

1 **UNITED STATES COURT OF APPEALS**

2
3 **FOR THE SECOND CIRCUIT**

4
5 August Term, 2015

6
7
8 (Argued: May 19, 2016 Decided: July 15, 2016)

9
10 Docket No. 15-2054

11
12 - - - - -X
13
14 JOSEPH MAZZEI, on behalf of himself
15 and all others similarly situated,

16
17 Plaintiff-Appellant,

18
19 - v. -

20
21 THE MONEY STORE, TMS MORTGAGE
22 INC., HOMEQ SERVICING CORP.,

23
24 Defendants-Appellees.*

25
26 - - - - -X
27
28 Before: KEARSE, WINTER, and JACOBS, Circuit
29 Judges.

30
31 Plaintiff-appellant Joseph Mazzei initiated a class
32 action against The Money Store et al., alleging, inter alia,
33 overcharge of late fees on mortgages, and prevailed in a
34 jury trial. The United States District Court for the

* The Clerk of Court is directed to amend the official caption in this case to conform to the listing of the parties above.

1 Southern District of New York (Koeltl, J.) (i) granted
2 defendants-appellees' post-verdict motion to decertify
3 (under Federal Rule of Civil Procedure 23(c)(1)(C)) a class
4 that was previously certified pursuant to Rule 23(a) and
5 (b)(3); and (ii) entered judgment in favor only of Mazzei,
6 the putative class representative.

7 We hold that a district court has power, consistent
8 with the Seventh Amendment and Rule 23, to decertify a class
9 after a jury verdict and before the entry of final judgment.
10 We also hold that, in considering such decertification (or
11 modification), the district court must defer to any factual
12 findings the jury necessarily made unless those findings
13 were "seriously erroneous," a "miscarriage of justice," or
14 "egregious." Applying these principles, we conclude that
15 the district court did not abuse discretion in determining
16 that Rule 23's requirements were not met and in decertifying
17 the class.

18 An accompanying summary order affirms the denial of
19 Mazzei's motion for a new trial as to a second claim.

20 Affirmed.

21 PAUL S. GROBMAN (Neal DeYoung,
22 Sharma & DeYoung, on the brief),
23 New York, New York, for
24 Appellant.

1 DANIEL A. POLLACK (Edward T.
2 McDermott, Anthony Zaccaria,
3 Minji Kim, on the brief),
4 McCarter & English, LLP, New
5 York, New York, for Appellees.
6

7 DENNIS JACOBS, Circuit Judge:

8 Plaintiff-appellant Joseph Mazzei initiated a class
9 action against The Money Store et al., alleging, inter alia,
10 overcharge of late fees on mortgages, and prevailed in a
11 jury trial. The United States District Court for the
12 Southern District of New York (Koeltl, J.) (i) granted
13 defendants-appellees' post-verdict motion to decertify
14 (under Federal Rule of Civil Procedure 23(c)(1)(C)) a class
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20 after a jury verdict and before the entry of final judgment.
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22 modification), the district court must defer to any factual
23 findings the jury necessarily made unless those findings
24 were "seriously erroneous," a "miscarriage of justice," or
25 "egregious." Applying these principles, we conclude that

1 the district court did not abuse discretion in determining
2 that Rule 23's requirements were not met and in decertifying
3 the class.

4 An accompanying summary order affirms the denial of
5 Mazzei's motion for a new trial as to a second claim.

6 Affirmed.

7
8 **BACKGROUND**

9 In 1994, Joseph Mazzei obtained a mortgage loan from
10 his employer, The Money Store. At that time, The Money
11 Store was a loan servicer and mortgage lender. Mazzei
12 missed payments on the loan for years beginning in late
13 1997, and received three notices of default in 1998. In
14 1999, The Money Store changed ownership, and Mazzei was laid
15 off. Soon after, The Money Store ceased originating loans
16 and became HomeEq Servicing Corp.

17 Early in 2000, The Money Store's servicing operator,
18 TMS Mortgage Inc., notified Mazzei that he was in default;
19 Mazzei's loan was "accelerated" (i.e., the entire sum of
20 principal and interest became due) and foreclosure
21 proceedings were begun. Mazzei avoided a foreclosure sale
22 by filing for bankruptcy, and ultimately paid the full

1 balance of the loan, with interest and various default fees.
2 These fees included, inter alia, attorney's fees, and ten
3 late fees of \$26.76 each--five of which were incurred after
4 acceleration.

