

1 BRYAN SCHWARTZ LAW  
2 Bryan J. Schwartz (SBN 209903)  
3 bryan@bryanschwartzlaw.com  
4 William C. Jhaveri-Weeks (SBN 289984)  
5 bill@bryanschwartzlaw.com  
6 1330 Broadway, Suite 1630  
7 Oakland, CA 94612  
8 Telephone: (510) 444-9300  
9 Facsimile: (510) 444-9301

8 SCHONBRUN DESIMONE SEPLOW  
9 HARRIS & HOFFMAN LLP  
10 Wilmer J. Harris (SBN 150407)  
11 wharris@sdshhlaw.com  
12 Shayla Myers (SBN 264054)  
13 shaylamyers@sdshhlaw.com  
14 715 Fremont Ave.  
15 S. Pasadena, CA 91030  
16 Telephone: (310) 396-0731  
17 Facsimile: (310) 399-7040  
18 [Additional counsel on following page]  
19 *Attorneys for Individual and Representative*  
20 *Plaintiffs and the Putative Class*

17 **UNITED STATES DISTRICT COURT**  
18 **CENTRAL DISTRICT OF CALIFORNIA**

19 Terry P. Boyd, Ethel Joann Parks, Sonia  
20 Medina, Linda Zanko, and Victor Galaz  
21 individually, on behalf of others similarly  
22 situated, and on behalf of the general public,

23 Plaintiffs,

24 vs.

25 Bank of America Corp.; LandSafe, Inc.;  
26 LandSafe Appraisal Services, Inc.; and  
27 DOES 1-10, inclusive

28 Defendants.

Case No.: 13-CV-00561 DOC (JPRx)

**PLAINTIFFS' NOTICE OF MOTION  
AND MOTION FOR CLASS  
CERTIFICATION UNDER FRCP 23;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT**

Date: March 17, 2014  
Time: 8:30 a.m.  
Place: Courtroom 9D, Santa Ana  
Hon. David O. Carter

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

SCHONBRUN DESIMONE SELOW  
HARRIS & HOFFMAN, LLP

Benjamin Schonbrun (SBN 118323)  
bschonbrun@sdshhlaw.com

Michael D. Seplow (SBN 150183)  
mseplow@sdshhlaw.com

Aidan C. McGlaze (SBN 277270)  
amcglaze@sdshhlaw.com

723 Ocean Front Walk  
Venice, CA 90291

Telephone: (310) 396-0731

Facsimile: (310) 399-7040

*Attorneys for Individual and Representative  
Plaintiffs and the Putative Class*

1 NOTICE OF MOTION AND MOTION  
2 TO DEFENDANTS BANK OF AMERICA CORP., LANDSAFE, INC., AND  
3 LANDSAFE APPRAISAL SERVICES, INC., AND THEIR ATTORNEYS OF  
4 RECORD:

5 **PLEASE TAKE NOTICE** that on March 17, 2014 at 8:30 a.m. in the  
6 Courtroom of the Honorable David O. Carter, located at 411 W. Fourth St., Santa Ana,  
7 CA 92701, Plaintiffs Terry P. Boyd, Ethel Joann Parks, Sonia Medina, Linda Zanko,  
8 and Victor Galaz, through their attorneys and on behalf of all others similarly situated,  
9 will and hereby do move the Court for class certification under Federal Rule of Civil  
10 Procedure 23 (“Rule 23”). This motion is based on: this Notice of Motion and Motion;  
11 the accompanying Memorandum of Points and Authorities; the declarations of  
12 Plaintiffs, opt-in Plaintiffs, Bryan J. Schwartz, Esq. and Wilmer J. Harris, Esq., and  
13 exhibits thereto; such other information as may be presented to the Court at the time of  
14 the hearing; and the pleadings and other documents submitted in this matter.

15 Plaintiffs seek class certification of a class consisting of all persons who are or  
16 have been employed by Defendants Bank of America Corp., LandSafe, Inc., or  
17 LandSafe Appraisal Services, Inc. (“Defendants”) as Appraisers, including employees  
18 with the job title “Residential Appraiser” or “Review Appraiser” and any other  
19 employee performing the same or similar job duties for Defendants, within the State of  
20 California at any time from April 9, 2009 (*i.e.*, within four years prior to the date on  
21 which this action was filed) to the final disposition of this case (the “California Class”).  
22 *See* 2d Amend. Compl. ¶ 36 (ECF No. 42). Certification is appropriate under Rule 23  
23 based on common questions of law and common facts applicable to all potential  
24 members of the class, including whether Defendants acted properly when they  
25 classified all Appraisers as exempt from California overtime and meal- and rest-period  
26 premium requirements.

27 Plaintiffs also seek certification of two California subclasses: (i) All California  
28 Class members who are no longer employed by Defendants, and have been not

1 employed there for at least 72 hours (hereafter, “Waiting Time Subclass”) (under  
2 California Labor Code §§ 200-03); and (ii) all California Class members who are  
3 currently employed by Defendants or were employed by Defendants within the year  
4 preceding the filing of the initial Complaint in this action (hereafter, “Penalty  
5 Subclass”) (under California Labor Code §§ 226 & 2698 *et seq.*). *See* 2d Amend.  
6 Compl. ¶¶ 37, 38.

7 This motion is made following the conference of counsel pursuant to Local Rule  
8 7-3, which took place on January 6, 2014. *See* Declaration of Bryan J. Schwartz, dated  
9 January 13, 2013, submitted herewith (“Schwartz Decl.”), at ¶ 19. A Proposed Order is  
10 submitted herewith.

11  
12 Dated: January 13, 2013

BRYAN SCHWARTZ LAW

SCHONBRUN DESIMONE SEPLOW  
HARRIS & HOFFMAN, LLP

15  
16 By:           /s/ Bryan J. Schwartz            
17 BRYAN J. SCHWARTZ

18 *Attorneys for Individual and Representative*  
19 *Plaintiffs and the Putative Class*

**TABLE OF CONTENTS**

**I. MEMORANDUM OF POINTS AND AUTHORITIES**..... 1

**II. STATEMENT OF FACTS** ..... 3

    A. BofA Uniformly Classifies all Appraisers as Exempt, Not Tracking Their Time or Providing Breaks, and Denying them Overtime and Meal/Rest Premiums. .... 3

    B. Staff and Review Appraiser Duties are Uniform..... 3

    C. All Appraisers’ Reports Are Transaction-Specific, and No Appraisers Set Company Policy, Bind the Company, Advise Management, Supervise Others, or Advise or Negotiate with Customers..... 4

    D. All Appraisers Are Production Workers Producing LandSafe’s “Core Product,” and Are Compensated under a Uniform Plan Based on Production. .... 5

    E. Appraisers’ Work Uniformly Involves No Significant Choice, Discretion, or Independent Judgment. .... 7

    F. Only a High School Degree – Not a “Prolonged Course of Specialized Intellectual Instruction” – Is Required to Become a BofA Appraiser. .... 9

**III. CLASS CERTIFICATION SHOULD BE GRANTED**..... 10

    A. Class Certification Is Appropriate under Rule 23(a). .... 11

        1. The Class Is Numerous..... 11

        2. The Representative Parties’ Claims Are Typical ..... 11

        3. The Representative Parties Will Adequately Protect the Class..... 12

        4. There Are Questions of Law and Fact Common to the Class... 13

            a. Plaintiffs’ Claims Raise Common Questions..... 13

            b. The Administrative Exemption Tests Create Commonality..... 14

            c. The Professional Exemption Tests Raise Common Questions. .... 19

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

B. Certification under Rule 23(b) Is Proper Because Common Questions of Law and Fact Predominate and Class Resolution Is Superior ..... 20

1. The Nature of Appraisers’ Job Requirements and Job Duties Is the Predominant Common Question..... 20

2. Defendants’ Anticipated Arguments Cannot Defeat Predominance. .... 22

3. Class Resolution Is Superior..... 24

**IV. CONCLUSION** ..... 25

**TABLE OF AUTHORITIES**

**Federal Cases**

*Abdullah v. U.S. Security Associates*, 731 F.3d 952 (2013)..... 13, 21, 23

*Alcantar v. Hobart Service*, 2013 WL 146323 (C.D. Cal. Jan. 14, 2013) ..... 12

*Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184  
(2013) ..... 11, 24

*Avilez v. Pinkerton Government Services*, 286 F.R.D. 450 (C.D. Cal. 2012)..... *passim*

*Bollinger v. Residential Capital, LLC*, 863 F. Supp. 2d 1041 (W.D. Wa. 2012) ..... 16

*Bratt v. County of Los Angeles*, 912 F.2d 1066 (9th Cir. 1990) ..... 15

*Campbell v. PriceWaterhouseCoopers, LLP*, 287 F.R.D. 615  
(E.D. Cal. 2012) ..... 12, 17, 19, 21

