exercise of adjudicating which are criminal fraudsters cannot occur without individual inquiries predominating. Bank of America thus respectfully submits that the Court should de-certify the Plaintiff classes.

Dated: June 8, 2026

Respectfully submitted,

By: */s/ Sabrina M. Rose-Smith*__________

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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 June 8, 2026. 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: June 8, 2026 *s/ Sabrina M. Rose-Smith*

SABRINA M. ROSE-SMITH