5 Mazzei then sued The Money Store, TMS Mortgage Inc.,
6 and HomEq Servicing Corp. (collectively, "The Money Store")
7 for breach of contract, on behalf of a putative class,
8 challenging the imposition of post-acceleration late fees
9 (and attorney's fees²). Citing terms set forth in the
10 Fannie Mae form loan documents that Mazzei signed when the
11 mortgage loan was originated, Mazzei contended that the Note
12 contemplated the imposition only of *pre*-acceleration late
13 fees, and that the imposition of *post*-acceleration late fees
14 violated the agreement.

15 Mazzei achieved certification of the class, defined as:

16 All similarly situated borrowers who signed form
17 loan agreements on loans which were owned or
18 serviced by the defendants and who from March 1,
19 2000 to the present . . . were charged: (A) late
20 fees after the borrower's loan was accelerated,

² The attorney's fees claim is disposed of in a summary order issued simultaneously with this opinion. Mazzei also asserted claims under the Fair Debt Collection Practices Act ("FDCPA"), the Truth in Lending Act ("TILA"), and the Real Estate Settlement Procedures Act ("RESPA"), as well as a claim of unfair deceptive business practices under California statutory law; none of these additional claims went to trial, and they are not at issue on this appeal.

1 and where the accelerated loan was paid off ("Post
2 Acceleration Late Fee Class")

3 Order for Certification of Class Action, Mazzei v. Money
4 Store, No. 01-CV-5694 (JGK) (RLE) (S.D.N.Y. Jan. 29, 2013),
5 ECF No. 187; see also Mazzei v. Money Store, 288 F.R.D. 45,
6 56, 66-69 (S.D.N.Y. 2012).³

7 The class definition was later amended on consent to
8 exclude borrowers who signed loan mortgage agreements after
9 November 1, 2006, and (for administrative purposes) to close
10 on June 2, 2014. Order, Mazzei v. Money Store, No. 01-CV-
11 5694 (JGK) (RLE) (S.D.N.Y. June 3, 2014), ECF No. 267.

12 The certified class action eventually went to trial.
13 The jury returned a verdict in favor of Mazzei and the class
14 on the late fee claims. It awarded Mazzei \$133.80, and it
15 awarded the class approximately \$32 million plus prejudgment
16 interest. (The jury found in favor of The Money Store on
17 the remaining claims.)

18 After trial, and before the entry of judgment, The
19 Money Store moved for decertification of the class pursuant
20 to Federal Rule of Civil Procedure 23(c)(1)(C), or, in the

³ The district court declined to certify three additional potential classes that corresponded to three additional breach-of-contract theories. See Mazzei, 288 F.R.D. at 57-62.

1 alternative, the entry of judgment as a matter of law on the
2 class late fee claims pursuant to Federal Rule 50. The
3 class was composed of borrowers whose loans were *either*
4 *owned* by The Money Store (via origination or assignment) *or*
5 *serviced* by it. Both motions were based in relevant part on
6 Mazzei's failure to prove class-wide privity of contract
7 between The Money Store and those borrowers whose loans it
8 only serviced, and did not own. The district court agreed
9 that Mazzei's failure to prove privity with respect to such
10 absent class members defeated class certification on grounds
11 of typicality and predominance. The district court
12 therefore granted The Money Store's motion for
13 decertification of the class. Mazzei v. Money Store, 308
14 F.R.D. 92, 106-07, 109-13 (S.D.N.Y. 2015). The district
15 court also opined that it would have granted The Money
16 Store's motion for judgment as a matter of law if
17 decertification had not been appropriate. Id. at 113.
18 Judgment was entered for Mazzei on his individual late fee
19 claim.

20 Mazzei challenges the decertification⁴ on the grounds,
21 inter alia, that decertification is unavailable after a jury

⁴ Mazzei also appeals the district court's denial of Mazzei's motion for a new trial on the fee-splitting claim. See Mazzei, 308 F.R.D. at 100-06. We affirm that decision in an accompanying summary order.

1 verdict in favor of a certified class; that the findings
2 made to support decertification were incompatible with the
3 Seventh Amendment; and that the Rule 23 requirements for
4 class certification were satisfied. We affirm.