*Dilts v. Penske Logistics, LLC*, 267 F.R.D. 625 (S.D. Cal. 2010) ..... 14

*Ellis v. Costco Wholesale Corp.*, 657 F.3d 970 (9th Cir. 2011) ..... 13

*Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492 (N.D. Cal. 2012)..... 12, 25

*Fenton v. Farmers Insurance Exchange*, 663 F. Supp. 2d 718 (D. Minn. 2009) ..... 18

*Gusdonovich v. Business Information*, 705 F. Supp. 262 (W.D. Pa. 1985)..... 19

*Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998)..... 13

*Hanon v. Dataproducts Corp.*, 976 F.2d 508 (9th Cir. 1992)..... 11

*Heffelfinger v. Electronic Data Systems Corp.*, 2008 WL 8128621  
(C.D. Cal. Jan. 7, 2008)..... 17, 21, 23, 25

*Herrera v. LCS Financial Services Corp.*, 274 F.R.D. 666 (N.D. Cal. 2011)..... 23, 24

*In re Wells Fargo Home Mortgage Overtime Pay Litigation*, 268 F.R.D. 604  
(N.D. Cal. 2010) ..... 23

*In re Wells Fargo Overtime Pay Litigation*, 571 F.3d 953 (9th Cir. 2009) ..... 20, 21

*Jacob v. Duane Reade, Inc.*, 289 F.R.D. 408 (S.D.N.Y. 2013) ..... 17, 21

1 *Kress v. PricewaterhouseCoopers LLP*, 2013 WL 140102  
 2 (E.D. Cal. Jan. 10, 2013) ..... 21, 22  
 3 *Leyva v. Medline Industries, Inc.*, 716 F.3d 510 (9th Cir. 2013) ..... 24  
 4 *O’Connor v. Boeing North America, Inc.*, 184 F.R.D. 311 (C.D. Cal. 1998)..... 11  
 5 *Reich v. American International Adjustment Co.*, 902 F. Supp. 321  
 6 (D. Conn. 1994)..... 18  
 7 *Rieve v. Coventry Health Care Inc.*, 870 F. Supp. 2d 856 (C.D. Cal. 2012) ..... 15, 16, 19  
 8 *Rutti v. Lojack Corp.*, 2012 WL 3151077 (C.D. Cal. July 31, 2012) ..... 24  
 9 *Swigart v. Fifth Third Bank*, 288 F.R.D. 177 (S.D. Ohio 2012) ..... 21  
 10 *Urinikis-Negro v. American Family Property Services*, 616 F.3d 665 17  
 11 (7th Cir. 2010) ..... 17  
 12 *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935 (9th Cir. 2009) ..... 23  
 13 *Wal-Mart Stores, Inc. v. Dukes*, --- U.S.---, 131 S. Ct. 2541 (2011) ..... 13  
 14  
 15 **State Cases**  
 16 *Bradley v. Networkers International LLC*, 211 Cal. App. 4th 1129 (2012) ..... 14  
 17 *Harris v. Superior Court*, 53 Cal. 4th 170 (2011)..... 15  
 18 *Ramirez v. Yosemite Water Co., Inc.*, 20 Cal. 4th 785 (1999) ..... 20  
 19  
 20 **Statutes and Regulations**  
 21 29 C.F.R. § 541.205(a) (2001) ..... 15  
 22 Federal Rule of Civil Procedure 23 ..... *passim*  
 23 Industrial Welfare Commission Wage Order 4-2001, codified as  
 24 8 Cal. Code. Regs. § 11040 ..... 13, 14, 15, 19  
 25 California Business & Professions Code § 17200 ..... 14  
 26 California Code of Regulations title 10 ch. 6.5 art. 3 § 3543 ..... 10  
 27  
 28



1 California Labor Code § 203..... 14

2 California Labor Code § 226(a) ..... 14

3 California Labor Code § 226.7..... 13, 14

4 California Labor Code § 510..... 13

5 California Labor Code § 512..... 14

6 California Labor Code § 2699 (“PAGA”)..... 12, 14

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1 **I. MEMORANDUM OF POINTS AND AUTHORITIES**

2 Defendants Bank of America and its LandSafe subsidiaries (collectively,  
3 “BofA”) maintain a uniform policy of misclassifying hundreds of California-based real  
4 estate appraisers as exempt. As a result, these employees, who produce and review tens  
5 of thousands of appraisals each year for BofA’s individual loan packages, are and were  
6 not paid overtime for their long hours worked and not provided meal and rest periods,  
7 in violation of the California Labor Code.

8 Here, Plaintiffs challenge Defendants’ practice of classifying all appraisers as  
9 exempt. Certification is proper because Defendants’ asserted administrative and  
10 professional exemption defenses will rise or fall for the entire class together. In trying  
11 the merits of this case, Plaintiffs will show the administrative exemption does not apply  
12 to any of the appraisers, because, as Defendants’ Fed.R.Civ.P. 30(b)(6) designee  
13 repeatedly acknowledged, BofA’s appraisers are not setting overarching company  
14 policy, supervising anyone, or administering the business – they are on the front lines,  
15 “digging for information” to produce the thousands of appraisal reports that are  
16 LandSafe’s “core products,” each relating to a single BofA mortgage transaction.  
17 Fed.R.Civ.P. 30(b)(6) Dep. of all Defendants, Deponent Kenneth S. Nicholson  
18 (“30(b)(6) Dep.”), at 34:7-16, 160:25-161:14, submitted as Exhibit A to the Declaration  
19 of Bryan Schwartz (“Schwartz Decl.”). The professional exemption is likewise  
20 universally inapplicable: appraisers need not possess more than a high school diploma  
21 and a few weeks of specialized classes – their training is almost entirely on-the-job.

22 The facts on which Plaintiffs will rely to prove the merits of their claims are  
23 common to the Class: (1) BofA’s common exempt classification for all appraisers;  
24 (2) uniform compensation plans for all California Staff and Review Appraisers  
25 (hereafter, “Appraisers”); and (3) testimony from Appraisers that they worked overtime  
26 and were not afforded breaks, without being paid premiums.

27 Likewise, the proof on which Plaintiffs will rely to defeat Defendants’  
28 administrative and learned professional exemption defenses is common to the class, for  
example: (1) BofA’s 30(b)(6) testimony that Appraisers’ job descriptions are

1 standardized, and that their duties do not include supervising anyone, setting company  
2 policy, binding the company, advising management or negotiating for the company, and  
3 that their duties relate to individual loan transactions, rather than matters of significance  
4 to the business generally; (2) uniform company-wide written policies and government  
5 regulations that dictate the level of independence and discretion Appraisers exercise;  
6 (3) 30(b)(6) testimony and documentary proof that BofA views Appraisers as  
7 “production” workers, and compensates them under a plan designed “to incent[ivize]  
8 our staff to – to be productive” (30(b)(6) Dep. 129:9-23); (4) 30(b)(6) testimony  
9 government regulations demonstrating that, with respect to the professional exemption,  
10 the academic qualifications to become an Appraiser are identical for all Class members,  
11 and that appraisal skills are “gained through experience on the job,” not a prolonged  
12 course of specialized academic instruction (*id.* 299:2-18); and (5) declarations from  
13 Appraisers confirming that all exemption-related facts are the same for each of them,  
14 regardless of where they work in California.

15 All Appraisers do the same basic work, each of them producing and reviewing  
16 hundreds of appraisal reports a year for BofA’s home loan packages. Their work is  
17 tightly regulated, and all Appraisers must follow uniform policies and complete  
18 standardized forms. They are investigators – fact-gatherers who must report their  
19 findings in accordance with strict governmental regulations that do not vary by region.  
20 Because the Class members’ duties and role in BofA are the same, and because the  
21 qualifications for becoming an Appraiser are the same, there is no reason that the  
22 administrative or professional exemption would apply to some Class members but not  
23 to others. Indeed, BofA classified all Appraisers as exempt and denied them overtime  
24 and meal/rest premiums without making any employee-by-employee assessment.

25 Plaintiffs, who were or are Appraisers subject to the challenged exempt  
26 classification and all policies relevant to this suit during the statutory period, move to  
27 certify the California Class under Rule 23. Plaintiffs meet the Rule’s requirements, and  
28 the Court should grant the motion.

1 **II. STATEMENT OF FACTS**

2 **A. BofA Uniformly Classifies all Appraisers as Exempt, Not Tracking**  
3 **Their Time or Providing Breaks, and Denying them Overtime and**  
4 **Meal/Rest Premiums.**

5 BofA classifies all Appraisers as exempt, and does not track the hours they spend  
6 producing LandSafe’s “core products.” 30(b)(6) Dep. 34:7-16, 170:15-171:19.  
7 Appraisers regularly work over forty hours per week and eight hours a day – a fact that  
8 Defendants cannot rebut. Staff Appr. Decl. ¶ 16; Rev. Appr. Decl. ¶ 13; 30(b)(6) Dep.  
9 171:20-172:13 (“company’s not in a position to rebut” witness statements as to hours  
10 worked). BofA does not pay overtime to Appraisers. *Id.* 170:15-19. As to all  
11 Appraisers, “[t]here’s no policy” saying “you should take breaks after such and such  
12 amount of time, you should take two rest breaks a day, [or] anything like that.” *Id.*  
13 190:14-23. Appraisers are not paid meal or rest period premiums. *Id.* 170:20-171:3.

