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

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

24 Plaintiffs,

25 vs.

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

Defendants.

Case No.: SA13-CV-00561 DOC (JPRx)

**PLAINTIFFS' NOTICE OF MOTION  
AND MOTION FOR PARTIAL  
SUMMARY JUDGMENT;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT**

Date: December 29, 2015

Time: 8:30 a.m.

Place: Courtroom 9D, Santa Ana  
Hon. David O. Carter

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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 December 29, 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, and Linda Zanko,  
8 through their attorneys and on behalf of all others similarly situated, will and hereby do  
9 move the Court for partial summary judgment under Federal Rule of Civil Procedure 56.  
10 The motion is based on: this Notice of Motion and Motion; the accompanying  
11 Memorandum of Points and Authorities; the accompanying declarations of Bryan J.  
12 Schwartz, Esq. and Wilmer J. Harris, Esq. and the exhibits to such declarations; the  
13 previously-filed declarations of opt-in Plaintiffs; the accompanying Request for Judicial  
14 Notice; the pleadings and papers filed herein; and such other information as may be  
15 presented to the Court at the time of the hearing.

16           Based upon undisputed facts, Plaintiffs seek an order granting partial summary  
17 judgment as to the inapplicability of three federal overtime exemptions and three  
18 California overtime exemptions. With respect to federal law, Plaintiffs seek an order that  
19 the Federal Fair Labor Standards Act (“FLSA”) exemptions for (i) administrative  
20 employees, (ii) professional employees, and (iii) retail and service commissioned  
21 employees are inapplicable to the Class as a matter of law. *See* FLSA, 29 U.S.C.  
22 §§ 207(i), 213(a)(1). With respect to California law, Plaintiffs seek an order that the  
23 California Wage Order exemptions for (i) administrative employees, (ii) professional  
24 employees, and (iii) commissioned employees are inapplicable to the Class as a matter of  
25 law. *See* Industrial Welfare Commission Wage Order 4-2001, codified as 8 Cal. Code  
26 Regs. § 11040.

1 This motion is made following the conference of counsel pursuant to Local Rule 7-  
2 3, which took place on August 22, 2014. *See* Declaration of Wilmer J. Harris, Esq., dated  
3 November 12, 2014, submitted herewith, at ¶ 3.

4  
5 Dated: November 12, 2014

BRYAN SCHWARTZ LAW

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8  
9 By: /s/ Bryan J. Schwartz  
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12 *Plaintiffs and the Putative Class*

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**TABLE OF AUTHORITIES**

**Federal Cases**

*Ahle v. Veracity Research Co.*, 738 F. Supp. 2d 896 (D. Minn. 2010) ..... 19, 21

*Barnett v. Washington Mutual Bank, FA*, 2004 WL 1753400 (N.D. Cal. 2004) ..... 25

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*Campanelli v. Hershey Co.*, 765 F. Supp. 2d 1185 (N.D. Cal. 2011) ..... 18

*Corning Glass Works v. Brennan*, 417 U.S. 188 (1974)..... 8

*Davis v. J.P. Morgan Chase & Co.*, 587 F.3d 529 (2d Cir. 2009) ..... 14, 15, 16

*Dybach v. State of Fla. Dept. of Corrs.*, 942 F.2d 1562 (11th Cir. 1991) ..... 23

*Gusdonovich v. Business Information*, 705 F. Supp. 262 (W.D. Pa. 1985)..... 14

*Kadden v. VisuaLex, LLC*, 910 F. Supp. 2d 523 (S.D.N.Y. 2012) ..... 23

*Klem v. County of Santa Clara*, 208 F.3d 1085 (9th Cir. 2000) ..... 9

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*Pignataro v. Port Authority of N.Y & N.J.*, 593 F.3d 265 (3d Cir. 2010) ..... 23

*Reber v. AIMCO/Bethesda Holdings, Inc.*, 2008 WL 4384147  
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*Rieve v. Coventry Health Care Inc.*, 870 F. Supp. 2d 856 (C.D. Cal. 2012) ..... *passim*

*Solis v. Washington*, 656 F.3d 1079 (9th Cir. 2011) ..... 23

*Takacs v. A.G. Edwards & Sons, Inc.*, 444 F. Supp. 2d 1100 (S.D. Cal. 2006) ..... 25

1 *Turcotte v. Renton Coil Spring Co.*, 2008 WL 4542436 (W.D. Wash. Oct. 8, 2008) .... 19

2 *Young v. Cooper Cameron Corp.*, 586 F.3d 201 (2d Cir. 2009) ..... 23

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4 **State Cases**

5 *Combs v. Skyriver Communications, Inc.*, 159 Cal. App. 4th 1242 (2008) ..... 11

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11 **Statutes and Regulations**

12 29 U.S.C. § 207(i) ..... 25

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4 **Other Sources**

5 “Administrative Employees/ Appraisers,” Opinion Letter, Department of  
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Appraisers produce appraisal reports for residential properties, which serve as  
4 collateral for mortgages issued by Defendant Bank of America Corp. (“Bank of America”  
5 or “BofA”). To produce the reports, Appraisers gather specified information about each  
6 property, visit and photograph the property, and complete a standardized form. Each  
7 report relates to a single mortgage transaction. Each month, Appraisers complete about  
8 20,000 of them nationwide for BofA and its in-house appraisal subsidiary, LandSafe  
9 Appraisal Services, Inc. (“LandSafe”). Appraisers have no other job duties. They do not  
10 supervise anyone, have no authority to set policies or advise management, and cannot  
11 commit funds or decide whether or not to offer a loan. Appraisers are “production”  
12 workers and are paid primarily based on the quantity of reports they generate.

13 Plaintiffs sued, claiming that Defendants misclassified them as “exempt” from the  
14 overtime laws and other California and federal wage protections. On December 11, 2013,  
15 this Court granted conditional certification of a nationwide collective action, and ordered  
16 that FLSA opt-in notice be sent to eligible Appraisers. *See* ECF No. 109. On June 27,  
17 2014, the Court granted Plaintiffs’ motion for class certification of a California class. *See*  
18 ECF No. 232. Between the California class and the nationwide opt-ins, approximately  
19 360 Appraisers are participating in this case.<sup>1</sup>

20 Defendants attempt to justify their failure to pay overtime to these Appraisers  
21 based upon several California and federal exemptions. Defendants bear the burden of  
22 demonstrating that these exemptions plainly and unmistakably apply. Because all such  
23 exemptions must be narrowly construed, the undisputed facts entitle Plaintiffs to partial  
24 summary judgment.

25 \_\_\_\_\_  
26 <sup>1</sup> The case was originally brought on behalf of an additional job classification – Review  
27 Appraisers. The Parties settled the claims of the Review Appraisers, and the Final  
28 Approval hearing is currently scheduled for November 17, 2014.

1 The test for the administrative exemption, under both California and federal law,  
2 requires Defendants to establish that Appraisers perform work “*directly related* to the  
3 management or general business operations of the employer or the employer’s  
4 customers.” The governing regulations and case law make clear that Appraisers’ work  
5 does not satisfy this prong: Appraisers are production workers who repeatedly perform a  
6 transaction-specific task on the front lines of Defendants’ business – a mandatory step in  
7 the day-to-day process of issuing a mortgage loan. Appraisers do not perform work tied  
8 to the general administration of Defendants’ business, such as human resources or  
9 corporate strategy – they help churn out BofA’s and Landsafe’s basic products.