6 DISCUSSION

7 I

8 Federal Rule of Civil Procedure 23(c)(1)(C) provides
9 that “[a]n order that grants or denies class certification
10 may be altered or amended before final judgment.” Fed. R.
11 Civ. P. 23(c)(1)(C). Mazzei argues nevertheless that a
12 class may not be decertified after a jury verdict in its
13 favor because such decertification is tantamount to
14 overturning a jury verdict, for which the only procedural
15 avenue available is judgment as a matter of law under Rule
16 50(b); and decertification would violate the class members’
17 Seventh Amendment right to a jury trial.⁵

⁵ Defendants do not argue that these arguments are waived, although it is unclear that Mazzei raised them in the district court. In any event, because our waiver doctrine is “prudential, not jurisdictional, we have discretion to consider waived arguments, and we have exercised this discretion where necessary to avoid a manifest injustice or where the argument presents a question of law and there is no need for additional fact-finding.” Bogle-Assegai v. Connecticut, 470 F.3d 498, 504 (2d Cir.

1 class certification may be altered or amended before final
2 judgment."); Fed. R. Civ. P. 23(c)(1) advisory committee's
3 notes to 2003 amendment ("A determination of liability after
4 certification, however, may show a need to amend the class
5 definition. Decertification may be warranted after further
6 proceedings."); see also 7AA Wright et al., Federal Practice
7 & Procedure § 1785.4 (3d ed. 2016 update) ("Reference to the
8 final judgment [in Rule 23(c)(1)(C)] avoids a possible
9 ambiguity under the prior rule, making clear that after a
10 determination of liability it may be permissible to amend
11 the class definition or subdivide the class if it becomes
12 necessary in order to define the remedy or if
13 decertification is warranted.").

14 Indeed, because the results of class proceedings are
15 binding on absent class members, see Fed. R. Civ. P.
16 23(c)(3), the district court has the affirmative "duty of
17 monitoring its class decisions in light of the evidentiary
18 development of the case." Richardson v. Byrd, 709 F.2d
19 1016, 1019 (5th Cir. 1983) ("The district judge must define,
20 redefine, subclass, and decertify as appropriate in response
21 to the progression of the case from assertion to facts.");
22 see Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812

1 (1985) (“[T]he Due Process Clause of course requires that
2 the named plaintiff *at all times* adequately represent the
3 interests of the absent class members.” (emphasis added)).
4 The power to decertify a class after trial when appropriate
5 is therefore not only authorized by Federal Rule 23 but is a
6 corollary.⁷

7 **B**

8 The Seventh Amendment, which applies in federal court
9 proceedings, is not to the contrary. The Amendment has two
10 parts: The Trial by Jury Clause preserves a litigant’s
11 right to a jury trial in a subset of civil cases; the
12 Reexamination Clause provides that “no fact tried by a jury,

⁷ See also In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 141 (2d Cir. 2001) (concluding that district court did not abuse discretion in certifying class where it “specifically recognized its ability to modify its class certification order, sever liability and damages, or even decertify the class if such an action ultimately became necessary”), overruled on other grounds by In re IPO Sec. Litig., 471 F.3d 24 (2d Cir. 2006), and superseded by statute on other grounds as stated in Attenborough v. Constr. & Gen. Bldg. Laborers’ Local 79, 238 F.R.D. 82, 100 (S.D.N.Y. 2006); Boucher v. Syracuse Univ., 164 F.3d 113, 118 (2d Cir. 1999) (“[U]nder Rule 23(c)(1), courts are ‘required to reassess their class rulings as the case develops.’” (quoting Barnes v. Am. Tobacco Co., 161 F.3d 127, 140 (3d Cir. 1998))); Green v. Wolf Corp., 406 F.2d 291, 298 & n.10 (2d Cir. 1968) (Kaufman, J.) (a court should err on the side of certification because certification “is always subject to modification should later developments during the course of the trial so require” (quoting Esplin v. Hirsi, 402 F.2d 94, 99 (10th Cir. 1968))).

1 shall be otherwise re-examined in any Court of the United
2 States, than according to the rules of the common law.”
3 U.S. Const. amend. VII.

4 As to Mazzei, there is no Seventh Amendment issue at
5 all. Mazzei will receive damages on his individual claim in
6 the amount awarded him by the jury. And he has no
7 constitutional right to represent a class; whether he may do
8 so is purely a matter of Rule 23.