13 **B. Staff and Review Appraiser Duties are Uniform.**

14 For BofA to sell a mortgage on a home, the loan package must include an  
15 appraisal of the the property. 30(b)(6) Dep. 153:13-23; Staff Appr. Decl. ¶¶ 3.<sup>1</sup> Through  
16 its LandSafe subsidiaries, BofA has employed hundreds of Staff and Review Appraisers  
17 in California in the last several years to produce and review appraisal reports. Schwartz

---

18  
19 <sup>1</sup> 26 California Appraisers have opted into this case (out of 45 opt-ins nationwide), and  
20 22 of them have submitted declarations. Citations to “Staff Appr. Decl. ¶ X” are to  
21 Paragraph X of the Declarations of California Staff Appraisers Terry Boyd (ECF No.  
22 44-2), Linda Zanko (ECF No. 44-14), Ethel Parks (ECF No. 10), Sonia Medina (ECF  
23 No. 44-9), Harvey Waggoner (ECF No. 44-13), Michael Petris (ECF No. 44-11), Eric  
24 Costa (ECF No. 44-3), Ricky Leung (ECF No. 44-8), Karen Lampert (ECF No. 44-7),  
25 May Lonn Chan-Villareal (ECF No. 63-4), and, submitted herewith, Donald Mass,  
26 Margaret Riley, Jason Summers, Debby Evans, Cynthia Greaves, Jeff Mandel, Michael  
27 Landes, Anthony Barnette and Timothy Barnette. Citations to “Rev. Appr. Decl. ¶ X”  
28 are to Paragraph X of the Declarations of California Review Appraisers Victor Galaz  
(ECF No. 44-5), Colin Keller (ECF No. 63-2), and Michael Stowe (submitted  
herewith). When cited thus, Paragraph X of each declaration provides support.

1 Decl. ¶ 15. BofA Appraisers across the country (of whom there have been over 1000 in  
2 the last several years) produce approximately 20,000 appraisal reports per month.  
3 30(b)(6) Dep. 108:6-15; Schwartz Decl. ¶ 15. On average, BofA charges borrowers  
4 \$400 per report. *Id.* 36:5-18.

5 Staff and Review Appraiser “job descriptions ... are standardized nationwide.”  
6 *Id.* 46:16-20. All Staff Appraisers are assigned properties to inspect in their “territory.”  
7 Staff Appr. Decl. ¶ 11. They gather a specified list of data about each property,  
8 coordinate a visit to the property, inspect and photograph the property, and look up  
9 prices of similar properties (“comps”) in the neighborhood. *Id.* ¶¶ 6-9. They input this  
10 information into a standardized federal form – usually the Fannie Mae Form 1004 for  
11 single family dwellings. *See* 30(b)(6) Dep. 225:19-227:13 (Appraisers company-wide  
12 spend an average of 65% of their time completing or reviewing Form 1004s); Staff  
13 Appr. Decl. ¶ 5. Other standardized forms are used for other types of property, such as  
14 condominium units and 2-4 unit residential properties. *Id.* Based on the mandatory  
15 information they gather and the sales prices of the comps, Staff Appraisers provide an  
16 estimated value of the property. *Id.* ¶ 9. Staff Appraisers typically produce two to three  
17 appraisal reports per day. *Id.* ¶ 11; 30(b)(6) Dep. 251:18-252:3.

18 Likewise, the basic job duties of Review Appraisers throughout the Company are  
19 identical. Review Appraisers proofread Staff Appraisers’ reports to ensure that they  
20 comply with BofA and regulatory requirements. Rev. Appr. Decl. ¶ 8. They look up  
21 information in various public and subscription databases to confirm that the data in the  
22 Appraisal Reports is accurate. *Id.* ¶¶ 7-8. Review Appraisers review numerous reports  
23 each day. *Id.*; 30(b)(6) Dep. 252:17-23.

24 **C. All Appraisers’ Reports Are Transaction-Specific, and No Appraisers**  
25 **Set Company Policy, Bind the Company, Advise Management,**  
26 **Supervise Others, or Advise or Negotiate with Customers.**

27 Each report that a Staff Appraiser produces, and each report that a Review  
28 Appraiser reviews, relates to a single mortgage sale by BofA. *See* 30(b)(6) Dep.  
157:18-158:3 (agreeing that “99 point whatever percent” of the time, an appraisal report

1 “is specific to ... a particular loan that Bank of America’s trying to sell.”). Apart from  
2 completing and reviewing appraisal reports, Appraisers play no role in Defendants’  
3 business. Staff Appr. Decl. ¶¶ 3-4; Rev. Appr. Decl. ¶¶ 4-5. Neither Staff nor Review  
4 Appraisers supervise anyone. *See* 30(b)(6) Dep. 117:21-118:1. They do not make  
5 management decisions or advise management. *Id.* 132:11-133:5; 158:9-160:10. They do  
6 not advise the loan officers. *Id.* 149:1-3. They do not advise the homeowner or  
7 negotiate on behalf of BofA. *Id.* 148:2-15, 23-24. Appraisers have no authority to  
8 develop management objectives, policies, or practices. *Id.* 150:12-151:14 (“[T]he  
9 appraisers and [] review appraisers are not formulating LandSafe or Bank of America  
10 policies in any way, ... [and] don’t set the objectives for LandSafe or Bank of  
11 America;” they are “providing the product; they’re not goal setting for the institution.”).  
12 Appraisers “are not supposed to be interacting with sales, retail sales [employees] ... on  
13 a loan that they’re doing.” *Id.* 141:6-11. Appraisers do not decide whether to issue  
14 loans: “The appraiser does not say, yes, you can get a loan, to anyone.” *Id.* 163:6-8.

15 Appraisers’ reports do not bind BofA or LandSafe, and Appraisers have no  
16 authority to commit BofA or LandSafe at all, much less in matters of significance. *Id.*  
17 162:5-16 (Appraisers do not “bind Bank of America to any... course one way or the  
18 other,” and “don’t bind LandSafe to a particular course of conduct either.”); *id.* 41:23-  
19 42:23 (Appraisers “are not making decisions about home loans or extending credit.”);  
20 *id.* 143:6-12 (communications with owner “limited to information gathering”).

21 **D. All Appraisers Are Production Workers Producing LandSafe’s “Core  
22 Product,” and Are Compensated under a Uniform Plan Based on  
23 Production.**

24 BofA views Staff and Review Appraisers as “production” workers. The 30(b)(6)  
25 corporate designee for all Defendants, who oversees all Appraisers nationwide, Mr.  
26 Nicholson, testified: “I manage the *production* group within LandSafe that fulfills the  
27 appraisals with in-house staff appraisers, and reviews appraisals with in-house  
28 reviewers.” 30(b)(6) Dep. 14:8-11 (emph. added). He referred to the 20,000 appraisal  
reports, such as Form 1004s, that BofA Appraisers produce monthly as “the products”



1 they produce. *Id.* 106:14-108:15. He testified that LandSafe “completes these products  
2 as ... their core product,” and that “all of the in-house staff appraisers and review  
3 appraisers ... are working principally on these products.” *Id.* 33:15-34:16; *see also id.*  
4 32:3-6 (most of time is spent producing a discrete list of appraisal products). Review  
5 appraisers, or “production reviewers,” “spend the bulk of their time [on] ... the review  
6 appraisal products that [LandSafe] generate[s].” *Id.* 32:3-17; 82:3-5. LandSafe’s job is  
7 to “fulfill” BofA’s orders for appraisal reports, such as Form 1004s, which the 30(b)(6)  
8 deponent described as “the product that [the companies] primarily sell.” *Id.* 36:5-37:13.

9 All Appraisers “are ranked on production.” *Id.* 191:20-192:8. Staff Appraisers’  
10 billings are used to track productivity. *Id.* 192:3-19. For “Reviewers, it would be...  
11 points, which is like billings,” based upon quantity of reviews. *Id.* 192:20-193:2. Staff  
12 Appraisers’ managers receive “their teams’ billings and production, I believe, on a daily  
13 basis.” *Id.* 193:14-18; *see also id.* 193:7-13 (rankings of Review Appraisers provided to  
14 management daily “to track production”). Managers, in turn, are “reviewed on the  
15 production” of the Appraisers they supervise, and “different district managers have  
16 friendly competitions” to see whose Appraisers “have the fastest turn time, and which  
17 ones are producing the most billings.” *Id.* 194:24-195:18. Unless there is a “justifiable  
18 reason,” low-volume producers “would be terminated.” *Id.* 199:14-200:19.

