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

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

SCHONBRUN DESIMONE SEPLOW
HARRIS & HOFFMAN LLP
Wilmer J. Harris (SBN 150407)
wharris@sdshhlaw.com
Shayla Myers (SBN 264054)
shaylamyers@sdshhlaw.com
715 Fremont Ave.
S. Pasadena, CA 91030
Telephone: (626) 441-4129
Facsimile: (626) 283-5770
[Additional counsel on following page]
Attorneys for Individual and Representative
Plaintiffs and the Putative Class

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiffs,

vs.

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

Defendants.

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

PLAINTIFFS' REPLY IN FURTHER SUPPORT OF MOTION FOR CLASS CERTIFICATION UNDER FRCP 23

Date: May 19, 2014
Time: 8:30 a.m.
Place: Courtroom 9D, Santa Ana
Hon. David O. Carter

SCHONBRUN DESIMONE SEPLOW
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
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

TABLE OF CONTENTS

I. INTRODUCTION 1

II. FACTS 2

A. The Opposition Does Not Dispute the Key Facts for Certification. 2

B. Appraisers Perform the Same Material Duties 3

C. Parks and Boyd Testified Consistently with the Other Deponents 5

III. CLASS CERTIFICATION SHOULD BE GRANTED 8

A. Commonality and Predominance Are Satisfied. 8

1. The Opposition's Merits Arguments Apply Class-Wide, Showing that Common Questions Predominate. 8

2. Defendants' Merits-Oriented Authorities Support Certification. 10

3. Defendants Cannot Defeat Certification by Arguing, Contrary to the Evidence, that Appraisers "Performed" their Uniform Duties Differently. 11

4. The California Commission Exemption Is Inapplicable Based on the Common Fact that Appraisers Do Not Sell Anything. 18

5. Common Proof Establishes Defendants' Violations of the Itemized Wage Statement Provisions of Labor Code § 226 18

6. Individualized Damages Issues Do Not Defeat Certification 19

B. Plaintiffs Establish the Adequacy of the Class Representatives 20

1. Terry Boyd 20

2. Ethel Joann Parks 21

3. Linda Zanko 22

C. Proceeding on a Class Basis Is Manageable and Superior. 22

1. The Advantages of Determining Common Issues Outweigh Any Individual Interest in Separate Adjudications 22

2. This Court Can Manage the Litigation. 23

IV. CONCLUSION 25

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

TABLE OF AUTHORITIES

Federal Cases

Abdullah v. U.S. Security Associates, 731 F.3d 952 (9th Cir. 2013) 18

ABKCO Music, Inc. v. LaVere, 217 F.3d 684 (9th Cir. 2000) 19

Ah Quin v. County of Kuaua Department of Transportation, 733 F.3d 267 (9th Cir. 2013) 21

Amgen Inc. v. Connecticut Retirement Plans & Trust Funds, 133 S. Ct. 1184 (2013) 1, 8

Anderson v. Mt. Clemens, 328 U.S. 680 (1946) 25

Avilez v. Pinkerton Government Services, 286 F.R.D. 450 (C.D. Cal. 2012) 14, 17, 24

Balasanyan v. Nordstrom, Inc., 294 F.R.D. 550 (S.D. Cal. 2013) 20

Batts v. Bankers Life & Casualty Co., 2014 WL 296925 (N.D. Cal. Jan. 27, 2014) 21

Blackie v. Barrack, 524 F.2d 891 (9th Cir. 1975) 19

Bucklin v. American Zurich Insurance Co., 2013 WL 3147019 (C.D. Cal. June 19, 2013) 11

Campbell v. PriceWaterhouseCoopers, LLP, 287 F.R.D. 615 (E.D. Cal. 2012) 9

Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013) 24

Delagarza v. Tesoro Refining and Marketing Co., 2011 WL 4017967 (N.D. Cal. Sept. 8, 2011) 15

Dilts v. Penske Logistics, LLC, 267 F.R.D. 625 (S.D. Cal. 2010) 25

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

Fjeld v. Penske Logistics, LLC, 12-cv-3500, 2013 U.S. Dist. LEXIS 116485 (not available on Westlaw) (C.D. Cal. Aug. 9, 2013) 13

Hanlon v. Chrysler Corp., 150 F.3d 1011 (9th Cir. 1998)... 22

Harris v. Vector Marketing Corp., 753 F. Supp. 2d 996, 1015 (N.D. Cal. 2010) 20

Heffelfinger v. Electronic Data Systems Corp., 2008 WL 8128621 (C.D. Cal. Jan. 7, 2008) 15, 23

In re AutoZone, Inc., Wage & Hour Employment Practices Litigation, 289 F.R.D. 526 (N.D. Cal. 2012) 25