9 As to the class, there is no violation. The right of
10 absent class members to adjudication by jury is unimpaired.
11 Their claims survive by virtue of American Pipe tolling.
12 See American Pipe & Constr. Co. v. Utah, 414 U.S. 538
13 (1978). Under this rule, the filing of a putative class
14 action tolls the statute of limitations with respect to all
15 absent would-be class members until the time class
16 certification is denied. See American Pipe, 414 U.S. at
17 554; Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 353-54
18 (1983). Therefore, any putative member of the decertified
19 class who wishes to do so may file an individual action
20 seeking breach-of-contract damages on a similar claim (so
21 long as the individual action is instituted during whatever
22 amount of time remains in the limitations period). See
23 Crown, Cork & Seal, 462 U.S. at 347, 353-54.

1 The district court's decertification thus has the same
2 effect as would a grant of a motion for a new trial pursuant
3 to Federal Rule 59(a). The grant of such a motion does not
4 mean that there must be a new trial, or that there will be
5 one; it just means that there can be one if an individual
6 claimant chooses to continue pursuit of the claim. It is
7 beyond dispute that the grant of such a motion does not
8 violate the Seventh Amendment. See Gasperini v. Ctr. for
9 Humanities, Inc., 518 U.S. 415, 432-33 (1996); Byrd v. Blue
10 Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 539-40 (1958);
11 Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 250 (1940);
12 Raedle v. Credit Agricole Indosuez, 670 F.3d 411, 418 (2d
13 Cir. 2012); United States v. Landau, 155 F.3d 93, 104-06 (2d
14 Cir. 1998).

15 There are many procedural devices that impose "judicial
16 control on juries," Binder v. Long Island Lighting Co., 57
17 F.3d 193, 202 (2d Cir. 1995), abrogated in part on other
18 grounds in banc by Fisher v. Vassar Coll., 114 F.3d 1332,
19 1340 (2d Cir. 1997), and such controls are not only
20 compatible with the Seventh Amendment jury trial right, but
21 necessary to the institution. See Dagnello v. Long Island
22 R.R. Co., 289 F.2d 797, 805 (2d Cir. 1961) ("The jury does
23 not function alone, but in cooperation with the judge

1 presiding over the trial. . . . Without judicial supervision
2 over what Blackstone called the 'misbehavior' of juries, a
3 trial by jury would lack one of 'the essentials of the jury
4 trial as it was known to the common law before the adoption
5 of the Constitution.'" (footnotes omitted)). Permissible
6 controls include certain procedures that were "not in
7 conformity with practice at common law when the Amendment
8 was adopted." Gasperini, 518 U.S. at 436 n.20.

9 The right of absent class members to a jury trial is
10 protected, not impaired, by the Rule 23(c)(1)(C)
11 decertification procedure, which protects their due process
12 rights (and defendants') by ensuring that any class claim
13 that proceeds to final judgment--and thus binds them--is
14 fairly and appropriately the subject of class treatment.
15 See Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349 (2011)
16 ("Rule 23(a) ensures that the named plaintiffs are
17 appropriate representatives of the class whose claims they
18 wish to litigate."); Amchem Prods., Inc. v. Windsor, 521
19 U.S. 591, 621 (1997) ("Subdivisions (a) and (b) [of Rule 23]
20 focus court attention on whether a proposed class has
21 sufficient unity so that absent members can fairly be bound
22 by decisions of class representatives."); Shutts, 472 U.S.
23 at 812 (consistent with the Due Process Clause, absent class

1 members may be bound to a class judgment only if they are
2 adequately represented by the named plaintiffs); Hansberry
3 v. Lee, 311 U.S. 32, 42-43, 45 (1940) (same); see also supra
4 Part I.A.

5 **C**

6 Decertification in this case provokes a further
7 question: the power of the court to make the findings that
8 supported its ruling. Decertification was based on the
9 district court's determination that Mazzei had failed to
10 prove through class-wide evidence at trial that borrowers
11 whose loans were only serviced (not owned) by The Money
12 Store were nevertheless in a contractual relationship with
13 The Money Store. This factual question--whether Mazzei
14 proved that absent class members were in privity with The
15 Money Store--was both relevant to the (de)certification
16 motion *and* an element of the class's merits claim. And on
17 the merits, the jury obviously found that privity has been
18 established.