19 Compensation plans for all Staff Appraisers and Review Appraisers,  
20 respectively, are uniform statewide (indeed, nationwide), and emphasize their quotas  
21 and production-driven duties. 30(b)(6) Dep. 128:2-13, 347:13-16. The compensation  
22 plan was designed “to drive bank productivity,” meaning “to incent[ivize] our staff to –  
23 to be productive.” *Id.* 129:9-23. As explained in the document that BofA provides to all  
24 Staff Appraisers, pay is based on a “production payout factor” determined by the  
25 Appraiser’s average daily “billings,” with possible reductions for failure to meet turn-  
26 times or for “material errors” in a report. *See* Exhibit E to Zanko Decl. (ECF No. 44-14;  
27 Exh. filed under seal); 30(b)(6) Dep. 120:15-16. Production quantity, and meeting  
28 minimum regulatory requirements, drives all Appraisers’ compensation. 30(b)(6) Dep.

1 86:4-10; 91:23-92:17; 120:15-16. As long as reports minimum quality requirements,  
2 Appraisers are compensated based on having produced the report, not on how well-  
3 written or astute it was. *Id.* 91:23-92:17; *id.* 88:12-89:2 (nothing is “included in the  
4 calculation other than production, they’re on time, and their quality piece”). As with  
5 Staff Appraisers, “review appraiser[s] ... also earn or have the opportunity to earn  
6 in[cent]ive based on their production,” *id.* 341:1-14, and their pay may be reduced if  
7 they fail to meet their production deadlines, or for errors in their reports. *Id.* ¶¶ 8-9.

8 **E. Appraisers’ Work Uniformly Involves No Significant Choice,**  
9 **Discretion, or Independent Judgment.**

10 Appraisers do not compare and evaluate possible courses of conduct, or make  
11 decisions after considering various options. 30(b)(6) Dep. 161:5-16. They rely on pre-  
12 established, standardized criteria dictated by BofA’s corporate policies, federal  
13 regulations, and the appraisal form. Schwartz Decl. Ex. I (Dep. of Terry P. Boyd, Oct.  
14 31, 2013 (“Boyd Dep.”)) 124:8-24, 138:25-139:19, 172:2-174:1; *id.* Ex. J (Dep. of  
15 Victor Galaz, Oct. 30, 2013 (“Galaz Dep.”) 212:10-213:20, 256:24-258:10; Staff Appr.  
16 Decl. ¶ 17; Galaz & Stowe Decl. ¶ 15; Keller Decl. ¶ 16. A Staff or Review Appraiser’s  
17 report can be rejected by his or her supervisor. 30(b)(6) Dep. 157:8-12. The “job of the  
18 appraiser is investigator ... they’re digging for information.” *Id.* 160:25-161:14.

19 The documents to which Appraisers must adhere are extremely detailed. *See*  
20 Schwartz Decl. ¶¶ 3-8 & Ex. G (BofA “Property and Appraisals” guidelines); Ex. E  
21 (LandSafe “Scope of Work” for Form 1004); Ex. C (Fannie Mae “Uniform Appraisal  
22 Dataset” (UAD) Guidelines); Ex. F (LandSafe “Appraisal Reviews” Guidelines); Ex. B  
23 (LandSafe “Unacceptable Appraisal Practices No. 7” in selection of comps); Ex. D  
24 (LandSafe “Appraisal Reporting Requirements Update”); *see also* Form 1004 (ECF No.  
25 44-15, at 5 of 51, in supp. of Cond. Cert. Mot.). Adhering to these documents is “not an  
26 optional thing.” 30(b)(6) Dep. 339:2-340:9; 281:14-19. If Appraisers fail to meet these  
27 requirements, they are penalized. Staff Appr. Decl. ¶ 17; Rev. Appr. Decl. ¶¶ 15-17.

28 These policies are uniform throughout California and nationwide. 30(b)(6) Dep.  
339:9-15 (Staff Appraisers must follow “the same scope of work [form] no matter



1 where [they] are working” geographically); *id.* 281:14-19 (all LandSafe Appraisers  
2 must adhere to Fannie Mae UAD guidelines when completing 1004s); *id.* 274:1-8  
3 (policy scoring appraisers on timeliness and completeness of submissions uniform  
4 nationwide); *id.* 355:11-18 (“Appraisal Reviews” document governing all Review  
5 Appraisers uniform nationwide); *id.* 333:13-334:25 (requirements for selecting and  
6 adjusting comps and for photographing properties uniform nationwide); *id.* 309:17-23  
7 (ANSI standards for measuring properties uniform nationwide).

8 The appraisal form requires Appraisers to check off boxes or select descriptors  
9 from drop-down menus relating to information about the property at issue. For  
10 example, on each Form 1004, federal guidelines require the Appraiser to fill in the  
11 “view” field with one of three items: “neutral, beneficial or adverse.” 30(b)(6) Dep.  
12 283:15-21. Then, there is a field to explain why the view falls into the particular  
13 category – for example, if the view is “beneficial” because there is a water view, the  
14 Appraiser must enter “WTR.” *Id.* 285:20-286:4. Appraisers also must identify at least  
15 three comps that have been sold within a specified period of time, and may not deviate  
16 from this requirement if, for example, they “think it’s clear enough with two” comps.  
17 *Id.* 307:13-25. Appraisers must select comps that meet the geographic requirements in  
18 “Unacceptable Appraisal Practices.” *Id.* 322:20-323:3.

19 After a Staff Appraiser completes a form, he or she supplies an estimated value  
20 of the property based on the sale prices of the comps and the differences between the  
21 comps and the subject property. Staff Appr. Decl. ¶¶ 9, 17. For example, if the subject  
22 property has one more bedroom than a comp, the Appraiser must estimate how much  
23 difference in value the extra bedroom makes. The process of arriving at a value is  
24 broken down into detailed, standardized steps, largely dictated by the mandatory  
25 guidelines, the Form and the values of the comps. *Id.*

26 Likewise, all Review Appraisers follow the same detailed guidelines and a pre-  
27 established checklist to ensure that none of the information that is required to be in the  
28 applicable form is missing. 30(b)(6) Dep. 370:1-7. Review Appraisers’ “major primary

1 function ... is to make sure that none of the[] UAPs [*i.e.*, unacceptable appraisal  
2 practices] are present” in an appraisal report. *Id.* 375:17-376:7. Review Appraisers  
3 discovering an error in a report are required to send it back to the Staff Appraiser to be  
4 corrected or clarified. *Id.* 370:20-371:11. Review Appraisers fill out a LARA, which is  
5 LandSafe’s “standard review form,” and which they spend about half their time  
6 producing. *Id.* Dep. 232:5-14; 233:22-234:1. Like Staff Appraisers, Review Appraisers  
7 lack authority to deviate from standardized criteria. Rev. Appr. Decl. ¶ 7.

8 Appraisers have no room for choice about which assignments they complete, and  
9 are penalized if they reject an assignment. *Id.* 276:1-24 (“[W]e don’t like our staff  
10 appraisers to reject assignments. ... [I]t could count against them. ... [I]t’s not what the  
11 job is. It’s not to just pick and choose whatever tasks you want to do and not the ones  
12 you don’t want to do.”). Staff Appraisers are automatically assigned appraisal jobs via a  
13 computer program called Appraisal Port. *Id.* 150:4-11. A group of managers controls  
14 the workload distribution settings. *Id.* 245:12-21. Staff Appraisers have up to twenty  
15 appraisals in their “pipeline” at any one time. *Id.* 261:14-20. Any adjustment to an  
16 Appraiser’s capacity settings is requested through his or her district manager. *Id.* 265:2-  
17 12. Once Staff Appraisers receive an assignment on Appraisal Port, all of their actions  
18 are timed. Staff Appr. Decl. ¶ 14. They must contact the borrower within 24 hours, and  
19 record their communications in Appraisal Port. *Id.* They must complete the appraisal  
20 and submit their report within a specified “turn-time,” or their pay will be reduced. *Id.*  
21 ¶¶ 11, 14. Review Appraisers also receive their job assignments through BofA’s  
22 software system. *Id.* 343:8-15. (Reviewers “hit ‘get next’ to pull in another review to  
23 complete[,] [and] a review is assigned to them.”). Review Appraisers also have  
24 specified times for completing their reviews. Rev. Appr. Decl. ¶ 9.