In re Sugar Industry Antitrust Litigation, 73 F.R.D. 322 (E.D. Pa. 1976) 25

In re Wal-Mart Stores, Inc. Wage & Hour Litigation, 2008 WL 413749 (N.D. Cal. Feb. 13, 2008) 20

In re Weichey, 405 B.R. 158 (W.D. Pa. 2009) 11

In re Wells Fargo Overtime Pay Litigation, 571 F.3d 953 (9th Cir. 2009) 14

Jovel v. Boiron Inc., 2014 WL 1027874 (C.D. Cal. Feb. 27, 2014) 20

Kriendler v. Chemical Waste Management, Inc., 877 F. Supp. 1140 (N.D. Ill. 1995) 22

Krzesniak v. Cendant Corp., 2007 WL 1795703 (N.D. Cal. June 20, 2007) 23

Leyva v. Medline Industries, Inc., 716 F.3d 510 (9th Cir. 2013) 19, 24

Marlo v. United Parcel Service, 639 F.3d 942 (9th Cir. 2011) 13, 14

Marsh v. First Bank of Delaware, 2014 WL 554553 (N.D. Cal. Feb. 7, 2014) 20

Martinez v. Extra Space Storage, Inc., 2013 WL 3889221 (N.D. Cal. July 26, 2013) 21

Parra v. Bashas', Inc., 291 F.R.D. 360 (D. Ariz. 2013) 21

Reber v. AIMCO/Bethesda Holdings, Inc., 2008 WL 4384147 (C.D. Cal. Aug. 25, 2008) 10

Rieve v. Coventry Health Care Inc., 870 F. Supp. 2d 856 (C.D. Cal. 2012) 9

Rodriguez v. Hayes, 591 F.3d 1105 (9th Cir. 2009) 9

Romero v. Producers Dairy Foods, Inc., 235 F.R.D. 474 (E.D. Cal. 2006) 25

Rosenberg v. Renal Advantage, Inc., 2013 WL 3205426 (S.D. Cal. June 24, 2013) 12, 14

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

Stockwell v. City and County of San Francisco, — F.3d —,
2014 WL 1623736 (9th Cir. Apr. 24, 2014) 1, 8

Tierno v. Rite Aid Corp., 2006 WL 2535056 (N.D. Cal. Aug. 31, 2006) 24

Vinole v. Countrywide Home Loans, Inc., 571 F.3d 935 (9th Cir. 2009) 13, 14, 24

Yokoyama v. Midland National Life Insurance Co., 594 F.3d 1087 (9th Cir. 2010) 19

State Cases

Bell v. Farmers Insurance Exchange, 115 Cal. App. 4th 715 (2004) 25

Bradley v. Networkers International LLC, 211 Cal. App. 4th 1129 (2012) 17

Brinker Restaurant Corp. v. Superior Court, 53 Cal. 4th 1004 (2012) 18

Corrales v. Bradstreet, 153 Cal. App. 4th 33 (2007) 21

Dailey v. Sears, Roebuck & Co., 214 Cal. App. 4th 974 (2013) 15

Faulkinbury v. Boyd & Assocs., 216 Cal. Ap. 4th 220 (2013) 18

Heyen v. Safeway Inc., 216 Cal. App. 4th 795 (2013) 15, 16

Muldrow v. Surrex Solutions Corp., 208 Cal. App. 4th 1381 (2012) 18

Post v. Palo/Haklar & Associate, 23 Cal. 4th 942 (2000) 21

Price v. Starbucks, 192 Cal. App. 4th 1136 (2011) 19

Ramirez v. Yosemite Water Co., Inc., 20 Cal. 4th 785 (1999) 18

Sav-On Drug Stores. v. Superior Court, 34 Cal. 4th 319 (2004) 25

United Parcel Service Wage & Hour Cases, 190 Cal. App. 4th 1001 (2010)........... 10, 14

Statutes and Regulations

Federal Rule of Civil Procedure 23 .... 12, 24

Federal Rule of Civil Procedure 30(b)(6) ....*passim*

California Labor Code § 226 *et seq.* 17, 18, 19

California Labor Code § 98 21

I. INTRODUCTION

Defendants argue that appraising is "more art than science." Whether this is true or not, it is an argument about the nature of the position that applies equally to all Appraisers. The Opposition pays lip service to *Amgen v. Connecticut Retirement*'s instruction that class certification is not for "free-ranging merits inquiries." Yet, in making summary-judgment arguments about the nature of the duties of the position Plaintiffs contend is misclassified, the Opposition urges the Court to evaluate merits issues unrelated to the commonality and predominance inquiries at issue. To do so would be error. *See Stockwell v. City & Cnty. of San Francisco*, — F.3d —, 2014 WL 1623736, at *4 (9th Cir. Apr. 24, 2014). Because Defendants' merits arguments apply to the whole class, the Opposition effectively re-emphasizes that predominant common questions exist, making class certification appropriate.