10 Defendants also fail the federal administrative exemption because they do not  
11 exercise “discretion and independent judgment *with respect to matters of significance.*”  
12 Even assuming for the purpose of this motion that Appraisers exercise some “discretion  
13 and independent judgment,” they do not do so “with respect to matters of significance”:  
14 Appraisers cannot alter the policies and guidelines about how to complete appraisal  
15 reports; they cannot bind BofA to decisions; and they make no decisions extending  
16 beyond individual appraisal reports specific to a single property. Narrowly applying the  
17 exemption, the Court should find that Defendants are unable to establish that Appraisers  
18 do any of the tasks provided as examples of “matters of significance” in the regulations.

19 As a matter of law, Appraisers also do not fall within the state or federal  
20 professional exemptions. The education requirements for Appraisers are undisputed.  
21 They are set by state licensing regulations based upon national Appraiser Qualifications  
22 Board standards. The license requirements consist of a period of on-the-job training, the  
23 equivalent of several weeks of “classroom” study (which can be performed via online  
24 courses), and passage of a test. This does not satisfy the narrow professional exemption.

25 Also as a matter of law, Defendants do not qualify for the federal “retail and  
26 service commissioned employees” exemption, which applies only to “retail or service  
27 establishments.” Jurisprudence and regulations establish that neither a bank selling  
28 mortgages nor its in-house appraisal subsidiary qualifies for this category.

1           Lastly, as a matter of law, Plaintiffs do not fall within the California  
2 “commissioned” employees exemption, which applies only to workers engaged in sales.  
3 It is undisputed that Appraisers do not sell anything.

4           Because Appraisers do not fall plainly and unmistakably into the limited FLSA or  
5 California exemptions, the Court should grant Plaintiffs partial summary judgment.

6 **II. STATEMENT OF UNDISPUTED MATERIAL FACTS**

7           **A. Appraisers’ Only Role Is to Produce Appraisal Reports, Each Related**  
8           **to a Single Mortgage.**

9           Appraisers have one primary duty: generating appraisal reports for properties upon  
10 which BofA offers mortgages. *See* Deposition of Rule 30(b)(6) witness K. Scott  
11 Nicholson (“Nicholson Dep.”) at 34:7-16; 225:19-232:22, attached as Exhibit A to the  
12 Declaration of Bryan J. Schwartz, Esq., dated November 12, 2014 (“Schwartz Decl.”).  
13 Appraisers typically produce multiple appraisal reports per day, and their managers  
14 control how many assignments they receive through “Appraisal Port,” an automated  
15 software program. *Id.* 251:18-252:3 (“[T]he most recent number I’ve seen was 2.15”  
16 reports per day); *id.* 261:14-263:1. If they turn down assignments, Appraisers can be  
17 penalized. *Id.* 276:1-24. Appraisers throughout the company produce about 20,000  
18 appraisal reports each month. *Id.* 108:6-15. Each report pertains to a single mortgage  
19 issued by BofA on a single residential property. *Id.* 159:4-22.

20           To produce a report, an Appraiser completes a standardized appraisal form.  
21 Nicholson Dep. 225:19-232:22; *see also* Schwartz Decl. Ex. B (sample Form 1004). The  
22 form details exactly what information the Appraiser must retrieve and input concerning  
23 the property. Schwartz Decl. Ex. B. Some of the data must be pulled from databases;  
24 some must be gathered from an in-person inspection. *Id.* The form requires the Appraiser  
25 to take and attach photographs of specified rooms and views of the property, and to create  
26 a diagram of the floor-plan. *Id.* After completing a report, the Appraiser submits it for  
27 review, and many reports are manually reviewed by Review Appraisers and sometimes  
28 also a manager. Nicholson Dep. 360:9-361:14, 378:24-379:5. If the Reviewer or manager

1 finds fault with the report, it can be rejected, and the Appraiser's compensation can be  
2 docked as a result. *Id.* 85:21-86:10, 370:8-371:11.

3 **B. Appraisers Supervise No One, Do Not Advise Management, and Lack**  
4 **Authority to Set Policies or Bind the Company.**

5 Appraisers do not supervise anyone. Nicholson Dep. 117:21-23. They do not make  
6 management decisions. *Id.* 159:4-160:10 (management "might make management  
7 decisions looking at [appraisal report] data, but the appraisers and review appraisers are  
8 not the ones looking at aggregate data to make management decisions."). They do not  
9 advise management. *Id.* 132:7-133:5 (BofA allows Appraisers to provide feedback as an  
10 "extracurricular thing that some appraisers may do," but it is "nobody's primary duty").  
11 They do not advise loan officers. *Id.* 150:1-3. They do not advise the homeowner. *Id.*  
12 149:23-24. Appraisers have no authority to develop management objectives, policies, or  
13 practices. *See id.* 40:1-22 (pricing policy not determined by Appraisers); *id.* 150:12-151:2  
14 (Appraisers' "primary job duties do not include involvement with formulation of  
15 policies"); *id.* 151:10-14 (Appraisers are "providing the product; they're not goal setting  
16 for the institution"). They may not deviate from policies. *Id.* 338:15-340:9 (following the  
17 "very detailed list" of how to complete a report is "not an optional thing, or something  
18 that the appraiser can waive"). Although they must choose "comparable" properties to  
19 include in reports, they may not deviate from guidelines in doing so. *See* Schwartz Decl.  
20 Ex. C (Unacceptable Appraisal Practice ("UAP") 7); Nicholson Dep. 322:20-323:3  
21 (compliance with UAP 7 is not optional – "you must follow this").

22 Appraisers have no authority to commit, bind, or negotiate on behalf of Bank of  
23 America or LandSafe – the bank can decide to issue a loan based upon its business  
24 judgment regardless of the appraisal value. Nicholson Dep. 41:23-42:23 (Appraisers  
25 "don't make a final decision on . . . whether a loan is accepted or not. They don't know  
26 anything about that loan."), 163:1-8 (same), 149:2-15 ("[N]egotiating on behalf of  
27 LandSafe or B of A is not part of what appraisers or review appraisers do."), 143:6-12  
28 ("[T]he limited communications [Appraisers] would have with a real estate agent or a

1 homeowner or either a buyer or seller would be limited strictly to information  
2 gathering.”), 161:25-162:25 (Appraisers do not “bind Bank of America to . . . any course  
3 one way or the other,” “don’t bind LandSafe to a particular course of conduct either,” and  
4 “are not committing any funds of BofA to doing anything.”). Appraisers do not resolve  
5 complaints for BofA. *Id.* 151:15-21:4.

6 **C. Appraisers Are Production Workers Completing a Mandatory Step in**  
7 **BofA’s Sale of Mortgages.**

8 Every time BofA offers a mortgage on a house, BofA performs an appraisal.  
9 Nicholson Dep. 152:12-22; Schwartz Decl. Ex. D (BofA website: “For a home purchase,  
10 an on-site appraisal is needed for the mortgage to be approved”). Indeed, for a mortgage  
11 to be eligible for sale by BofA to Fannie Mae or Freddie Mac, BofA must obtain an  
12 appraisal, and mortgages over \$250,000 require an appraisal by law. *See* Schwartz Decl.  
13 ¶¶ 6-7 & Exs. E, F (regs. of Fannie Mae and Freddie Mac, requiring appraisal for  
14 mortgages sold to them); 12 C.F.R. § 34.43(a) (“An appraisal performed by a State  
15 certified or licensed appraiser is required for all real-estate-related financial transactions”  
16 over \$250,000, with exceptions). BofA charges its customers, on average, approximately  
17 \$400 for the appraisal. Nicholson Dep. 36:5-13; *see also* Schwartz Decl. Ex. D (BofA  
18 website: “Borrowers are typically required to pay for the appraisal”).<sup>2</sup>

19 Defendants view Appraisers as “production” workers. Defendants’ 30(b)(6)  
20 witness, Mr. Nicholson, testified: “I manage the production group within LandSafe that  
21 fulfills the appraisals with in-house staff appraisers.” Nicholson Depo. 14:8-11; *id.* 24:7-9  
22 (same). Appraisers are paid under a compensation plan designed “to drive bank  
23 productivity,” meaning “to incent[ivize] our staff . . . to be productive.” *Id.* 129:9-23. The  
24 30(b)(6) witness repeatedly referred to appraisal reports as “the products” that Appraisers

25 \_\_\_\_\_  
26 <sup>2</sup> In their Request for Judicial Notice submitted herewith (“Req. Jud. Notice”), Plaintiffs  
27 request that the Court take judicial notice of the Fannie Mae and Freddie Mac  
28 regulations, as well as the print-out from Defendant BofA’s website.