24 **F. Only a High School Degree – Not a “Prolonged Course of Specialized**  
25 **Intellectual Instruction” – Is Required to Become a BofA Appraiser.**

26 Under BofA’s policy, there is no requirement to obtain any degree beyond a high  
27 school diploma or GED to become a Staff or Review Appraiser. *See* 30(b)(6) Dep.  
28 143:3-8. Eleven of the 22 California declarants have only a high school degree. Staff

1 Appr. Decl. ¶ 20; Galaz & Stowe Decl. ¶ 19; Keller Decl. ¶ 20. Those who have  
2 obtained degrees have studied topics having nothing to do with appraising, including  
3 electronics, psychology, and journalism. *Id.* The 30(b)(6) deponent was “not aware of  
4 what degrees [Appraisers at BofA] have,” and does not know of anyone at BofA with a  
5 degree in appraising. *Id.* 30(b)(6) Dep. 143:18-144:2, 147:12-149:1. Ultimately,  
6 appraising is learned “through experience on the job.” *Id.* 299:2-18.

7 All Appraisers in the proposed California Class must be licensed by the state.  
8 Staff. Appr. Decl. ¶ 20; Rev. Appr. ¶ 19. BofA has no difference in requirements for  
9 Staff Appraisers and Review Appraisers. *Id.* Licensing requirements consist of a limited  
10 number of hours of classroom training, more extensive hours of supervised on-the-job  
11 experience, and passage of a test. *Id.*; 30(b)(6) Dep. 147:24-148:10. The currently  
12 required amount of classroom training is 150 hours, *i.e.*, less than four weeks of full-  
13 time instruction. *See* Cal. Code Regs. tit. 10 ch. 6.5 art. 3 § 3543(a)(1) (provided, with a  
14 request for judicial notice, in support of Plaintiffs’ Mot. for Cond. Cert. (ECF Nos. 44-  
15 15 (at 13 of 51) & 45). The required number of hours of supervised on-the-job  
16 experience to become licensed to sign reports independently is 2,000 hours. *Id.* §  
17 3541(c); *see also* 30(b)(6) Dep. 147:9-148:10 (significant “on-the-job training”).

### 18 **III. CLASS CERTIFICATION SHOULD BE GRANTED**

19 In this case, the predominant, common question under Rule 23 is whether the  
20 California Labor Code’s narrow administrative and professional exemptions apply to  
21 Appraisers. Does the administrative exemption apply to workers who, according to  
22 Defendants’ 30(b)(6) witness, do not supervise anyone, do not make management  
23 decisions, do not advise management, do not have authority to bind the employer,  
24 spend their time gathering information and producing transaction-specific standardized  
25 reports, and have no role in setting company objectives, policies, or practices? Does the  
26 professional exemption apply to employees who are not required to have any degree  
27 beyond a high school diploma or GED, are subject to identical state-wide licensing  
28 requirements emphasizing on-the-job apprenticeship, and learn their job through

1 experience, not a prolonged course of intellectual instruction? Regardless of whether  
2 those “questions will be answered, on the merits, in favor of the class,” these “*questions*  
3 common to the class predominate,” and certification is thus appropriate. *Amgen Inc. v.*  
4 *Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1191 (2013) (emph. in orig.).

5 **A. Class Certification Is Appropriate under Rule 23(a).**

6 The California Class and both subclasses satisfy the four criteria under Rule  
7 23(a): numerosity, typicality, adequacy of the representation, and commonality.<sup>2</sup>

8 **1. The Class Is Numerous**

9 A class must be “so numerous that joinder of all members is impracticable.” Fed.  
10 R. Civ. P. 23(a)(1). Because forty members presumptively satisfies this requirement  
11 (*Avilez v. Pinkerton Gov’t Servs.*, 286 F.R.D. 450, 456 (C.D. Cal. 2012) (Carter, J.)),  
12 this class, numbering in the hundreds, easily meets the requirement.<sup>3</sup>

13 **2. The Representative Parties’ Claims Are Typical.**

14 The “claims or defenses of the representative parties [must be] typical of the  
15 claims or defenses of the class.” Fed. Rule Civ. P. 23(a)(3). Courts assess typicality by  
16 determining whether other members have a similar injury, whether the action is based  
17 on conduct not unique to the named plaintiffs, and whether other members have been  
18 injured by the same conduct. *Hanon v. Dataproducts Corp.*, 976 F.2d 508 (9th Cir.

---

19  
20 <sup>2</sup> The Class is also ascertainable, as it is feasible to “determine whether a particular  
21 individual is a member.” *See O’Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 319  
22 (C.D. Cal. 1998). Defendants identified all individuals in the positions at issue for the  
23 past three years, per the Court’s FLSA conditional certification order (ECF No. 109).

24 <sup>3</sup> Approximately 240 Appraisers have worked for BofA in California in the past three  
25 years (*i.e.*, less than the applicable class period). *See Schwartz Decl.* ¶ 15. Individuals  
26 already terminated (in the waiting time penalties subclass) and employed in the last  
27 year (in the PAGA and itemized wage statement subclass), respectively, likewise far  
28 exceed the 40-person threshold for numerosity. *Id.* ¶¶ 15, 16.

1 1992). Here, all five named Plaintiffs performed the same Staff or Review Appraiser  
2 duties as the Class, all were classified as exempt, all worked overtime hours, and none  
3 received overtime pay or breaks. *See* Boyd, Medina, Zanko, Galaz and Parks Decls. in  
4 Supp. of Mot. for Cond. Cert. (ECF Nos. 44-2, 44-5, 44-9, 44-10, 44-14); Boyd Dep.  
5 62:19-63:8, 212:23-214:9, 214:24-216:8; Galaz Dep. 134:13-19, 298:19-299:19; *see*  
6 *also Campbell v. PriceWaterhouseCoopers, LLP*, 287 F.R.D. 615, 623 (E.D. Cal. 2012)  
7 (typicality met because named plaintiffs “present the same common questions as are  
8 presented by other class members[:] whether their work involved the exercise of  
9 discretion and independent judgment, and whether they had to be ‘learned  
10 professionals.’”). Plaintiffs Boyd, Medina, Zanko and Galaz terminated their  
11 employment within three years of the filing of this suit, and represent the waiting time  
12 penalties subclass; Plaintiffs Parks, Medina and Zanko have been employed within one  
13 year prior to the filing of the suit, and represent the PAGA<sup>4</sup> and itemized wage  
14 statement subclass. *See* 2d Am. Compl. ¶¶ 42, 43 (ECF No. 42). Typicality is satisfied.

### 15 3. The Representative Parties Will Adequately Protect the Class

16 Plaintiffs satisfy the adequacy requirement of Rule 23(a)(4) if they do not have  
17 conflicts of interest with the class and are represented by qualified and competent  
18 counsel. *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 535 (N.D. Cal. 2012). None  
19 of the named Plaintiffs has a conflict with the class. *See* Schwartz Decl. ¶ 14 & Ex. K.  
20 Plaintiffs are represented by qualified and competent counsel with successful track  
21 records in class actions. *Id.* ¶¶ 17-18; Declaration of Wilmer J. Harris, Esq., submitted  
22 herewith, ¶¶ 2-19. Accordingly, the Court should appoint Plaintiffs as class

---

23  
24 <sup>4</sup> Although class certification “is not required to maintain a cause of action under  
25 PAGA” (*Alcantar v. Hobart Serv.*, 2013 WL 146323, \*3 (C.D. Cal. Jan. 14, 2013)  
26 (Gutierrez, J.)), Plaintiffs include the PAGA claim, as they are seeking class  
27 certification of a penalty subclass in any event.  
28

1 representatives and their counsel, Bryan Schwartz Law and Schonbrun DeSimone  
2 Seplow Harris & Hoffman, LLP, as Class Counsel.

3 **4. There Are Questions of Law and Fact Common to the Class.**

4 The “commonality” prong of Rule 23 requires “questions of law or fact common  
5 to the class.” *See* Fed. R. Civ. P. 23(a)(2); *Avilez*, 286 F.R.D. at 460-61. This “requires  
6 that the class’s claims are based on a ‘common contention ... capable of classwide  
7 resolution,’ meaning that determination of the ‘truth or falsity’ of that contention ‘will  
8 resolve an issue that is central to the validity of [the class’s] claims.’” *Avilez*, 286  
9 F.R.D. at 460-61 (quoting *Wal-Mart Stores, Inc. v. Dukes*, --- U.S.---, 131 S. Ct. 2541,  
10 2551 (2011)). The commonality requirement is “construed permissively;” a single  
11 common question is sufficient, and the test is “less rigorous” than the predominance test  
12 of Rule 23(b)(3). *Avilez*, 286 F.R.D. at 460-61 (citing *Ellis v. Costco Wholesale Corp.*,  
13 657 F.3d 970, 981 (9th Cir. 2011), *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th  
14 Cir. 1998)). Where the legality of a particular policy (here, the policy to classify  
15 appraiser duties as exempt) presents a “significant question of law” that is “apt to drive  
16 the resolution of the litigation,” certification is appropriate. *Abdullah v. U.S. Sec.*  
17 *Assoc.*, 731 F.3d 952, 963 (9th Cir. 2013) (citing, *inter alia*, *Dukes*, 131 S.Ct. at 2551).