19 Normally, the district court resolves factual issues
20 related to class certification, making its findings based on
21 the preponderance of the evidence,⁸ even if they overlap

⁸ See Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc., 546 F.3d 196, 202-03 (2d Cir. 2008) (holding that the "preponderance of the evidence standard applies to evidence proffered to establish Rule 23's requirements").

1 with the merits of the case. See Amgen v. Conn. Ret. Plans
2 & Trust Funds, 133 S. Ct. 1184, 1195 (2013) (“Merits
3 questions may be considered to the extent . . . that they
4 are relevant to determining whether the Rule 23
5 prerequisites for class certification are satisfied.”);
6 Dukes, 564 U.S. at 351 (“Frequently that ‘rigorous [Rule 23]
7 analysis’ will entail some overlap with the merits of the
8 plaintiff’s underlying claim. That cannot be helped.”).
9 But such findings do not bind the trier of fact. In re IPO,
10 471 F.3d at 41. The question becomes: How does a jury’s
11 factual finding impact the district court’s decision about
12 whether decertification is appropriate or not?

13 We hold that when a district court considers
14 decertification (or modification) of a class after a jury
15 verdict, the district court must defer to any factual
16 findings the jury necessarily made unless those findings
17 were “seriously erroneous,” a “miscarriage of justice,” or
18 “egregious.” See Raedle, 670 F.3d at 418. This is the
19 standard that a district court applies to a Rule 59 motion
20 for a new trial on weight-of-the-evidence grounds; and we
21 conclude that it is appropriate in this context as well.⁹

⁹ The judge is permitted to “weigh the evidence and the credibility of witnesses and need not view the evidence in the light most favorable to the verdict winner,” but “should

1 As to questions of fact that are not necessarily decided by
2 the jury's verdict, the court can make its own factual
3 findings based on the preponderance of the evidence as is
4 usually done when making a determination about class
5 certification.

6 For the reasons discussed supra (Part I.B), the Seventh
7 Amendment is not violated by the district court's evaluation
8 of trial evidence in ruling on the procedural issue of
9 decertification. That is what trial judges do when
10 considering a motion for a new trial on the ground that the
11 verdict was against the weight of the evidence. See Landau,
12 155 F.3d at 106 (the Seventh Amendment does not prevent a
13 district court from "substitut[ing] its view of the evidence
14 for that of the jury, provided the judge is 'convinced that
15 the jury has reached a seriously erroneous result or that
16 the verdict is a miscarriage of justice'"). At the same
17 time, we have explained that the judge's power to do so is
18 in "tension" with the Seventh Amendment. Raedle, 670 F.3d
19 at 418; Landau, 155 F.3d at 105 (same). Given that
20 "tension" (here, with the Reexamination Clause), it is

rarely disturb a jury's evaluation of a witness's
credibility . . . simply because the judge disagrees with
the jury." Raedle, 670 F.3d at 418 (citations and internal
quotation marks omitted).

1 imprudent and likely improper to further relax the standard
2 by which a trial court may “substitute its view of the
3 evidence for that of the jury.” Landau, 155 F.3d at 106.
4 By respecting the jury’s work, the Seventh Amendment issue
5 is avoided.¹⁰ This approach makes full use of the work the
6 jury has already done; and it fits the post-trial procedural
7 scheme set forth in Federal Rules 50(b) and 59(a).

8 Mazzei argues that post-verdict decertification should
9 be constrained by the Rule 50 standard of “legally
10 insufficient evidence.” See Fed. R. Civ. P. 50(a)(1);
11 Galdieri-Ambrosini v. Nat’l Realty & Dev. Corp., 136 F.3d
12 276, 289 (2d Cir. 1998). That stringent standard is not
13 called for because (unlike the grant of a Rule 50 motion)
14 decertification does not resolve the claims of the class--
15 which withstand decertification and survive unimpaired. The
16 “seriously erroneous” formulation better comports with the
17 district court’s authority to manage the class action and to

¹⁰ See also 11 Wright et al., Federal Practice & Procedure § 2806 (3d ed. 2016 update) (“The judge’s power to set aside the verdict is supported by clear precedent at common law and, far from being a denigration or a usurpation of jury trial, has long been regarded as an integral part of trial by jury as we know it. On the other hand, a decent respect for the collective wisdom of the jury, and for the function entrusted to it in our system, certainly suggests that in most cases the judge should accept the findings of the jury, regardless of the judge’s own doubts in the matter.” (footnote omitted)).