1 produce. *E.g., id.* 33:15-34:16, 107:14-108:15. He testified: “LandSafe Valuation  
2 Services completes these products as . . . their core product,” and “that would be the case  
3 for all of the in-house staff appraisers.” *Id.* 33:15-34:16. LandSafe’s job is to “fulfill”  
4 BofA’s orders for “appraisal products.” *Id.* 36:5-37:18.

5 Appraisers “are ranked on production.” *Id.* 191:20-192:5. For each appraisal they  
6 produce, Appraisers receive “billings,” which are used to track productivity. *Id.* 192:3-19.  
7 “[T]he managers get their . . . teams’ billings and production . . . on a daily basis.” *Id.*  
8 193:14-18. Managers are “reviewed on the production” of the Appraisers they supervise,  
9 and some district managers compete to see whose Appraisers can produce more. *Id.*  
10 194:24-196:5. Low-volume producers who lack a “justifiable reason” “would be  
11 terminated.” *Id.* 200:2-19. Appraisers have mandatory “turn-times” (*i.e.*, deadlines) for  
12 completing each report they are assigned. *Id.* 259:22-260:13. Appraisers’ pay is  
13 calculated in part based on their “production, *i.e.*, average daily ‘billings.’” *Id.* 85:21-  
14 86:10 (pay based on Appraisers’ “production, [whether] they’re on time, and their quality  
15 piece”). These undisputed facts establish that Appraisers are front-line workers rather  
16 than administrators focused on Defendants’ general business operations.

17 **D. The Requirements to Become an Appraiser Consist of a High School**  
18 **Diploma, Several Weeks of Classes, on-the-Job Training, and Passage**  
19 **of a State Licensing Test.**

20 To become an Appraiser, there is no requirement to obtain any degree beyond a  
21 high school diploma or GED. *See* Nicholson Dep. 144:3-8. Many of the Plaintiffs have  
22 only a high school diploma. *See, e.g.,* Appraiser Decls. ¶ 20.<sup>3</sup> Some who have obtained

23 <sup>3</sup> This citation refers to Paragraph 20 of previously-submitted declarations of eleven Staff  
24 Appraisers who have only high school degrees: Karen Lampert (ECF No. 44-7), Michael  
25 Petris (ECF No. 44-11), Gerald Robbins (ECF No. 44-12), Harvey Waggoner (ECF No.  
26 44-13), May Lonn Chan (ECF No. 63-4), Margaret Riley (ECF No. 118-2), Donald Mass  
27 (ECF No. 118-3), Michael Landes (ECF No. 118-7), Jeff Mandel (ECF No. 118-8),  
28 Debby Evans (ECF No. 118-9), Anthony Barnette (ECF No. 118-11).

1 college degrees have studied topics having nothing to do with appraising, including  
2 counseling, psychology, and political science. *Id.*<sup>4</sup> The 30(b)(6) witness was unaware of  
3 anyone who has a degree in appraising. Nicholson Dep. 148:12-149:1. He was “not aware  
4 of what degrees [his] staff have.” *Id.*; *see also id.* 144:13-21 (“I guess I’ve never even  
5 asked the question about what their – what their educational level completed was.”).

6 Appraisers must be licensed by their state, and state requirements are based, with  
7 immaterial variations, on national standards promulgated by the Appraiser Qualification  
8 Board (“AQB”). The AQB’s current standards for an appraiser license require 150 total  
9 hours (less than four weeks full-time) of classroom training (which can be satisfied  
10 through online courses), 2,000 hours of supervised on-the-job experience, and passage of  
11 the state test. *See* Schwartz Decl. Ex. G (AQB standards), Ex. H (compendium of state  
12 requirements); *see also* Req. Jud. Notice. Appraisers can also obtain a higher-level  
13 license, called a “certified” residential license (a small number of states require the  
14 “certified” license – *see* Schwartz Decl. Ex. H). During the class period, Defendants have  
15 “preferred” but not required this. Nicholson Dep. 145:10-19. Some Plaintiffs and class  
16 members are not “Certified” Appraisers. *See, e.g.*, Schwartz Decl. Ex. I (Deposition of  
17 Joann Parks) 33:14-34:3; *id.* Ex. J (Deposition of Terry Boyd) 43:6-44:17. To obtain a  
18 certified residential license (under the AQB standards and in all states where Class  
19 Members are located, with non-material variations), an appraiser must complete an  
20 additional 50 hours of classes and an additional 500 hours of experience (for a total of  
21 2,500 in the two years prior to certification). *Id.* Exs. G, H. In addition, to obtain a  
22  
23  
24

25 \_\_\_\_\_  
26 <sup>4</sup> *See, e.g.*, Paragraph 20 of declarations of Linda Zanko (ECF No. 44-14) (B.S. in  
27 psychology), Rick Leung (ECF No. 44-8 (B.A. in political science), Eric Costa (ECF No.  
28 44-3) (Associate degree in business); Sonia Medina (ECF No. 44-9 (M.S. in counseling).



1 certified license, an Appraiser must *either* hold an Associate degree (in any subject) *or*  
2 pass certain college-level courses. *Id.* Ex. G at 14.<sup>5</sup>

3 The “ability to determine if a ... particular piece of data impacts the value of the  
4 property that you are appraising ... is gained through experience on the job.” Nicholson  
5 Dep. 298:2-18; *id.* 146:24-147:10 (on-the-job training far exceeds classroom training).

6 **E. BofA Is a Bank Selling Mortgages, and LandSafe Is its In-House**  
7 **Appraisal Subsidiary.**

8 LandSafe Appraisal Services, Inc., is a wholly-owned subsidiary of BofA.  
9 Nicholson Dep. 28:11-19. All of the appraisals LandSafe produces are done for Bank of  
10 America. *Id.* 28:20-29:4. “[T]here’s no store you can walk into to buy these appraisals,”  
11 and “[a]n outside entity cannot order an appraisal.” *Id.* 35:4-16.

12 Appraisers have no sales duty. *Id.* 124:12-17. They simply “complete the  
13 appraisals that come to them through the appraisal port system .... They are not  
14 drumming up business for BofA or LandSafe.” *Id.* 89:13-18.

15 **III. AS A MATTER OF LAW, APPRAISERS ARE NON-EXEMPT.**

16 When the material facts are undisputed, “[t]he question whether [employees’]  
17 particular activities excluded them from the overtime benefits of the FLSA is a question  
18 of law.” *Bratt v. Cnty. of Los Angeles*, 912 F.2d 1066, 1068 (9th Cir. 1990) (quotation  
19 omitted). Defendants bear the burden of proving that Appraisers are exempt. *Corning*  
20 *Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974); *Ramirez v. Yosemite Water Co.,*  
21 *Inc.*, 20 Cal. 4th 785, 794-95 (1999). Any ambiguity is resolved in favor of the  
22 employees. *See Rieve v. Coventry Health Care Inc.*, 870 F. Supp. 2d 856, 861 (C.D. Cal.