The Opposition largely does not dispute the facts set forth in Plaintiffs' Opening Brief about how Appraisers produce reports, where Appraisers fall in the corporate hierarchy, and what training they must complete to obtain the job. These facts drive the resolution of the case, and derive from common sources: Defendants' 30(b)(6) testimony, Defendants' detailed procedures for producing appraisals, the standardized appraisal forms themselves, and state licensing requirements. Ultimately, three common questions predominate for determining classwide liability: whether Appraisers, who follow detailed requirements to generate reports for individual BofA mortgage loan packages, are administratively exempt; whether Appraisers, who must have only a high school diploma, several weeks of courses, and on-the-job training, are professionally exempt; and whether the Commission exemption applies to non-sales personnel.

Defendants admit that they expect all Appraisers to perform identical duties, arguing only that individual inquiry is necessary because some Appraisers may not perform their duties as expected. Defendants concede too much: uniform job duties governed by uniform regulations and forms warrant certification. Moreover, Defendants never identify *how* they think performance might differ among Appraisers, making some exempt and others not. Defendants fail to rebut evidence that Appraisers

perform their jobs the same way. Defendants' declarations reaffirm this uniformity. By design, Defendants' appraisal requirements and forms standardize appraisals.

Defendants' key authorities are inapplicable – those cases either involve a specific fact that will be decided differently from one class member to another (*e.g.*, whether each employee spent more or less than 50% of the time outside the office, for purposes of the "outside sales" exemption), or involve evidence that the class members were performing significantly different duties (*e.g.*, because different physical locations required different duties). Such facts do not exist here.

The Opposition does not contest the adequacy of Class Representative Sonia Medina, so even if Defendants' challenges to the adequacy of the other named plaintiffs had merit, which they do not, adequacy is not a ground to deny class certification.

With respect to superiority and manageability, resolving the merits issue on a classwide basis will conserve judicial resources and allow relief for nearly two hundred class members without repeatedly litigating whether BofA Appraisers perform exempt work. That damages calculations involve individualized inquiry does not weigh against certification, and is typical of misclassification class actions. Certification is proper.

II. FACTS

A. The Opposition Does Not Dispute the Key Facts for Certification.

The Opposition does not dispute that all BofA Appraisers are identically situated in all of the following ways, acknowledged by Defendants' Rule 30(b)(6) witness:

(1) their job consists entirely of producing appraisal reports – averaging more than two per day – for BofA loan packages (Opening Br. 5-6; Staff Appr. Decl. ¶¶ 3-11[1]);

(2) their "job descriptions" are "standardized" as to all class members (Opening Br. 4);

(3) they are required to follow pre-established steps dictated by BofA's corporate policies and standardized appraisal forms, uniform to all class members (*id.* at 7-8);

[1] "Staff Appr. Decl." has the same meaning as in the Opening Br. at 3 n.1.

(4) for BofA to sell a mortgage, the loan package must include an appraisal (*id.* at 3);
(5) each appraisal is transaction-specific, relating to a single mortgage (*id.* at 4);
(6) Appraisers supervise no one (*id.* at 5);
(7) they are reviewed based on their production, paid under a uniform production-based compensation plan, and referred to as "production" workers (*id.* at 6-7);
(8) their job consists largely of investigating and gathering required information and inspecting properties (*id.* at 4, 7);
(9) they do not advise management (*id.* at 5);
(10) they are not free to reject assignments (*id.* at 9);
(11) they are subject to mandatory "turn-times" for completing assignments (*id.* at 6);
(12) they make no policy decisions (*id.* at 5);
(13) they cannot bind the company, which has "ultimate responsibility for determining [mortgage] eligibility" (*id.* at 5, Opp'n 5);
(14) they are not required to have a degree (Opening Br. 9);
(15) they must satisfy the identical State requirements, consisting of a large amount of on-the-job training, a small amount of classroom training, and a test (*id.* at 10);
(16) they learn appraising "through experience on the job" (*id.*);
(17) they are classified as exempt, such that none of them receives overtime or has his or her time tracked, either on a wage statement or otherwise (*id.* at 3); and
(18) there is no policy providing meal breaks or making available rest breaks (*id.*).