1 protect the rights of absent class members, see, e.g., Fed.
2 R. Civ. P. 23(d), (e); it respects the trial court's
3 position as best-situated to evaluate class issues, see In
4 re Sumitomo Copper Litig., 262 F.3d 134, 139 (2d Cir. 2001)
5 (referring to Second Circuit's "longstanding view that the
6 district court is often in the best position to assess the
7 propriety of the class"); and it recognizes Rule 23's
8 explicit contemplation of post-merits decertification,
9 see Fed. R. Civ. P. 23(c)(1)(C).

11 II

12 A district court order granting or denying class
13 certification is reviewed for abuse of discretion. Myers v.
14 Hertz Corp., 624 F.3d 537, 547 (2d Cir. 2010). This
15 standard applies to the ultimate decision on class
16 certification and to rulings on each of the Rule 23
17 requirements. Id. A district court decision granting
18 certification is given greater deference than a decision
19 denying certification (or, a fortiori, an order decertifying
20 a class). See Johnson v. Nextel Commc'ns Inc., 780 F.3d
21 128, 137 (2d Cir. 2015) (citing Moore v. PaineWebber, Inc.,
22 306 F.3d 1247, 1252 (2d Cir. 2002)).

1 A plaintiff seeking certification of a Rule 23(b)(3)
2 damages class action has the burden to establish numerosity,
3 commonality, typicality, adequacy of representation,
4 predominance of common questions of law or fact, and the
5 superiority of a class action to other procedures. Fed. R.
6 Civ. P. 23(a), (b)(3); see Amgen, 133 S. Ct at 1191;
7 Teamsters Local 445, 546 F.3d at 202-03. In opposing the
8 decertification motion, Mazzei retained the burden to
9 demonstrate that these requirements were satisfied. See
10 Rossini, 798 F.2d at 596-600; cf. Rubinstein, Newberg on
11 Class Actions § 7:22 (5th ed. 2016 update) (when a defendant
12 moves for an order denying class certification, the burden
13 to prove compliance with Rule 23 remains with the
14 plaintiff).

15 The class included borrowers whose loans were *either*
16 owned or serviced by The Money Store. To prove a breach-of-
17 contract claim on its behalf, Mazzei was required to prove,
18 inter alia, that class members were in a contractual
19 relationship with defendants. See Diesel Props S.R.L. v.
20 Greystone Bus. Credit II LLC, 631 F.3d 42, 52 (2d Cir.
21 2011). The decertification was based on Mazzei's failure to
22 prove through class-wide evidence the existence of privity
23 between The Money Store and those class members whose loans

1 were serviced but not owned by it. This factual question
2 was relevant both to the merits of the class claim and to
3 the certification inquiry.

4 The jury found that privity was proven; the district
5 court found to the contrary, and determined that typicality
6 and predominance were therefore both lacking. As held supra
7 (Part I.C), the district court was required to defer to the
8 jury's finding of fact as to privity unless the finding was
9 "seriously erroneous," a "miscarriage of justice," or
10 "egregious." It is therefore significant that the district
11 court ruled in the alternative that the evidence for such a
12 finding was legally insufficient.¹¹ Having found the
13 evidence legally insufficient, the court a fortiori found
14 that the jury's finding was at least "seriously erroneous."

15 This was not an abuse of discretion. We also conclude
16 that the district court did not abuse discretion in

¹¹ Defendants moved in the alternative for judgment as a matter of law pursuant to Rule 50(b), and the district court explained that it would grant this motion were it to reach it. See Mazzei, 308 F.R.D. at 113 ("[D]efendants would be entitled to judgment as a matter of law on the claim on behalf of the Late Fee Class because of the 'complete absence of evidence' supporting a contractual relationship between the members of the Late Fee Class and the defendants." (quoting Galdieri-Ambrosini, 136 F.3d at 288-90)). In fact, the district court appears to have applied the Rule 50 standard in adjudicating the motion for decertification. See id. at 110-13.

1 determining that, given the failure of class-wide evidence
2 as to privity at trial, Rule 23(a) and (b)(3) requirements
3 were not satisfied and decertification was therefore
4 warranted.