23  
24 <sup>5</sup> In January 2015, the AQB will implement a new requirement that a licensed Appraiser  
25 *either* obtain an Associate degree or higher (in any subject) *or* complete 30 credit-hours  
26 of college classes (in any subject). *See* Schwartz Decl. Ex. G at 58. The AQB will also  
27 implement a requirement that certified appraisers possess a Bachelor’s degree (in any  
28 subject). *Id.* at 60. *See also* Req. Jud. Notice.

1 2012) (Carter, J.) (“FLSA exemptions are to be narrowly construed against ... employers  
2 and are to be withheld except as to persons plainly and unmistakably within their terms  
3 and spirit.”) (quoting *Klem v. Cnty. of Santa Clara*, 208 F.3d 1085, 1089 (9th Cir.  
4 2000)); *Ramirez*, 20 Cal. 4th at 794 (“[U]nder California law, [overtime] exemptions ...  
5 are narrowly construed.”). Defendants cannot meet their burden.

6 **A. The California Administrative Exemption Does Not Apply Because**  
7 **Plaintiffs’ Work Is Not “Directly Related to Management Policies or**  
8 **General Business Operations.”**

9 The California administrative exemption is set forth in the Industrial Welfare  
10 Commission’s Wage Order 4-2001, 8 Cal. Code Regs. § 11040 (“Wage Order”); *see* Cal.  
11 Lab. Code § 515(a). To meet the exemption, an employer must satisfy each provision of a  
12 five-prong test; one prong requires that the employee’s “duties and responsibilities  
13 involve the performance of ... work *directly related to management policies or general*  
14 *business operations* of their employer or their employer’s customers.” *See* Wage Order 4  
15 § 1(A)(2) (ital. added).

16 As this Court has explained in applying the California administrative exemption, to  
17 be “directly related” to management policies or general business operations, an  
18 employee’s duties must be both “qualitatively” and “quantitatively” exempt. *See Rieve*,  
19 870 F. Supp. 2d at 869 (citing *Harris v. Superior Court*, 53 Cal. 4th 170, 181 (2011)). If  
20 Defendants, as a matter of law, are unable to meet either or both of these requirements,  
21 summary judgment is merited. *Id.*

22 Defendants cannot meet their burden to show that Appraisers perform a  
23 qualitatively exempt administrative function, *i.e.*, a position that “services” the business,  
24 such as “advising the management, planning, negotiating, representing the company,  
25 purchasing, promoting sales, and business research and control.” *Rieve*, 870 F. Supp. 2d  
26 at 873. Terms like “represent” are not read broadly to encompass all employees who  
27 interact with the public, given that exemptions are construed narrowly. *Id.* In *Rieve*, 870  
28 F. Supp. 2d at 869, this Court analyzed the version of the Federal Regulations

1 incorporated into the Wage Order in applying the “directly related” test, noting that the  
2 administrative exemption is limited to employees whose work is qualitatively of  
3 “substantial importance to the management or operation of the business of his employer  
4 or his employer’s customers.” *Id.* The Court elaborated:

5 An inquiry addressing the relative importance of employees is a delicate  
6 analysis, as all employees of a business must serve some essential function,  
7 or their respective positions would not exist. . . . The key inquiry is thus  
8 perhaps not one of relativity or a focus on the word “substantial” but rather  
9 an examination of whether the employee’s value directly flows “to the  
10 management or operation of the business.” *Such language indicates that the*  
11 *employee in question must hold a supervisory position instead of serving on*  
12 *the front lines of the business* .... It is possible to imagine a situation in  
13 which a *high level advisor* does not supervise any employees but directly  
14 interacts with upper management. In most cases, however, it would seem  
15 that an employee whose value flows to management or the operation of the  
16 business would actually supervise other employees.

17 *Rieve*, 870 F. Supp. 2d at 872-73 (ital. added).

18 In *Rieve*, the plaintiff was a “Field Case Manager—Medical Worker’s  
19 Compensation” who ensured that injured employees of her employer’s business  
20 customers received good care and returned to work quickly. *Id.* at 859. The plaintiff was  
21 not a high-level advisor, did not supervise anyone, did not have the authority to order  
22 treatment or to modify treatment ordered by a physician, and did not make decisions  
23 about reducing costs, but only “documented” achieved cost savings in a computer  
24 program with “preformatted templates.” *Id.* She spent most of her time gathering  
25 information about the care patients were receiving and evaluating whether it was  
26 appropriate. *Id.* She offered advice only “at the individual level, far removed from advice  
27 that is related to management or the general operations of a business.” *Id.* at 873-75.  
28 Based on such undisputed facts, this Court found her exempt as a matter of law.

1           These rationales apply equally here. Appraisers “serv[e] on the front lines of the  
2 business.” *Rieve*, 870 F. Supp. 2d at 873. They do not supervise anyone or advise  
3 management. Nicholson Dep. 117:21-23, 132:7-133:5. They lack “managerial authority  
4 to ... alter polic[ies],” and their work is “on the individual [customer] level, far from  
5 questions affecting management or the general operations of the business.” *Rieve*, 870 F.  
6 Supp. 2d at 873; *see also Reber v. AIMCO/Bethesda Hold., Inc.*, 2008 WL 4384147 (C.D.  
7 Cal. Aug. 25, 2008) (Carter, J.) (“Conducting detailed property inspections to determine  
8 necessary repairs and replacements seems akin to a building inspector or a ‘grader.’ It  
9 involves using construction expertise to apply standard criteria. ... This is a sort of fact-  
10 gathering function unrelated to setting management policy or general business.”).

11           Appraisers are also non-exempt, following *Rieve*, because they do not “formulate”  
12 management policies or participate in the operation of the business as a whole; they do  
13 not “carry out major assignments,” or “affect[] business operations to a substantial  
14 degree.” *See supra* § II.B. This Court has observed that “[t]he ability to take action on  
15 behalf of the employer seems a logical narrowing principle for the potentially overbroad  
16 language” of the relevant portion of the administrative exemption. *Rieve*, 870 F. Supp.  
17 2d at 874. “[I]n most cases, for an employee’s work to affect policy or for him to carry  
18 out policy, it seems likely that he would be tasked with decision-making authority, such  
19 that the absence of such authority is a relevant factor.” *Id.* Because the 30(b)(6) designee  
20 acknowledged that Appraisers make no binding decisions on behalf of Defendants and  
21 cannot commit Defendants to particular courses of action (Nicholson Dep. 41:23-42:23;  
22 161:25-162:25; 163:1-8), as a matter of law, they are non-exempt, following *Rieve*.<sup>6</sup>

23 <sup>6</sup> Although the Court need not reach it, Defendants also cannot satisfy the second prong  
24 of the California administrative exemption test, which requires exercise of discretion and  
25 independent judgment. *See Wage Order* § 1(A)(2)(b). The 2001 Federal Regulations  
26 incorporated into the Wage Order state that such discretion must be with respect to  
27 “matters of significance.” *See 29 C.F.R. 541.207(a)* (2001); *Combs v. Skyriver*  
28 *Commc’ns, Inc.*, 159 Cal. App. 4th 1242, 1266 (2008). For the reasons discussed *infra*  
§ III.B.2 (discussing FLSA administrative exemption), this requirement is not met.