18 **a. Plaintiffs’ Claims Raise Common Questions.**

19 Appraisers statewide, all classified as exempt, testify that they have regularly  
20 worked long hours (over eight per day and 40 per week) and have not been paid  
21 overtime premiums under California Labor Code § 510. Boyd Dep. 212:23-214:9;  
22 Galaz Dep. 134:13-19; Staff Appr. Decl. ¶ 16; Rev. Appr. Decl. ¶ 13; *see also* 30(b)(6)  
23 Dep. 170:15-19 (“Every appraiser and review appraiser in LandSafe is exempt.”).  
24 Likewise, Appraisers statewide testify to their inability to take meal and rest periods  
25 under California Labor Code § 512. *See* Staff Appr. Decl. ¶ 16; Galaz & Stowe Decl.  
26 ¶ 14; Keller Decl. ¶ 15; *see also* Boyd Dep. 212:23-214:9; Galaz Dep. 298:19-299:19.  
27 Defendants’ policies do not provide for such periods for exempt employees, and  
28 Defendants have never paid Appraisers meal/rest premiums under Labor Code § 226.7  
and Industrial Welfare Commission Wage Order 4-2001, codified as 8 Cal. Code. Regs.



1 § 11040 codified as 8 Cal. Code. Regs. § 11040 (“Wage Order”). *See* 30(b)(6) Dep.  
2 170:20-171:1; 189:14-190:23. The remaining class claims – penalties for itemized wage  
3 statement violations (Cal. Lab. Code § 226(a)), waiting time (Cal. Lab. Code § 203),  
4 and under PAGA (Cal. Lab. Code § 2699), and restitution under Business &  
5 Professions Code § 17200 – are derivative of the overtime and meal/rest period claims.<sup>5</sup>

6 With a prima facie case of Labor Code and § 17200 violations articulated  
7 classwide, the focus will be on the administrative and professional exemptions  
8 Defendants claim as an affirmative defense for all Appraisers. *See, e.g., Avilez*, 286  
9 F.R.D. at 462 (Carter, J.) (formulating certification analysis as considering prima facie  
10 case of violations, followed by exemptions as affirmative defenses). Because the  
11 primary duties are the same for all Staff Appraisers and all Review Appraisers, whether  
12 those duties fit either exemption can be resolved on a classwide basis.<sup>6</sup>

13 **b. The Administrative Exemption Tests Create**  
14 **Commonality.**

15 Among other requirements of this exemption, employees must: have duties that  
16 involve the performance of work directly related to management policies or general

17  
18 <sup>5</sup> Because these claims are derivative, Plaintiffs devote no further separate discussion to  
19 them. *See, e.g., Avilez*, 286 F.R.D. at 473 (“Because the Section 226(a) claims are  
20 derivative, this order’s holding that common questions predominate over the [meal  
21 break] claim also applies to the Section 226 claim.”); *Dilts v. Penske Logistics, LLC*,  
22 267 F.R.D. 625, 640 (S.D. Cal. 2010) (if meal/rest claims can be tried classwide, the  
waiting time, itemized wage, and § 17200 claims “are also ripe for class adjudication”).  
Only differing statutes of limitations for the claims necessitates subclasses.

23 <sup>6</sup> A common question is also presented by the *lack of* a compliant meal/rest policy.  
24 BofA has no such policy, and pays no Cal. Lab. Code § 226.7 premiums. *See Abdullah*,  
25 731 F.3d at 962, following *Bradley v. Networkers Int’l LLC*, 211 Cal. App. 4th 1129,  
26 1150 (2012) (in misclassification case, claim that “employer’s *lack of* a policy  
27 violated” Cal. Lab. Code § 226.7 challenged “uniform companywide conduct,” making  
28 class resolution appropriate).

1 business operations of their employer or their employer’s customers; and customarily  
2 and regularly exercise discretion and independent judgment. *See* Wage Order 4  
3 § 1(A)(2); *see also Rieve v. Coventry Health Care Inc.*, 870 F. Supp. 2d 856, 868-69  
4 (C.D. Cal. 2012).

5 **i. Whether Appraiser duties are “directly related to**  
6 **management policies or general business**  
7 **operations” is subject to common proof.**

8 Under the “directly related” prong, an employee’s duties must be “both  
9 ‘qualitatively administrative’ and ‘quantitatively ... of substantial importance to the  
10 management or operations of the business.’” *See Rieve*, 870 F. Supp. 2d at 869 (quoting  
11 *Harris v. Super. Court*, 53 Cal. 4th 170, 181 (2011)). As stated in the federal regulation  
12 that is explicitly incorporated into California’s administrative exemption:

13 The phrase “directly related to management policies or general business  
14 operations of his employer or his employer’s customers” describes those  
15 types of activities relating to the administrative operations of a business *as*  
16 *distinguished from “production” ... work*. In addition to describing the  
17 types of activities, the phrase limits the exemption to persons who perform  
18 work of *substantial importance to the management or operation of the*  
19 *business* of his employer or his employer’s customers.

20 *See* 29 C.F.R. § 541.205(a) (2001) (emph. added); *see also Rieve*, 870 F. Supp. 2d at  
21 872 (discussing this regulation as the basis for California’s law). As this Court said:

22 The key inquiry is thus perhaps not one of relativity or a focus on the word  
23 “substantial” but rather an examination of whether the employee’s value  
24 directly flows “to the management or operation of the business.” *Such*  
25 *language indicates that the employee in question must hold a supervisory*  
26 *position instead of serving on the front lines of the business.*

27 *Rieve*, 870 F. Supp. 2d at 872-73 (emphasis added). Qualitatively administrative work  
28 involves advising management, planning, negotiating and representing the company.  
*Harris*, 53 Cal.4th at 181-82; *see also Bratt v. Cnty. of L.A.*, 912 F.2d 1066, 1070 (9th



1 Cir. 1990) (administrative exemption applies to those engaged in “the running of a  
2 business, and not merely ... the day-to-day carrying out of its affairs”); *Bollinger v.*  
3 *Residential Capital, LLC*, 863 F. Supp. 2d 1041, 1048 (W.D. Wa. 2012) (under Federal  
4 administrative exemption, work that is “part and parcel of running [any] business,” such  
5 as “human resources manager,” is exempt, whereas “[t]he work Plaintiffs did –  
6 collecting customers’ financial data and measuring that data against Defendants’  
7 lending guidelines – was necessary because Defendants provided mortgages, not  
8 because Defendants were in business generally,” and was thus non-exempt).

9 This Court has also observed that “[t]he ability to take action on behalf of the  
10 employer” is “a narrowing principle” for the concept of “directly related to  
11 management policies or general business operations,” and “in most cases, for an  
12 employee’s work to affect policy or for him to carry out policy, it seems likely that he  
13 would be tasked with decision-making authority.” *Rieve*, 870 F. Supp. 2d at 874.

14 Here, whether Appraisers are subject to the administrative exemption depends on  
15 evidence common to all Appraisers. As elaborated with record citations in the  
16 Statement of Facts above, the job description is standardized for all Staff and Review  
17 Appraisers, as are the compensation plans. Common proof will show that: Appraisers  
18 do not supervise anyone, advise management, or make policy decisions; all Appraisers  
19 are production workers on the front lines who spend their days producing the appraisal  
20 reports that are the core of LandSafe’s business, and for which BofA’s customers pay a  
21 fee; and Appraisers are not authorized to recommend any course of conduct or act on  
22 behalf of BofA on any decisions that bind the company. On the contrary, they compile  
23 reports including valuations, and are required to avoid negotiation with or advice to  
24 BofA’s end customers, or interactions with BofA lending decision-makers (*e.g.*,  
25 underwriters). Common proof shows that Appraisers’ work is “transaction-specific,”  
26 recurring roughly 20,000 times monthly, and that the transactions typically cost several  
27 hundred dollars each. Common proof shows that Appraisers do not “carry out major  
28 assignments” that “affect[] business operations to a substantial degree.” A finding of

1 commonality is therefore appropriate. *See, e.g., Heffelfinger v. Elec. Data Sys. Corp.*,  
2 2008 WL 8128621 (C.D. Cal. Jan. 7, 2008) (Morrow, J.), *aff'd* 492 F. App'x 710, 714  
3 (9th Cir. 2012) (granting certification in administrative exemption case where issue was  
4 whether workers' duties constituted "work directly related to management policies or  
5 general business operations;" common question whether employees "share similar job  
6 duties" supports certification); *Jacob v. Duane Reade, Inc.*, 289 F.R.D. 408, 416  
7 (S.D.N.Y. 2013) (certifying class challenging administrative exemption where members  
8 "have largely consistent duties, which lend themselves to common determinations").

