EXHIBIT 1

REDACTED

No. 25-4072

In the

United States Court of Appeals for the Ninth Circuit

IN RE: BANK OF AMERICA CALIFORNIA UNEMPLOYMENT BENEFITS LITIGATION,

BANK OF AMERICA, N.A.,
Defendant-Petitioner.

On Petition for Leave to Appeal
from the United States District Court for the Southern District of California
No. 3:21-MD-02992-GPC-MSB (Curiel, J.)

REDACTED REPLY IN SUPPORT OF PETITION FOR LEAVE TO APPEAL UNDER FED. R. CIV. P. 23(f)

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The district court erroneously certified classes of over 100,000 people despite a problem that should have been insurmountable: the classes demonstrably include fraudsters who stand to compound ill-gotten fraud gains with an ill-gotten share of any class recovery, and Plaintiffs have no method for figuring out who they are. As this Court recognized in *Van v. LLR, Inc.*, 61 F.4th 1053 (9th Cir. 2023), that failure alone precludes class certification.

Plaintiffs' attempted defense of the certification order just heightens the need for appellate review. Precisely to avoid the individualized inquiry necessary to identify which class members are in fact fraudsters, Plaintiffs now maintain that they will allow *any* class member BANA *unilaterally* identifies as *potentially* fraudulent to be booted from the class—*even up to the day of trial*. That does not provide a coherent methodology to solve the predominance problem; it *compounds* the problem, and creates an impermissible failsafe class in which class membership hinges on the merits of the underlying claims.

Appellate review of these massive classes is warranted now, to ensure that the district court's manifest errors on the predominance and failsafe issues will not escape review and to provide guidance on recurring, important class-certification questions.

ARGUMENT

I. Plaintiffs misunderstand the "death knell" factor.

Rule 23(f) appeals are favored when the stakes of a class-certification ruling are so high the defendant would be "virtually compel[led]" to settle rather than press potentially meritorious defenses through trial and, if need be, appeal from final judgment. *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 958 (9th Cir. 2005). Plaintiffs cannot deny that [redacted] they seek easily clears that threshold.

So Plaintiffs seek to obscure the point that the pertinent death knell is "the death knell of the *litigation*," not the *defendant*. *Chamberlan*, 402 F.3d at 958 (emphasis added); *see also*, *e.g.*, *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013) ("The death knell marks not the defendant's demise, but the *litigation's*."). "[I]t is enough that certification generate[s] unwarranted pressure to settle nonmeritorious or marginal claims," which a "vast sum in damages" that is "subject to trebling" could create even for an amply capitalized defendant. *Rail Freight*, 725 F.3d at 251-52 (internal quotation marks omitted); *accord Chamberlan*, 402 F.3d at 958 (Rule 23(f) enables review of certifications that "put considerable pressure on the defendant to settle independent of the merits of the plaintiffs' claims") (internal quotation marks omitted). Thus, Plaintiffs are wrong that *Chamberlan* establishes that "the death knell of the litigation" *requires* a "showing that [the defendant] lacks the resources to defend th[e] case to a conclusion." Opp. 10-11 (internal quotation marks omitted). If the law were otherwise, no large company could ever obtain Rule 23(f) review.

II. The district court committed manifest error assessing predominance, and Plaintiffs' defense of that error just underscores the failsafe problem.

The district court failed to hold Plaintiffs to their burden to establish predominance under the framework this Court outlined in *Van*—and then tried to avoid the problem by relying on an improper failsafe class definition. *See* Pet. 14-18. The Opposition repeats the same legal errors.

A. The district court violated Circuit precedent on predominance.

Nothing in the district court's order or Plaintiffs' Opposition identifies what *Van* requires for predominance: a reliable methodology to identify and eliminate fraudsters from among the unnamed class members, without needing case-by-case-adjudication and without assuming away meritorious defenses. Plaintiffs contend that "15 pages of the district court's order … carefully apply *Van* to the factual record." Opp. 12 (citing A51-65, 85-86). That is wrong: Most of that section is unrelated to predominance, and it cites *Van* just twice—and only to reference the general legal standard. A62, A67. And regardless of how many pages the district court took to "apply *Van*," the problem remains that it *mis*applied *Van*.