1           **B. The Federal Administrative Exemption Does Not Apply.**

2           To satisfy the FLSA administrative exemption under 29 U.S.C. § 213(a)(1), the  
3 employer must: (i) meet the salary-basis test (not at issue here); (ii) meet the “directly-  
4 related” prong (employees’ primary duty is “the performance of office or non-manual  
5 work *directly related* to the management or general business operations of the employer  
6 or the employer’s customers”); and (iii) prove the employees’ primary duty includes “the  
7 exercise of discretion and independent judgment with respect to *matters of significance*.”  
8 29 C.F.R. § 541.200(a) (ital. added). Defendants cannot satisfy tests (ii) or (iii).<sup>7</sup>

9                   **1. Generating Appraisals Is Not “Directly Related to the**  
10                   **Management or General Business Operations” of Defendants; It**  
11                   **Is Part of Defendants’ Day-to-Day Business.**

12                   **a. The Regulations Preclude a Finding of Exemption.**

13           The regulations offer three points of guidance to explain the phrase “directly  
14 related to management or general business operations.” First, “an employee must perform  
15 work directly related to assisting with the *running or servicing of the business*, as  
16 distinguished, for example, from working on a manufacturing production line or selling a  
17 product in a retail or service establishment.” 29 C.F.R. § 541.201(a) (ital. added). Second,  
18 such work “includes, but is not limited to, work in functional areas such as tax; finance;  
19 accounting; budgeting; auditing; insurance; quality control; purchasing; procurement;  
20 advertising; marketing; research; safety and health; personnel management; human

21 \_\_\_\_\_  
22 <sup>7</sup> Although Defendants must satisfy all three prongs to claim the exemption, under the  
23 “highly compensated employees” rule, employees earning \$100,000 or more per year are  
24 exempt under the FLSA (not California law) if Defendants satisfy *either* the second *or*  
25 the third prong. *See* 29 C.F.R. § 541.601. In the event that the Court holds that  
26 Defendants fail to meet only one federal prong, then summary judgment as to the federal  
27 administrative exemption in favor of all employees earning less than \$100,000 will be  
28 appropriate. The fact dispute on the remaining prong should be tried only as to employees  
earning at least \$100,000 per year. *See, e.g., McCoy v. N. Slope Borough*, 2013 WL  
4510780, at \*11 (D. Alaska Aug. 26, 2013) (granting partial summary judgment to  
employees with respect to the years in which they earned less than \$100,000).

1 resources; employee benefits; labor relations; public relations; government relations;  
2 computer network, internet and database administration; legal and regulatory compliance;  
3 and similar activities.” *Id.* § 541.201(b). Third, “employees acting as advisers or  
4 consultants to their employer’s clients or customers (as tax experts or financial  
5 consultants, for example) may be exempt.” *Id.* § 541.201(c).

6 Each of these three points weighs against exemption. First, Appraisers do not have  
7 any role in “running or servicing” Defendants’ business – on the contrary, they work on  
8 the front lines, carrying out a mandatory step to each mortgage sale. *See supra* §§ II.B,  
9 II.C. Second, Appraisers’ work is not “plainly and unmistakably” within any of the  
10 “functional areas” listed in Section 541.201(b). And third, Appraisers do not act as  
11 “advisors or consultants” to their employer’s clients or customers. Defendants may  
12 contend Appraisers “advise” BofA about the value of properties, but the regulations do  
13 not support this expansive definition of “advisor.” Appraisers’ duty is gathering  
14 information and submitting transaction-specific reports pertaining to individual properties  
15 – not high-level or “general business” advising (*e.g.*, about corporate strategy or legal  
16 compliance), as contemplated by the regulations. 29 C.F.R. § 541.201(b), (c).

17 **b. The Case Law Demonstrates the Class’s Work Is Not**  
18 **“Directly Related” to General Business Operations.**

19 **i. Similar jobs have been held non-exempt.**

20 The case law analyzing the “directly related” prong has focused on the distinction  
21 between, on the one hand, “running or servicing” the business, and on the other hand,  
22 carrying out the core business. As the Ninth Circuit put it, the “essence” of the distinction  
23 is whether the duties of the employee involve “running the business itself or determining  
24 its overall course or policies,” as opposed merely to “the day-to-day carrying out of its  
25 affairs.” *See Bratt*, 912 F.2d at 1070. The employees in *Bratt* were required “to conduct  
26 factual investigations of adult offenders or juvenile detainees and advise the court on  
27 their proper sentence or disposition within the system.” *Id.* at 1069. The Ninth Circuit  
28 held them to be non-exempt, reasoning that the phrase “*general business operations*”

1 (Ninth Circuit’s italics) meant something that affected the business at a higher level, not  
2 “day-to-day” investigations of offenders. *Id.* at 1070; *see also Reich v. Am. Int’l Adjust.*  
3 *Co.*, 902 F. Supp. 321, 322-25 (D. Conn. 1994) (automobile damage appraisers not  
4 exempt because they perform “day-to-day activities of the business through their fact  
5 finding and damage evaluations” rather than “administratively running the business”);  
6 *accord Gusdonovich v. Bus. Inform.*, 705 F. Supp. 262 (W.D. Pa. 1985).

7 Other courts have explored this distinction with respect to employees who, like  
8 Appraisers, work in the financial services industry. In *Bollinger v. Residential Capital,*  
9 *LLC*, 863 F. Supp. 2d 1041, 1048 (W.D. Wa. 2012), the Court stated that exempt  
10 positions were ones that “*any employer* needs performed” to run or service its business,  
11 such as human resources and high-level corporate strategy; in contrast, “work that is  
12 *particular to an employer’s industry*,” such as underwriting mortgages, falls in the  
13 category of “the day-to-day carrying out” of the employer’s business. 863 F. Supp. 2d at  
14 1048 (a position like human resources manager “is part and parcel of running a business  
15 and therefore exempt administrative work,” whereas mortgage underwriting is not) (ital.  
16 added); *see also id.* at 1048 (“exempt administrative work is high-level advice and  
17 analysis”). The *Bollinger* Court held that mortgage underwriters were not exempt because  
18 “the work Plaintiffs did – collecting customers’ financial data and measuring that data  
19 against Defendants’ lending guidelines – was necessary because Defendants provided  
20 mortgages, not because Defendants were in business generally.” *Id.*; *see also Davis v.*  
21 *J.P. Morgan Chase & Co.*, 587 F.3d 529, 532-35 (2d Cir. 2009) (underwriters conducting  
22 day-to-day business of offering loans not exempt).

23 **ii. The administration/production dichotomy clarifies**  
24 **that Defendants fail the “directly-related” prong.**

25 Courts evaluating the federal administrative exemption also take into account the  
26 “administration/production dichotomy.” The Ninth Circuit describes the dichotomy as a  
27 useful tool in the “directly-related” inquiry that “distinguishes between work related to  
28 the goods and services which constitute the business’ marketplace offerings and work

1 which contributes to ‘running the business itself.’” *Bothell v. Phase Metrics, Inc.*, 299  
2 F.3d 1120, 1126 (9th Cir. 2002).