5 **A**

6 To establish privity, Mazzei relies exclusively on
7 testimony by Adam Levitin, Mazzei's opening expert witness
8 concerning mortgages and mortgage securitizations, and the
9 single Pooling and Service Agreement ("PSA") introduced at
10 trial, which applied to Mazzei's 1994 loan.¹² Levitin
11 testified generally as to mortgages and securitizations,
12 described the life of a hypothetical loan issued to "Betty
13 Borrower," and (in the course of that testimony) opined that
14 the hypothetical servicer of the hypothetical borrower's
15 loan would be assigned rights to payment; and that if the
16 servicer did not credit those payments Betty Borrower could
17 sue the servicer for breach of contract. App'x 2787-89; see
18 also App'x 2792 (opining that "once you have delegated
19 duties under the contract, you have stepped into the shoes
20 of the original party to the contract").

¹² Mazzei's spoliation-based argument was not raised below and is therefore waived. See In re Nortel Networks Corp. Sec. Litig., 539 F.3d 129, 133 (2d Cir. 2008); see also Dist. Ct. Dkt. 497; App'x 5302-17.

1 Levitin also opined that the PSA for Mazzei's loan
2 (which was originated by a defendant entity in 1994) imposed
3 certain duties on the servicer (another defendant) in
4 connection with servicing the loan, including the power to
5 waive or modify the terms of the loan and to collect checks,
6 assess fees, etc. App'x 2804-05. Mazzei's PSA, Levitin
7 opined, was "typical" of the securitization industry, "not
8 an outlier deal." App'x 2811.

9 However, Levitin specifically conceded that he was
10 "expressing no opinion whatsoever on the defendants in this
11 case." App'x 2813; see also App'x 2807 (describing "the
12 role I've been asked to play here explaining the background
13 of how mortgage lending works today"). And there was no
14 other evidence linking Levitin's testimony about the
15 hypothetical borrower and about the mortgage and
16 securitization industries generally to the particular loans
17 of absent class members.¹³ We conclude that, given

¹³ Mazzei argues that The Money Store did not object to Levitin's testimony, and that testimony regarding industry custom and practice is admissible in breach-of-contract actions. See Br. of Appellant 48; Reply Br. 17 (citing cases). True; but the issue is whether the testimony (admissible or not) supported the jury finding that a contract existed between defendants and absent class members. See Cherry River Music Co. v. Simitar Entm't, Inc., 38 F. Supp. 2d 310, 319 & n.56 (S.D.N.Y. 1999) ("industry custom and usage . . . 'cannot create a contract where there has been no agreement by the parties'" (quoting

1 Levitin's disclaimer as to the particulars of the case, and
2 for substantially the reasons stated in the district court's
3 opinion, Levitin's testimony was not an impediment to the
4 court's conclusion that the jury's verdict was "seriously
5 erroneous," a "miscarriage of justice," or "egregious."¹⁴

6 **B**

7 "Rule 23(a) ensures that the named plaintiffs are
8 appropriate representatives of the class whose claims they
9 wish to litigate," Dukes, 564 U.S. at 349, by "effectively
10 'limit[ing] the class claims to those fairly encompassed by
11 the named plaintiff's claims,'" General Tel. Co. of Sw. v.
12 Falcon, 457 U.S. 147, 156 (1982) (quoting General Tel. Co.
13 of Nw. v. EEOC, 446 U.S. 318, 330 (1980)).

14 Typicality requires that "the disputed issue[s] of law
15 or fact occupy essentially the same degree of centrality to
16 the named plaintiff's claim as to that of other members of
17 the proposed class." Cardidad v. Metro-N. Commuter R.R.,
18 191 F.3d 283, 293 (2d Cir. 1999) (internal quotation marks

Stulsaft v. Mercer Tube & Mfg. Co., 43 N.E.2d 31, 33 (N.Y.
1942)) (citing cases)).

¹⁴ Since the Rule 59(a) standard applies in this context, we need not decide whether Levitin's generalized testimony was legally insufficient to support a jury finding that class members whose loans were not originated by (or expressly assigned to) The Money Store were in privity.

omitted), overruled on other grounds by In re IPO, 471 F.3d 24. One purpose of the typicality requirement is “to ensure that . . . ‘the named plaintiff’s claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.’” Marisol A. ex rel. Forbes v. Giuliani, 126 F.3d 372, 376 (2d Cir. 1997).