Plaintiffs try to prop up the district court's reasoning with a laundry list of seven arguments. Opp. 14-15. First they argue that "any individuals determined by the Bank to be criminals were by definition excluded from the class." Opp. 14 (citing A59). This is untrue: BANA found [redacted], which, under *Van*, is "sufficient to prove that an inquiry into the circumstances and motivations behind each of the [thousands of class members] might be necessary." 61 F.4th at 1069. That underscores the district court's predominance error, since that inquiry necessarily involves case-by-case adjudications. By leaning on the class "definition," the district court skipped this step entirely (and made the class an improper failsafe class—*see infra* Part II.B).

Plaintiffs' next two justifications likewise miss the mark. Opp. 14-15. Plaintiffs maintain that predominance is no obstacle so long as BANA shoulders all the work of conducting the required case-by-case adjudication. Specifically, Plaintiffs argue that BANA bears the burden under EFTA to show that a transaction was authorized, and further that it has access to all the information necessary to do so. *Id.*; *see also* Opp. 17. Both arguments lack merit. The predominance analysis focuses on whether individualized inquiries will be required, not on which party furnishes the evidence needed to conduct them. Pet. 21-22. Thus, even if Plaintiffs were correct on the burden point (they are not, *see* Pet. 20 n.2), an issue on which a defendant bears the burden can defeat predominance, *see True Health Chiropractic v. McKesson Corp.*, 896 F.3d 923, 931-32 (9th Cir. 2018), and "a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011). And even if all the relevant records really were in BANA's possession (they are not, as discussed below), that would not be dispositive: "there still would be no predominance because the Court—or a jury—would need to evaluate the records for each class member before making a determination" on liability. *Lee v. Pep Boys-Manny Moe & Jack of California*, 2015 WL 9480475, at *14 (N.D. Cal. Dec. 23, 2015).

Moreover, *Plaintiffs themselves acknowledge* that BANA's "own records" do not suffice to furnish all relevant evidence: the district court recognized—in language Plaintiffs repeat—that "the process of fact-intensive analysis" will need to be applied to "EDD's records," not just BANA's. Opp. 20 (citing A63). Further, the district court wrongly ignored that much of the evidence necessary to show that each individual's account was created for legitimate purposes—and that they suffered actual damages—[redacted]. Pet. 20-22; A63; RA80-83. Plaintiffs' Opposition doesn't address any of these issues, nor did their class certification briefing or the Court's order explain how these highly-individualized determinations could be made without overwhelming common questions of law or fact. *See* Pet. 14-18; *see also* RA80-83. This, too, should have defeated predominance (and commonality), and further merits an appeal. *See Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 (9th Cir. 2022); *Van*, 61 F.4th at 1067.

Plaintiffs' four remaining justifications are variations on a theme—in effect, that this issue is in the past because BANA had an opportunity to unearth the fraudsters in the classes, including pursuant to the Remediation Plan. Opp. 15. As the district court recognized, however, BANA provided "evidence that [] individualized issues bar recovery on at least some claims." A62. And once BANA showed that "at least some class members lack meritorious claims" because they are uninjured, it was unquestionably *Plaintiffs'* burden to prove that "class-member-by-class-member adjudication" will not swamp any common questions of law or fact. *Van*, 61 F.4th at 1069. Plaintiffs scoff that BANA's [redacted] identifies only four fraudsters [redacted]. Regardless, at that rate, the class would contain *thousands* of fraudsters [redacted]. Pet. 17-18. Plaintiffs cannot simply declare that this review is unlikely to yield further fraudsters. They were required to "propose" a "method" to identify and weed out the fraudsters remaining in the classes. *Olean*, 31 F.4th at 666; Pet. 16. They never did.