3 In *Davis v. J.P. Morgan Chase & Co.*, the Second Circuit applied the dichotomy to  
4 hold that mortgage underwriters, who play a transaction-based role similar to appraisers,  
5 were not exempt. 587 F.3d at 532-35. The Court held that the underwriters’ “work is not  
6 related either to setting ‘management policies’ nor to ‘general business operations’ such  
7 as human resources or advertising, 29 C.F.R. § 541.2, but rather concerns the  
8 ‘production’ of loans – the fundamental service provided by the bank.” *Id.*; *see also id.* at  
9 535 (“[W]e have drawn an important distinction between employees directly producing  
10 the good or service that is the primary output of a business and employees performing  
11 general administrative work applicable to the running of any business.”). The  
12 underwriters were judged by the quantity of their output – a metric not readily applied to  
13 administrative employees. *Id.* at 534-35. The Court described its holding as consistent  
14 with the purpose of the FLSA:

15 The overtime requirements of the FLSA were meant to apply financial  
16 pressure to “spread employment to avoid the extra wage” and to assure  
17 workers “additional pay to compensate them for the burden of a workweek  
18 beyond the hours fixed in the act.” While in the abstract any work can be  
19 spread, there is a relatively direct correlation between hours worked and  
20 materials produced in the case of a production worker that does not exist as  
21 to administrative employees.

22 *Id.* The Second Circuit’s reasoning applies with equal force to Appraisers here.

23 **iii. Applying Federal Precedents to Appraisers Supports**  
24 **a Non-Exempt Finding**

25 Application of the foregoing case law to the undisputed facts demonstrates that  
26 Appraisers do not perform work “directly related to the management or general business  
27 operations” of Defendants. Appraisers carry out the day-to-day affairs of LandSafe and  
28 BofA. *See supra* § II.A. Each decision they make has a narrow impact, on one



1 transaction, not on the business as a whole. *Id.* Each appraisal is a necessary step in  
2 producing every BofA mortgage. *See supra* § II.C.

3 With respect to the administration/production dichotomy, Defendants’ 30(b)(6)  
4 witness repeatedly and unambiguously described Appraisers as “production” workers.  
5 *See supra* § II.C. The quantity of reports they produce helps determine their pay. *Id.* They  
6 have mandatory turn-times and production requirements. *Id.* As in *Davis v. J.P. Morgan*,  
7 the policy underlying the FLSA – *i.e.*, that production employees whose work can easily  
8 be spread to additional employees should be protected by the FLSA – applies here:  
9 rather than having Appraisers work 60-hour weeks to produce BofA’s 20,000 appraisals  
10 per month, Defendants could hire additional workers to share the production burden, and  
11 ensure that these workers work 40-hour weeks, or are compensated for their overtime.  
12 Instead, Defendants decided to make Appraisers exempt, squeezing as much production  
13 out of them as possible.

14 Defendants may argue that because appraisals assist BofA in making lending  
15 decisions, their production is an exempt activity. The argument fails. Each appraisal  
16 relates to *one* lending decision, not lending decisions generally. Nicholson Dep. 159:4-  
17 22. End customers are charged for appraisals, generating revenue, and customers may not  
18 obtain mortgages without appraisals. *See id.* 36:5-13; Schwartz Decl. Ex. D; *supra* § II.C.

19 In this regard, the Ninth Circuit’s *Bothell* decision is instructive. There, the  
20 employer sold data storage equipment to companies, and the plaintiff-employee’s job was  
21 to install the equipment, train the customers in its use, and service it. The district court  
22 held that such activities were administrative because they were “ancillary” to the core  
23 business of *producing* the equipment itself, but the Ninth Circuit reversed: “Customers  
24 require installation, training, and service assistance in order successfully to operate the  
25 equipment and are unlikely to buy such equipment unless there is such assistance.  
26 Customer service activities, therefore, go to the heart of [the employer’s] marketplace  
27 offerings, not to the internal administration of [the employer’s] business.” The same is  
28

1 true here. Each BofA mortgage package requires an appraisal. Appraisers' work thus  
2 "goes to the heart of" Defendants' marketplace offerings.

3 **2. Appraisers Do Not Exercise Discretion and Independent**  
4 **Judgment "With Respect to Matters of Significance."**

5 Defendants also fail to meet the "discretion and independent judgment" prong of  
6 the federal administrative exemption. 29 C.F.R. § 541.200(a). As noted, failure to meet  
7 any one prong is fatal, with the sole exception of employees earning \$100,000 or more  
8 per year. *See supra* n.7. As to those employees, summary judgment is proper, as well,  
9 because in addition to failing the second ("directly-related") prong, Defendants fail to  
10 meet the "matters of significance" requirement of the third prong. Even if there is a fact  
11 dispute over how much discretion is exercised in completing an appraisal report,<sup>8</sup> the  
12 undisputed facts show that it is not discretion "with respect to matters of significance."

13 **a. The Discretion Itself Must Be with Respect to Matters of**  
14 **Significance.**

15 The regulations explain the phrase "discretion and independent judgment *with*  
16 *respect to matters of significance*," stating: "The term 'matters of significance' refers to  
17 the level of importance or consequence of the work performed." 29 C.F.R. § 541.202(a).  
18 Section 202(b) provides a non-exhaustive list of ten "[f]actors to consider when  
19 determining whether an employee exercises discretion and independent judgment with  
20  
21  
22  
23

24 \_\_\_\_\_  
25 <sup>8</sup> A DOL opinion letter concludes that real estate appraisers are non-exempt, concluding  
26 that the appraisers did not exercise "discretion and independent judgment," without even  
27 reaching the issue of "matters of significance." *See* "Administrative Employees/  
28 Appraisers," Opin. Ltr. DOL Wage & Hour Div., 1986 WL 1171077 (Feb. 25, 1986).

1 respect to matters of significance,” confirming that, to constitute discretion on “matters of  
2 significance,” the discretion itself must be with respect to matters of significance.<sup>9</sup>

3 A significant body of case law confirms that the discretion itself must be “with  
4 respect to matters of significance” to satisfy the exemption. In *Campanelli v. Hershey*  
5 *Co.*, 765 F. Supp. 2d 1185, 1187 (N.D. Cal. 2011), employees selling a wholesaler’s  
6 product to retailers were non-exempt, despite being “vital” to the company’s sales. The  
7 Court granted summary judgment to the employees, concluding that even though there  
8 was a dispute about how much discretion they exercised, it was “immaterial” because the  
9 discretion was not “with respect to matters of significance.” The court evaluated the 10  
10 factors in 29 C.F.R. § 541.202(b) and found dispositive the plaintiffs’ testimony that: “(1)  
11 they have no authority to negotiate or commit defendant to matters that have a significant  
12 financial impact; (2) they cannot deviate from defendant’s established policies and  
13 procedures without getting permission from their supervisors; and (3) they do not carry  
14 out major assignments....” (record cites omitted). The same is true here. *See supra* § II.B.

15  
16  
17 <sup>9</sup> The factors are: “(i) whether the employee has authority to formulate, affect, interpret,  
18 or implement management policies or operating practices; (ii) whether the employee  
19 carries out major assignments in conducting the operations of the business; (iii) whether  
20 the employee performs work that affects business operations to a substantial degree,  
21 even if the employee’s assignments are related to operation of a particular segment of  
22 the business; (iv) whether the employee has authority to commit the employer in matters  
23 that have significant financial impact; (v) whether the employee has authority to waive  
24 or deviate from established policies and procedures without prior approval; (vi) whether  
25 the employee has authority to negotiate and bind the company on significant matters;  
26 (vii) whether the employee provides consultation or expert advice to management; (viii)  
27 whether the employee is involved in planning long- or short-term business objectives;  
28 (ix) whether the employee investigates and resolves matters of significance on behalf of  
management; and (x) whether the employee represents the company in handling  
complaints, arbitrating disputes or resolving grievances.” *See* 29 C.F.R. § 541.202(b)  
(roman numerals added).