9 **ii. Whether Appraisers routinely exercise "discretion**  
10 **and independent judgment" on matters of**  
11 **significance is subject to common proof.**

12 The policies and forms that govern Appraisers' work are the same for all Class  
13 Members, and provide a source of common proof of lack of discretion and independent  
14 judgment. As the 30(b)(6) deponent explained (*see supra* § II.E), Staff Appraisers  
15 spend most of their time on the Form 1004, which is dictated by federal guidelines. The  
16 detailed Fannie Mae UAD requirements are "applicable whenever [LandSafe]  
17 appraisers are filling out the 1004." 30(b)(6) Dep. 281:2-19. The UAD "defines all  
18 fields required for an appraisal submission for specific appraisals forms and  
19 standardizes definitions and responses for a key subset of fields" and these rules are  
20 what all LandSafe "appraisers and review appraisers are working with every day." *Id.*  
21 282:13-25. Appraisers' discretion as to selection of comps and description of the  
22 property's features (recall the "WTR" code for a water view) are closely circumscribed  
23 by uniform policies. All Reviewers are governed by the LandSafe "Appraisal Reviews"  
24 policy, making them "glorified proofreaders." *Urinikis-Negro v. Am. Family Prop. Svs.*,  
25 616 F.3d 665, 666-68 (7th Cir. 2010) (review appraiser non-exempt). Likewise, all  
26 members of the California Class receive their work assignments and record their actions  
27 via the same BofA electronic interface – another common source of proof.

28 In *Campbell*, a group of accounting firm associates claimed they had been  
misclassified as exempt. 287 F.R.D. at 621. The employer relied on the California

1 professional and administrative exemptions. *Id.* at 620. In finding that the associates  
2 had satisfied the commonality requirement, the Court noted that the plaintiffs could  
3 show that “there is common proof that will determine the common question of whether  
4 [they] exercise discretion and independent judgment in their work.” *Id.* at 620-21. The  
5 Court pointed to the defendants’ 30(b)(6) testimony, which “indicates that an internal  
6 audit manual gives specific instructions on how Associates are to assist in the audit,  
7 what specific types of testing should be done, how the testing should be done, and what  
8 internal control framework should be followed.” *Id.* at 621. Here, BofA’s 30(b)(6)  
9 testimony establishes that common proof, *i.e.*, BofA and regulatory policies and  
10 guidelines, determines the level of Appraisers’ discretion and independent judgment.

11 Much of Appraisers’ time is spent gathering data – an “investigatory” function.  
12 30(b)(6) Dep. 160:25-161:14. Other courts have evaluated state and federal  
13 administrative exemptions on a class or collective basis with respect to employees when  
14 the nature of their shared duties, including duties consisting of data-gathering or  
15 investigation, will determine whether the exemption applies. *See, e.g., Fenton v.*  
16 *Farmers Ins. Exch.*, 663 F. Supp. 2d 718, 722-23 (D. Minn. 2009) (in case brought by  
17 20 employees under FLSA and California law, investigators of insurance claims not  
18 administratively exempt where they received assignments through uniform computer  
19 system, investigated by following specific steps, gathered records and produced reports,  
20 had production quotas and turn-times, and did not negotiate or make decisions for the  
21 company to pay claims); *Reich v. Am. Int’l Adjustment Co.*, 902 F. Supp. 321, 322-25  
22 (D. Conn. 1994) (automobile damage appraisers not exempt under FLSA where, after  
23 being assigned a damaged vehicle, “appraiser makes an appointment to travel to where  
24 the vehicle is located, inspect[s] the vehicle, determine[s] what parts must be replaced  
25 or repaired, [and] estimate[s] the cost of repair using company manuals;” perform “day-  
26 to-day activities of the business through their fact finding and damage evaluations”  
27 rather than “administratively running the business;” are “guided by ... skill and  
28 experience and by manuals,” and “may cause loss to the business upon a faulty cost

1 appraisal,” but not “of such substantial importance [as] to be directly related to general  
2 business operations.”); *Gusdonovich v. Bus. Inform.*, 705 F. Supp. 262 (W.D. Pa. 1985).

3 **c. The Professional Exemption Tests Raise Common**  
4 **Questions.**

5 To prevail on this affirmative defense, BofA will have to prove not only the  
6 “discretion and independent judgment” prong, but that an Appraiser “is primarily  
7 engaged in a learned ... profession,” meaning that an employee engages in “[w]ork  
8 requiring knowledge of an advanced type in a field [of] science or learning customarily  
9 acquired by a prolonged course of specialized intellectual institution and study” and  
10 that “is predominantly intellectual and varied in character (as opposed to routine  
11 mental, manual mechanical, or physical work) and is of such character that the output  
12 produced or the result accomplished cannot be standardized in relation to a given period  
13 of time.” *Rieve*, 870 F. Supp. 2d 867 (quoting Wage Order § 1(A)(3)(b)).

14 Again, the applicability of the exemption can be resolved on a classwide basis.  
15 Appraisers need only possess a high school degree, and the state’s mandatory licensing  
16 requirements are the same for all California Appraisers. *See Campbell*, 287 F.R.D. at  
17 621 (“[Learned professional] exemption presents a common question: does acceptance  
18 into the [position] require, as a standard prerequisite, advanced knowledge customarily  
19 acquired by a prolonged course of specialized academic instruction? It is also apparent  
20 on its face that this exemption is susceptible to common proof.”). The *Campbell* Court  
21 provided several “example[s] of common proof” that “would tend to show whether or  
22 not Associates have the supposedly required academic training” – resumes, the  
23 testimony of hiring managers, and the testimony of a 30(b)(6) witness regarding  
24 requirements for the position.” *Id.* at 623 (“[I]t is enough to determine whether or not  
25  
26  
27  
28

1 PwC requires such an educational background of its potential hires. This should be a  
2 simple matter of common proof.”). The same is true here.<sup>7</sup>

3 **B. Certification under Rule 23(b) Is Proper Because Common Questions**  
4 **of Law and Fact Predominate and Class Resolution Is Superior.**

5 **1. The Nature of Appraisers’ Job Requirements and Job Duties Is**  
6 **the Predominant Common Question.**

7 Plaintiffs also satisfy Rule 23(b)(3), under which a class action may be  
8 maintained if “the court finds that the questions of law or fact common to class  
9 members predominate over any questions affecting only individual members, and that a  
10 class action is superior to other available methods for fairly and efficiently adjudicating  
11 the controversy.” For many of the same reasons discussed above regarding  
12 commonality, the predominance and superiority requirements are met here.<sup>8</sup>

13 The fact that the Defendants chose to classify all Appraisers as exempt on a  
14 company-wide basis, rather than undertaking an employee-by-employee analysis,  
15 weighs in favor of finding that the Appraisers’ challenge may be resolved classwide.  
16 *See In re Wells Fargo Overtime Pay Litig.*, 571 F.3d 953, 957 (9th Cir. 2009) (“An  
17 internal policy that treats all employees alike for exemption purposes suggests that the  
18 employer believes some degree of homogeneity exists among the employees. This  
19 undercuts later arguments that the employees are too diverse for uniform treatment.  
20 Therefore, an exemption policy is a permissible factor for consideration under Rule

---

21  
22 <sup>7</sup> If Defendants rely on the California “Commissioned Employee” exemption, this  
23 also raises a common question – one easily answered by common proof. To qualify for  
24 the exemption, an employee “must be involved principally in selling a product or  
25 service, not making the product or service.” *Ramirez v. Yosemite Water Co., Inc.*, 20  
26 Cal. 4th 785 (1999). Appraisers “do not sell anything.” 30(b)(6) Dep. 124:12-17.

27 <sup>8</sup> Rule 23(b)(1) is also applicable.  
28

1 23(b)(3).”); *see also Abdullah*, 731 F.3d at 964 (challenge to common policy  
2 predominates because “there are no relevant distinctions between the worksites”).

3 Moreover, certification is proper because the heart of the case is a classification  
4 challenge that will stand or fall with respect to the entire class, rather than a challenge  
5 that may succeed as to some class members but fail as to others. *See, e.g., Campbell*,  
6 287 F.R.D. at 624 (common issues predominate because nothing suggested that some  
7 employees customarily exercised discretion and independent judgment while others did  
8 not); *Jacob*, 289 F.R.D. at 420-21 (predominance met because “‘core’ merits inquiry”  
9 on administrative exemption is not individualized because “most, if not all, ASMs  
10 perform a similar swath of duties”); *Swigart v. Fifth Third Bank*, 288 F.R.D. 177, 184,  
11 186 (S.D. Ohio 2012) (where “general policy [regarding how employees in particular  
12 position should perform job] is the focus of the litigation,” administrative exemption  
13 issue “will be determined based on common proof, and common questions clearly  
14 predominate”); *Heffelfinger*, 2008 WL 8128621, at \*24, 26 (“[Q]uestions whether  
15 certain tasks – or categories of tasks – are exempt,” are “the kind of sweeping threshold  
16 question that courts have found justifies class treatment;” to defeat certification,  
17 defendants must “adduc[e] evidence that their exemption mistake was confined to  
18 individual employees or differed across the proposed class.”). Thus, the existence of  
19 “uniform corporate policies” “will often bear heavily on questions of predominance and  
20 superiority,” and “courts have long found that comprehensive uniform policies detailing  
21 the job duties and responsibilities of employees carry great weight for certification  
22 purposes.” *In re Wells Fargo*, 571 F.3d at 958.