B. The failsafe class does not avoid the predominance problem.

The district court concluded that predominance was satisfied because "the proposed Class definition already excludes any person who … has previously engaged in fraudulent Program conduct, such as submission of fraudulent claims or other abuses of the claims process." A59 (citing A100). In so doing, the court "certified a class in which membership depends upon having a valid claim on the merits." *Ford v. TD Ameritrade Holding Corp*., 995 F.3d 616, 624 (8th Cir. 2021). Because the court certified "a fail-safe class … as a means of avoiding a predominance problem under Rule 23(b)(3)," the certification should be reversed. *Id.* (internal citation omitted).

Plaintiffs argue that BANA waived its objection to the failsafe class by not raising the issue in its opposition to class certification. Opp. 16, 24. But Plaintiffs never suggested in their motion that predominance could be resolved because the class definition itself took care of uninjured class members. A246-250. The district court created that problem in its order (A59), amplifying a suggestion by Plaintiffs in their *reply* (RA26)—to which BANA had no sur-reply. A party need not "be an oracle and predict issues that will arise for the first time in the district court's final order." *Saucillo v. Peck*, 25 F.4th 1118, 1130 (9th Cir. 2022). BANA could not forfeit the ability to seek review of this error before the court committed it.[1]

The reason Plaintiffs cling so tightly to forfeiture is that they have no ground to stand on when it comes to the merits. Their Opposition—appropriately—references this Court's account of the ills of failsafe classes in *Kamar v. Radio Shack Corp.*, 375 F. App'x 734, 736 (9th Cir. 2010), which perfectly diagnoses the problem with the classes certified here:

> The fail-safe appellation is simply a way of labeling the obvious problems that exist when the class itself is defined in a way that precludes membership unless the liability of the defendant is established. When the class is so defined, once it is determined that a person, who is a possible class member, cannot prevail against the defendant, that member drops out of the class. That is palpably unfair to the defendant, and is also unmanageable—for example, to whom should the class notice be sent?

Id.; *see* Opp. 16. But that is exactly what follows from the district court's logic. The court described no *process* for determining *which* class members must "drop[] out of the class" because they committed fraud. It relied on the class definitions themselves to do all the work. A59. But class definitions are not self-executing. Saying that the class definition "excludes any person who … engaged in fraudulent

[1] Nor do any of the norms around waiver counsel against this Court's exercising its "discretion to consider a purely legal question when"—as here—"the record relevant to the matter is fully developed" and "the district court … overlayed its entire discussion … with [an] erroneous presumption." *In re Apple Inc. Device Perf. Litig.*, 50 F.4th 769, 782 n.9 (9th Cir. 2022) (citing *Saucillo*, 25 F.4th at 1130 n.7, 1132).

Program conduct" just raises the question of how to adjudicate *who* engaged in fraudulent program conduct. *Id.*; *see also* 1 Wm. B. Rubenstein, NEWBERG & RUBENSTEIN ON CLASS ACTIONS § 3.6 (6th ed. 2025) ("Beyond the unfairness their name suggests, fail-safe classes also raise manageability problems. Specifically, because class membership turns on the outcome of the merits of the case, a court would have to hold individual hearings or mini-trials to determine whether each plaintiff satisfies the requirement of class membership …").

Plaintiffs contend they can avoid the predominance problem prospectively, just by allowing anyone BANA identifies as a fraudster to be kicked out of the classes—making *plaintiff* class membership turn on the *defendant's* unilateral decision. Opp. 20. That is as counterintuitive as it is unprecedented—and the fact that Plaintiffs have turned to that strategy as their last defense confirms that this certification order warrants this Court's review. At the threshold, Plaintiffs' "idea to exclude potential class members based on defendant's investigation invites concerns over adequacy of representation and loyalty to the class." *E.g., Johnson v. Yahoo! Inc.*, 2018 WL 835339, at *4 (N.D. Ill. Feb. 13, 2018). More fundamentally, this gambit creates a failsafe problem without solving the predominance problem: nothing precludes Plaintiffs from raising a challenge to any person or group of people BANA "identifies," so Plaintiffs' reassurance that the fraudster-elimination "process will not require any trial time" (Opp. 20-21) is manifestly untrue.