1 In *Calderon v. GEICO General Insurance Co.*, 917 F. Supp. 2d 428 (D. Md.  
2 2012), the employees in question were investigators who “support[ed] the [insurance]  
3 claims function by investigating suspicious claims and preventing loss due to fraud.” *Id.*  
4 at 437. The Court concluded that the employees exercised discretion and independent  
5 judgment, but not with respect to matters of significance. The investigators had great  
6 leeway with respect to how to conduct their investigations (*e.g.*, making credibility  
7 findings, choosing when to expand the scope of an investigation or deem it complete). *Id.*  
8 at 442. However, their function was to “attempt to confirm the facts surrounding a  
9 claim,” not to determine whether to pay or deny the claim. The same is true of  
10 Appraisers: they gather facts to complete a form that provides a non-binding estimate of  
11 the market value of a property, but they do not decide whether to issue a loan on the  
12 property, or in what amount – that decision is made by others. Nicholson Dep. 41:23-  
13 42:23; 163:1-8; *see also Ahle v. Veracity Research Co.*, 738 F. Supp. 2d 896, 906 (D.  
14 Minn. 2010) (investigators did not choose when a claim merited investigation, but simply  
15 followed the employer’s guidelines when a claim was assigned to them, and did not  
16 “recommend or participate in the decision whether to deny or pay a claim”).

17 A variety of cases illustrate the principle, articulated in *Ahle*, that “[a]ll employees  
18 exercise some discretion in deciding how to perform their jobs, and the way in which  
19 they exercise that discretion likely will affect matters of significance ... [b]ut an exercise  
20 of discretion that *impacts or affects a matter of significance* is not exercising discretion  
21 *with respect to* a matter of significance[;] [i]f the rule were otherwise, all employees  
22 would arguably meet the third element of the definition of administrative employees.”  
23 *Ahle*, 738 F. Supp. 2d at 908 (*ital. in original*); *see also Turcotte v. Renton Coil Spring*  
24 *Co.*, 2008 WL 4542436, at \*5 (W.D. Wash. Oct. 8, 2008) (employee charged with  
25 marketing products at trade shows worked largely unsupervised and had discretion about  
26 which shows to attend and how to market product, but was “not given the responsibility  
27 of making ... major decisions,” and therefore was not exempt, noting lack of “any  
28 authority for the proposition that setting your own work schedule supports a finding that

1 the employee exercised independent judgment and discretion relating to matters of  
2 significance”); *Bath v. Woodland Meadows*, 2009 WL 3270532, at \*5 (E.D. Mich. Oct. 5,  
3 2009) (“plant specialist” running a gas plant “exercised some discretion in performing his  
4 job” (*e.g.*, in researching and selecting vendors for particular repair work), but was non-  
5 exempt because lacked authority to formulate, affect, interpret, or implement  
6 management policies or operating practices; lacked authority to bind the employer  
7 financially or legally; not involved in the management of the business).

8 **b. The Discretion that Appraisers Exercise Does not Extend to**  
9 **“Matters of Significance”**

10 Appraisers do not exercise discretion with respect to “matters of significance,” as  
11 illustrated in the foregoing case law and the regulations. Applying each factor of 29  
12 C.F.R. § 541.202(b) here demonstrates that Appraisers’ work does not meet the  
13 regulatory definition of “matters of significance”: Appraisers lack “authority to  
14 formulate, affect, interpret or implement management policies or operating practices.”  
15 *See* Nicholson Dep. 150:12-151:2 (Appraisers’ “primary job duties do not include  
16 involvement with formulation of policies”); *see generally supra* § II.B. They do not  
17 “resolve[] matters of significance on behalf of management.” Nicholson Dep. 132:7-  
18 133:5, 159:4-160:10. They do not “carr[y] out major assignments” – each appraisal is  
19 worth on average approximately \$400. *Id.* 36:5-13. They do not have “authority to  
20 commit the employer” (*id.* 41:23-42:23; 161:25-162:25; 163:1-8) – distinguishing  
21 Appraisers from exempt insurance adjusters. *See* 29 C.F.R. § 541.203(a). They do not  
22 “ha[ve] authority to deviate from established policies and procedures” (Nicholson Dep.  
23 322:20-323:3, 338:15-340:9) – rather, they “have some leeway in the performance of  
24 their work but only within closely prescribed limits.” *See* 29 C.F.R. § 541.203(g), (h).<sup>10</sup>

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26 <sup>10</sup> In this regard, Appraisers are more ordinary inspectors, or graders of materials such as  
27 lumber, who are non-exempt. Like Appraisers, such employees “perform specialized  
28 work along standardized lines involving well-established techniques and procedures” and

1 Appraisers do not have authority to negotiate and bind the company, again  
2 distinguishing them from claims adjusters. Nicholson Dep. 41:23-42:23; 161:25-162:25;  
3 163:1-8; *see* 29 C.F.R. § 541.203(a) (claims adjusters). They do not provide any  
4 consultation or advice to management (Nicholson Dep. 159:4-160:10, 132:7-133:5,  
5 151:10-14), contrasting with the way exempt adjusters advise management regarding  
6 litigation decisions. *See* 29 C.F.R. § 541.203(a). Appraisers are not involved in planning  
7 business objectives. Nicholson Dep. 151:10-14. They do not represent the company in  
8 handling complaints, disputes, or grievances. *Id.* 151:15-21.

9 Appraisers are also unlike exempt financial services employees who determine  
10 “which financial products best meet the customer’s needs and financial circumstances,”  
11 and market or service those products. Nicholson Dep. 143:6-12 (interaction with  
12 customers “limited strictly to information gathering.”); 29 C.F.R. § 541.203(b).

13 Appraisers do not “perform[] work that affects business operations to a substantial  
14 degree” – except in the aggregate. Appraisals are a required step in the loan-selling  
15 process, and they are a revenue source to BofA (20,000 per month at \$400 each =  
16 approximately \$100 million/year). But this does not lead “plainly and unmistakably” to  
17 application of the administrative exemption. Virtually any position, in aggregate, affects  
18 business operations (as discussed in *Ahle*, 738 F. Supp. 2d at 908), or the position would  
19 not exist. Assembly-line workers perform work that “affects business operations,” but  
20 like Appraisers, they work on individual products, no one of which “affect[s] business  
21 operations to a substantial degree.”

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27 “rely on techniques and skills acquired by special training or experience” in exercising  
28 their limited amount of leeway. *See* 29 C.F.R. § 541.203(g), (h).

1           **C. The Federal Professional Exemption Does Not Apply Because**  
2           **Appraisers Are Not in a Recognized Field of Science or Learning, and**  
3           **Gain Skill Mainly through On-The-Job Experience, Not a Prolonged**  
4           **Course of Specialized Intellectual Instruction.**

5           The exemption for “learned professionals” does not apply because Appraisers are  
6 not required to have “knowledge of an advanced type in a field of science or learning  
7 customarily acquired by a prolonged course of specialized intellectual instruction.” 29  
8 C.F.R. §§ 541.300(a)(2)(i), 541.301. The phrase “field of science or learning” includes:

9           the traditional professions of law, medicine, theology, accounting, actuarial  
10 computation, engineering, architecture, teaching, various types of physical,  
11 chemical and biological sciences, pharmacy and other similar occupations  
12 that have a recognized professional status *as distinguished from the*  
13 *mechanical arts or skilled trades where in some instances the knowledge is*  
14 *of a fairly advanced type, but is not in a field of science or learning.*

15 29 C.F.R. § 541.301(c) (ital. added). Appraising is not plainly and unmistakably within  
16 such a recognized field.