23 In *Kress v. PricewaterhouseCoopers LLP*, 2013 WL 140102 (E.D. Cal. Jan. 10,  
24 2013), the Court granted certification in a case hinging on the administrative and  
25 professional exemptions. The plaintiffs were Senior Associates who were not Certified  
26 Public Accountants and who were engaged in providing audit services to the company’s  
27 end clients. *Id.* at \*1. After noting that, as in *Campbell*, common proof would determine  
28 the job’s required qualifications and level of discretion, the Court rejected the



1 defendant's predominance argument, focusing on the fact that defendant could not  
2 identify ways in which the exemption analysis would differ among class members:

3 Defendant does not argue that it is illegally withholding overtime pay from  
4 some employees while properly withholding it from others....[U]ntil  
5 defendant can show that all class members are required to have the  
6 threshold academic background required for the "professional" exemption,  
7 there is no need, on this motion, to examine what work they actually do on  
8 an employee-by-employee, week-by-week basis. Further, until defendant  
9 shows that unlicensed accountants are permitted to do the things California  
10 law and AICPA rules say they cannot do, there is no need to conduct the  
11 requested point-by-point examination of their actual work.

12 *Id.* at \*10. As in *Kress*, here the nature of the job requirements and job duties is the  
13 predominant common question, and Defendants do not contend that some Appraisers  
14 are exempt and others are not. *Id.* And as in *Kress*, Defendants' own testimony and  
15 written policies and testimony provide proof bearing on the applicability of the  
16 exemptions. *Avilez*, 286 F.R.D. at 469 (the "focus of the proposed class action will be  
17 on the words and conduct of the defendants rather than on the behavior of the  
18 individual class members"). Thus, common questions predominate.

19 **2. Defendants' Anticipated Arguments Cannot Defeat**  
20 **Predominance.**

21 As in *Kress*, the Court should easily distinguish the predominance and  
22 superiority concerns that have been raised in cases in which the exemption test would  
23 depend on individualized factors, such as, for example, cases in which certain outside  
24 salespeople might do more than 50% of their work inside an office while others might  
25 not, or in which some assistant managers spend more than 50% of their time on the  
26 floor selling, while others do not. The Ninth Circuit has contrasted such cases, which  
27 require individualized considerations that may make certification inappropriate, with  
28 cases like this one, in which the employer's centralized control of duties in the form of  
standardized corporate policies and procedures, uniform training requirements,

1 common job duties and other factors susceptible to common proof make certification  
2 appropriate. *See Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 946-947 (9th  
3 Cir. 2009) (noting contrast between case involving common policies, and *Vinole* case,  
4 in which plaintiffs’ “claims would require inquiries into how much time each individual  
5 ... spent in or out of the office and how the [employee] performed his or her job”); *see*  
6 *also In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 268 F.R.D. 604, 611 (N.D.  
7 Cal. 2010) (on remand) (concern arising from need to evaluate differences in how  
8 individual employees spent their time, as in *Vinole*, absent when “plaintiff proposes  
9 some form of common proof, such as a standard policy governing how and where  
10 employees perform their jobs”). Here, Appraisers spend all of their time engaged in the  
11 same basic duties, and all are subject to the state’s and the company’s standard  
12 licensing and qualification requirements. Here, not only the common exemption  
13 classification, but the “actual business practices” described by the 30(b)(6) witness and  
14 the declarants, including the way policies are implemented “on the ground,” show that  
15 common questions predominate. *Abdullah*, 731 F.3d at 965.

16 Defendants may argue that individualized issues as to arbitration agreements and  
17 severance agreements (purporting to waive participation in a class action) defeat  
18 predominance. They do not. “Courts have traditionally been reluctant to deny class  
19 action status as failing the predominance requirement of Rule 23(b)(3) simply because  
20 affirmative defenses may be available against individual members,” and “[t]he fact that  
21 some members of a putative class may have signed arbitration agreement or released  
22 claims against a defendant does not bar class certification.” *Avilez*, 286 F.R.D. at 466  
23 (quoting *Herrera v. LCS Fin. Servs. Corp.*, 274 F.R.D. 666, 681 (N.D. Cal. 2011)  
24 (“Other courts presented with this issue have held that class certification should not be  
25 denied merely because some class members may be subject to the defense that their  
26 claims are barred by valid documents releasing the defendant from liability.”  
27 (quotations omitted; citing cases)); *see also, e.g., Heffelfinger*, 2008 WL 8128621, at  
28 \*4, 13 (certifying overtime class despite fact that at least 125 class members out of class



1 of 440 had signed severance agreements purporting to waive claims asserted in the  
2 action). In the alternative, subclasses to separate employees who did and did not sign  
3 arbitration and/or severance agreements would eliminate any predominance obstacle.

4 The viability of the arbitration agreement and severance clauses purportedly  
5 eliminating class action rights, if anything, presents an additional predominant,  
6 common question as to those who signed them. For example, Plaintiffs will argue that  
7 Defendants have waived their rights under any arbitration agreements by engaging in  
8 discovery, opposing conditional certification, and opposing class certification without  
9 moving to compel arbitration. A subclass of those who signed arbitration agreements,  
10 therefore, would present this waiver issue as a predominant, common question. *See*  
11 *Avilez*, 286 F.R.D. at 473-74 (certifying class despite arbitration agreements and  
12 “alternatively conclud[ing] that the four Subclasses also satisfy the predominance  
13 requirement” and agreeing with plaintiff that the waiver-of-arbitration-agreement issue,  
14 itself, raises a “question of fact that predominates”).

15 Finally, the fact that individual Appraisers have damages claims that depend on  
16 their own number of hours worked or missed meal/rest breaks does not defeat class  
17 certification. *See Leyva v. Medline Indus., Inc.*, 716 F.3d 510, 513-14 (9th Cir. 2013)  
18 (“[D]amages determinations are individual in nearly all wage-and-hour class actions....  
19 [T]he amount of damages is invariably an individual question and does not defeat class  
20 action treatment.”) (internal quotations and citations omitted); *also Ellis*, 285 F.R.D. at  
21 539 (citing cases); *Herrera*, 274 F.R.D. 666, 680-81 (N.D. Cal. 2011) (“[I]ndividual  
22 damages issues typically do not bar class certification where common questions  
23 predominate over individual questions as to liability.”); *see also Amgen*, 133 S. Ct. at  
24 1196 (Rule 23(b)(3) “does *not* require a plaintiff seeking class certification to prove that  
25 each elemen[t] of [her] claim [is] susceptible to classwide proof” (emph. in orig.)).

### 26 **3. Class Resolution Is Superior**

27 A class action is superior under Fed. R. Civ. P. 23(b)(3) because there are  
28 significant disincentives for individuals to step forward with claims against a current or  
former employer. *See Rutti v. Lojack Corp.*, 2012 WL 3151077, at \*5 (C.D. Cal. July

1 31, 2012) (Carter, J.). There is no other litigation concerning the controversy, and the  
2 progress of the litigation thus far has been favorable to potential class members. Among  
3 other things, the Court granted Plaintiffs' motion for conditional certification.

4 The size of the proposed class (several hundred) is manageable. *See Ellis*, 285  
5 F.R.D. at 540. Because Plaintiffs challenge a classwide policy based on the general  
6 duties of all Appraisers, judicial economy favors adjudicating their claims in one  
7 proceeding, rather than hundreds of individual proceedings. *Id.* Moreover, the class  
8 members' interest in individually controlling the prosecution of this action is limited  
9 because the size of the potential recovery available to each plaintiff is unlikely to create  
10 an incentive to litigate the case individually, given the cost of fully prosecuting such  
11 claims, and, in any event, class members who prefer to proceed individually may opt  
12 out. *See Heffelfinger*, 2008 WL 8128621.

#### 13 **IV. CONCLUSION**

14 Plaintiffs respectfully request that the Court (1) certify the California Class and  
15 two subclasses; (2) approve the form and content of Plaintiffs' proposed judicial notice,  
16 attached to the Schwartz Decl. as Exhibit H; and (3) appoint the named Plaintiffs as  
17 Class Representatives and the undersigned as Class Counsel.

18  
19 DATED: January 13, 2013

BRYAN SCHWARTZ LAW  
SCHONBRUN DESIMONE SEPLOW  
HARRIS & HOFFMAN, LLP

20  
21  
22 By: /s/ Bryan J. Schwartz  
23 Bryan J. Schwartz (SBN 209903)  
24 Attorneys for Plaintiffs  
25  
26  
27  
28