III. The petition presents questions worthy of this Court's attention.

Manifest error would be enough to grant the petition by itself, *Chamberlan*, 402 F.3d at 959, but this case also warrants review to clarify the applicable legal principles for the courts in this Circuit. Plaintiffs' argument that the petition does not raise any "*unsettled* issue of class action law or procedure" misstates the issues presented. Opp. 23.

The petition seeks "guidance on *how to assess whether individualized inquiries predominate* when all agree the class contains some number of uninjured class members." Pet. 24 (emphasis added). Plaintiffs distort that question by claiming that the only question is "whether a class can be certified 'when all agree the class contains some number of uninjured class members.'" Opp. 23 (quoting Pet. 24). Although that is the issue the Supreme Court recently considered without deciding (which could have resolved this case if it had overturned Circuit precedent), it is not the question BANA's petition poses. *Olean* made it clear that "[w]hen individualized questions relate to the injury status of class members, Rule 23(b)(3) requires that the court determine whether individualized inquiries about such matters would predominate over common questions." 31 F.4th at 668. But *Olean* said nothing about *how* the uninjured might be "winnow[ed] out" in a manner comporting with the predominance requirement because it ultimately found that "all class members ha[d] standing here." *Id*. at 683. It falls to some other case—like this one—

to provide the necessary guidance. Indeed, Plaintiffs' Opposition only ratcheted up the need for guidance (and guardrails), as their disingenuous claim that they can solve predominance by allowing BANA to *unilaterally* exclude *any class member* places this case at the intersection of the predominance and failsafe lines of cases.

Finally, these critical issues are likely to evade end-of-case review given the intense settlement pressure on BANA. *See supra* Part I. And Plaintiffs' supposition that this case "is just months away from resolution" is barely credible. Opp. 24. The parties have yet even to begin briefing summary judgment, and the current pretrial conference date is not until next summer. This case could be years, not months, away from resolution.

IV. There is no public-policy imperative for a class action here.

Plaintiffs protest that if their classes cannot be certified here, then an EFTA "class could never be certified because the defendant could assert that some class members' claims might have been denied even if the required 'investigation' had been conducted." Opp. 22. But if class treatment were so manifestly appropriate for claims challenging EFTA investigation procedures, there would be ample precedent for it. In fact the precedents go the other way and "[c]ourts routinely decline to certify such overbroadly defined classes." *Nelson v. Conduent Bus. Servs. LLC*, 2020 WL 5587450, at *6 (N.D. Ga. Sept. 18, 2020) (denying certification of "a putative class of cardholders who 'reported fraudulent charges on their accounts and were

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denied a refund'" because "[t]he breadth of this proposed class definition includes customers who reported a transaction that was not, in fact, fraudulent" and who "may have no legitimate claim for a refund"); *see also Almon v. Conduent Bus. Servs., LLC*, 2022 WL 4545530, at *14-15 (W.D. Tex. Sept. 28, 2022) ("Defendants must be afforded the opportunity to prove that the reported transactions were authorized. The threshold question of whether fraud occurred at all is a fact-intensive inquiry that will vary with the circumstances of each case…") (internal citation omitted).

In any event, Plaintiffs' insinuation that denying class treatment here would license financial institutions to violate EFTA "indiscriminately" (Opp. 22) is unfounded, and difficult to square with the fact that their class is definitionally limited to people [redacted]. *See Kamm v. Cal. Dev. Co.*, 509 F.2d 205, 212 (9th Cir. 1975) (class treatment not superior when regulatory settlement already provides "significant relief").

<u>CONCLUSION</u>

For the reasons expressed above, BANA respectfully requests that the Court grant its Rule 23(f) petition.

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August 6, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Circuit Rules 5-2 and 32-3(2) because, according to the word count of Microsoft Word, the word-processing system used to prepare the brief, it contains 2,795 proportionately spaced words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

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