The Money Store did not deny its contractual relationship with class members (such as Mazzei) whose loans it owned; but it did dispute privity as to other class members. Whether borrowers whose loans were serviced but not owned by The Money Store were in fact in privity with The Money Store is an issue central to the claims of those class members. The issue is not central to Mazzei’s individual claim (a misalignment of interests that may be one reason for Mazzei’s failure to introduce sufficient evidence on their behalf). The district court’s post-trial ruling as to typicality was not an abuse of discretion.¹⁵

¹⁵ Mazzei argues for the first time on appeal that, if he was no longer “typical,” the court should have simply substituted a new class representative. This argument is waived for failure to raise it below. See In re Nortel Networks, 539 F.3d at 133; see also Dist. Ct. Dkt. 497; App’x 5302-17.

1 “The ‘predominance’ requirement of Rule 23(b)(3) ‘tests
2 whether proposed classes are sufficiently cohesive to
3 warrant adjudication by representation.’” Myers, 624 F.3d
4 at 547 (quoting Amchem, 521 U.S. at 623). “The
5 requirement’s purpose is to ‘ensure[] that the class will be
6 certified only when it would achieve economies of time,
7 effort, and expense, and promote uniformity of decision as
8 to persons similarly situated, without sacrificing
9 procedural fairness or bringing about other undesirable
10 results.’” Id. (quoting Cordes & Co. Fin. Servs., Inc. v.
11 A.G. Edwards & Sons, Inc., 502 F.3d 91, 104 (2d Cir. 2007)).
12 “Therefore the requirement is satisfied ‘if resolution of
13 some of the legal or factual questions that qualify each
14 class member’s case as a genuine controversy can be achieved
15 through generalized proof, and if these particular issues
16 are more substantial than the issues subject only to
17 individualized proof.’” Id. (quoting Moore, 306 F.3d at
18 1252).

19 A class-wide resolution to the privity question was not
20 possible because, without *class-wide* evidence that class
21 members *were* in fact in privity with The Money Store, the
22 fact-finder would have to look at every class member’s loan
23 documents to determine who did and who did not have a valid

1 claim. See Dukes, 564 U.S. at 351 (“What matters to class
2 certification . . . is . . . the capacity of a classwide
3 proceeding to generate common *answers* apt to drive the
4 resolution of the litigation. Dissimilarities within the
5 proposed class are what have the potential to impede the
6 generation of common answers.” (quoting Nagareda, Class
7 Certification in the Age of Aggregate Proof, 84 N.Y.U. L.
8 Rev. 97, 132 (2009))).

9 The district court identified the common questions
10 raised in the pleading: whether defendants charged post-
11 acceleration late fees and whether this breached the Fannie
12 Mae form agreement. It was “within the range of permissible
13 decisions” for the court to determine that these questions
14 did not predominate over the individual questions of whether
15 each class member was in a contractual relationship with
16 defendants. See Myers, 624 F.3d at 550-51 (affirming denial
17 of class certification for failure to demonstrate
18 predominance of common issues over individualized defenses).
19

20 III

21 “[O]rdinarily, if a court discerns a conflict . . . the
22 proper solution is to create subclasses of persons whose
23 interests are in accord.” Boucher v. Syracuse Univ., 164

1 F.3d 113, 118-19 (2d Cir. 1999) (quoting Payne v. Travenol
2 Labs, Inc., 673 F.2d 798, 812 (5th Cir. 1982)). Here,
3 however, there was no apparent basis on which the court or
4 the parties could have determined which members of the Late
5 Fee Class had loans that were owned by The Money Store, and
6 which had loans that were only serviced by The Money Store.
7 So decertification was appropriate rather than a narrowing
8 of the class definition or creation of subclasses.

9 Mazzei cites testimony that The Money Store originated
10 130,000 of the approximately 185,000 loans that were being
11 serviced by it in 2000, the beginning of the class period,
12 and speculates that the Late Fee Class's loans were among
13 these defendant-originated loans. There is no evidence at
14 all about which, if any, of these loans satisfied criteria
15 for membership in the class. Notably, The Money Store
16 stopped originating loans in 2001¹⁶; by 2003, The Money
17 Store was servicing approximately 380,000 loans; and the
18 class period extended into 2014. Over its full span of
19 years, the database contained over one million loans. It is
20 entirely unclear how many loans serviced by The Money Store
21 during the full class period were owned by it.

¹⁶ One example loan that Mazzei's database expert presented to the jury was originated in 2006--this loan could not have been originated by The Money Store.

1

CONCLUSION

2

For the foregoing reasons, the judgment is affirmed.