17           The phrase “prolonged course of specialized *intellectual* instruction” “restricts the  
18 exemption to professions where specialized *academic* training is a standard prerequisite  
19 for entrance into the profession.” 29 C.F.R. § 541.301(d) (ital. added). Under this limiting  
20 principle:

21           [T]he learned professional exemption is not available for occupations that  
22 customarily may be performed with only the general knowledge acquired by  
23 *an academic degree in any field*, with knowledge acquired through an  
24 apprenticeship, or with training in the performance of routine mental,  
25 manual, mechanical or physical processes. [It] also does not apply to  
26 occupations in which most employees *have acquired their skill by*  
27 *experience rather than by advanced specialized intellectual instruction.*

28 *Id.* (ital. added).

1 Short courses of study for a certification do not constitute a “prolonged course of  
2 specialized intellectual instruction.” *See Solis v. Washington*, 656 F.3d 1079, 1088 (9th  
3 Cir. 2011) (if four weeks of classroom training were sufficient to qualify as a specialized  
4 course of intellectual instruction, “nearly every position with a formal training program  
5 would qualify.”); *id.* at 1084 (“[P]ositions that do not require a particular course of  
6 intellectual instruction directly related to the employee’s professional duties do not come  
7 within the ‘learned professional’ exemption, even if they also require substantial practical  
8 experience.”); *see also Young v. Cooper Cameron Corp.*, 586 F.3d 201, 206 (2d Cir.  
9 2009) (design specialist who drafted plans for hydraulic power units subject to complex  
10 regulations not exempt, because “if a job does *not* require knowledge customarily  
11 acquired by an advanced educational degree—as for example when many employees in  
12 the position have no more than a high school diploma—then regardless of the duties  
13 performed, the employee is not an exempt professional under the FLSA”); *Pignataro v.*  
14 *Port Auth. of N.Y & N.J.*, 593 F.3d 265, 270 (3d Cir. 2010) (helicopter pilots non-exempt  
15 because they “are not required to spend a significant amount of time in a classroom in  
16 order to earn their certifications – nearly all of the instruction takes place in the air”);  
17 *Dybach v. State of Fla. Dept. of Corrs.*, 942 F.2d 1562, 1565 (11th Cir. 1991)  
18 (professional exemption did not apply to probation officer required to have college  
19 degree in any field); *McCoy v. N. Slope Borough*, 2013 WL 4510780 (D. Alaska Aug. 26,  
20 2013) (search-and-rescue pilots not exempt, despite requirements for several licenses,  
21 3,000 hours of flight time, and 500 hours of Arctic flying experience, because although  
22 the “training may have been quite prolonged[,] [it] was not a course of specialized  
23 intellectual instruction akin to an academic degree”); *Kadden v. VisuaLex, LLC*, 910 F.  
24 Supp. 2d 523, 539-40 (S.D.N.Y. 2012) (graphic designer not exempt because although  
25 graduate degree was preferred, it was not required, and “the common thread among  
26 [employees] was their experience in litigation support, rather than their particular  
27 educational backgrounds”).



1 Here, many of the Plaintiffs have only a high school diploma. *See supra* n.3. Even  
2 when a new national standard goes into effect next year requiring Appraisers to have a  
3 college degree in order to obtain the higher “Certified” license that BofA prefers, the  
4 degree is permitted to be in any subject, from music to philosophy. *See supra* § II.D. The  
5 30(b)(6) deponent was not aware of any Appraiser with a degree in “appraising.” *Id.* The  
6 requirements to obtain an Appraiser license fall squarely within the Regulations’  
7 description of what is *not* sufficient to satisfy the exemption: a short period of vocational  
8 classroom training not tied to any particular degree, and a period of on-the-job  
9 apprenticeship. The “learned professional” exemption does not apply to occupations in  
10 which employees acquire their skill by experience. 29 C.F.R. § 541.301(d). Defendants  
11 admit that Appraisers learn their trade “through experience on the job.” Nicholson Dep.  
12 298:2-18. Appraisers fall outside the exemption.

13 **D. The California Professional Exemption Does Not Apply.**

14 Similarly, to qualify for the professional exemption under California law,  
15 employees must be required to have knowledge “of an advanced type in a field of science  
16 or learning customarily acquired through a prolonged course of specialized intellectual  
17 instruction and study.” Wage Order § 1(A)(3)(b). Such knowledge is “distinguished from  
18 a general academic education and from an apprenticeship, and from training in the  
19 performance of routine mental, manual, or physical processes....” *Id.* The Wage Order  
20 incorporates the 2001 Federal Regulations, 29 C.F.R. § 541.301. *See* Wage Order  
21 § 1(A)(3)(e). Although very similar to the current regulations, the 2001 regulations place  
22 even greater emphasis on whether the position requires an academic degree: “The typical  
23 symbol of the professional training and the best prima facie evidence of its possession is,  
24 of course, the appropriate academic degree.” 29 C.F.R. § 541.301(e)(1) (2001).

25 Accordingly, Appraisers are not exempt professionals under California law for the  
26 same reasons that they are not exempt under federal law.

1           **E.     The Federal Retail and Service Commissioned Employee Exemption**  
2                           **Does Not Apply to Employees of Banks or Loan Companies.**

3           It is undisputed that BofA is a bank, selling loans, and that LandSafe is BofA's  
4 wholly-owned subsidiary providing appraisals exclusively to BofA. Employees cannot  
5 qualify for the "retail and service commissioned employee" exemption under 29 U.S.C.  
6 § 207(i) where the employer lacks the necessary "concept of retail selling or servicing."  
7 *See* 29 C.F.R. §§ 779.316-17 (exemption does "not encompass establishments in  
8 industries lacking a 'retail concept.' . . . [E]stablishments to which the retail concept does  
9 not apply" include: "Banks (both commercial and savings), . . . Credit companies,  
10 including small loan and personal loan companies, . . . Finance companies, . . . [and]  
11 Loan offices."); *Mitchell v. Ky. Fin. Co.*, 359 U.S. 290, 295 (1959) (personal lending  
12 institution lacked retail concept); *Barnett v. Wash Mut. Bank, FA*, 2004 WL 1753400, at  
13 \*3-6 (N.D. Cal. 2004) (home mortgage industry lacks retail concept).

14           As a financial institution selling loans, BofA cannot establish that the exemption  
15 applies to Plaintiffs. 29 C.F.R. § 779.316. As an in-house appraisal company from which  
16 the public cannot purchase anything (Nicholson Dep. 35:4-16), neither can LandSafe.

17           **F.     The California Commissioned Employee Exemption Does Not Apply**  
18                           **Because Plaintiffs Are Not Involved In Sales.**

19           It is undisputed that Appraisers' duties do not include sales. Nicholson Dep.  
20 124:12-17. California's "commissioned" employees' exemption, Wage Order 4-2001, 8  
21 Cal. Code Regs. § 11040(3)(D), applies only to employees principally involved in sales.  
22 *See Ramirez*, 20 Cal. 4th at 804; *see also Keyes Motors, Inc. v. Div. of Labor Standards*  
23 *Enf.*, 197 Cal. App. 3d 557, 562-64 (1987) (employees paid on commission not exempt  
24 because not involved in sales); *Takacs v. A.G. Edwards & Sons, Inc.*, 444 F. Supp. 2d  
25 1100, 1119 (S.D. Cal. 2006) (same).

26 **IV.    CONCLUSION**

27           For the foregoing reasons, Plaintiffs respectfully request that the Court grant partial  
28 summary judgment on Defendants' proffered wage law exemptions.

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