B. Appraisers Perform the Same Material Duties.

Common proof establishes not only that Defendants' major job expectations for Appraisers are the same, but that Appraisers actually perform the same tasks. The appraisal forms themselves demonstrate this, defining: what information the Appraisers must gather concerning the subject property; which pictures they must take; which measurements they must make; and, what data they must obtain concerning comparable properties ("comps"). *See* Second Decl. of Bryan J. Schwartz, Esq. in Supp. of Class Cert. ("2d Schwartz Decl.") Exs. C, F, H, J, L, N. The appraisal forms introduced in

depositions, for example, show that Sonia Medina (in Northern California), Michael Petris (in Orange County) and Rick Leung (in Los Angeles County) all: pulled required data from databases; filled in data regarding the neighborhood of the subject home; provided information about the property's foundation, walls, floors, driveway, stairs, attic, roof, and more; identified comps and provided detailed information about their sale history, site, age, view, room count, heating, garage, and pool; used those comps in a standardized process to arrive at an estimate of the value of the subject home; and took photos of the home's front, rear, sides, garage, street view, and interior rooms, as well as the comps. *See* 2d Schwartz Decl. Exs. F, H, J. Every Appraiser performs these steps for every appraisal. *See* Staff Appr. Decl. ¶¶ 3-11. Regardless of which form the Appraiser is completing, the tasks are essentially the same. *See, e.g.*, Exs. C & D (Form 1004 (single family home) and Form 1073 (condominium)); Staff Appr. Decl. ¶¶ 3-11.

If the Appraiser fails to complete the steps of the form, Defendants' computer program or a Review Appraiser rejects it. *See* 2d Schwartz Decl. Ex. A (30(b)(6) Dep.) 320:7-321:5; 356:7-358:20. Defendants' program automatically rejects a report or flags it for manual review if, for example, the Appraiser did not: check a mandatory box; fill out the cost approach section; complete a required map or sketch; or if "the appraised value doesn't fall within the adjusted sales prices of the comparable sales." *Id.*

LandSafe and USPAP documents exhaustively describe Appraisers' duties. *See* Opening Br. 7, citing Exs. B-E to First Decl. of Bryan J. Schwartz, Esq. in Supp. of Class Cert. (ECF No. 119) ("1st Schwartz Decl."). For example, LandSafe's "Scope of Work" for Form 1004 provided to all Appraisers states, *e.g.,* (all emphasis in original): "The LandSafe Appraiser <u>must</u> perform a complete visual inspection of the interior and exterior areas;" "Photographs of all improvements <u>must</u> be taken of the interior;" "At a minimum, photos of the front, rear, street scene, and any amenities substantially affecting marketability and/or value <u>must</u> be included;" "A floor plan sketch with exterior dimensions and living area calculations <u>must</u> be included;" and "The 1004

must include a Location Map." *Id*. Ex. E (ECF No. 119-5); *see also id.* Ex. A (ECF No. 119-1) (30(b)(6) Dep.) 339:2-15 (scope of work uniform nationwide).

C. Parks and Boyd Testified Consistently with the Other Deponents.

The Opposition claims that the "record evidence is varied with regard to how the putative class members performed their primary duties." Opp'n 5. Yet, Parks and Boyd (the only Plaintiffs discussed in the Opposition), and the four other Appraisers whom Defendants deposed, testified that they perform exactly the same steps in generating appraisals. First, they receive assignments through Appraisal Port, which must be completed within a "turn-time."[2] Second, they schedule appointments to inspect the property.[3] Third, they pull the form-required data about the subject property from databases.[4] Fourth, they identify potential comps, by looking in databases for recent sales with similar features to the subject property, including room count and square footage.[5] Fifth, they inspect the property, noting features of the house that must be recorded on the form, and taking required photographs and measurements.[6] Sixth, they drive by the potential comps and photograph them.[7] Seventh, they fill in the Form with

[2] 2d Schwartz Decl. Ex. B (Parks) 103:3-16, 226:1-6; Ex. E (Medina) 57:14-24; Ex. G (Petris) 92:25-94:18; Ex. I (Leung) 156:5-9, 209:12-25; Ex. K (Boyd) 145:12-14, 103:1-17; Ex. M (Mandel) 81:2-7, 98:20-22.

[3] Ex. B (Parks) 88:17-24; Ex. E (Medina) 150:2-18; Ex. G (Petris) 125:10-21; Ex. I (Leung) 162:14-17; Ex. K (Boyd) 148:11-15; Ex. M (Mandel) 150:12-20.

[4] Ex. B (Parks) 109:3-18; Ex. E (Medina) 70:5-17; Ex. G (Petris) 128:14-129:13; Ex. I (Leung) 161:16-162:7; Ex. K (Boyd) 148:20-150:5; Ex. M (Mandel) 149:18-150:8.

[5] Ex. B (Parks) 125:5-126:10; Ex. E (Medina) 75:18-76-7; Ex. G (Petris) 129:18-131:2; Ex. I (Leung) 167:2-19, 289:7-290:1; Ex. K (Boyd) 158:22-159:25; Ex. M (Mandel) 152:4-153:14.

[6] Ex. B (Parks) 121:7-122:24; Ex. E (Medina) 80:17-81:18; Ex. G (Petris) 163:16-164:4; Ex. I (Leung) 176:25-177:15; Ex. K (Boyd) 172:2-174:1; Ex. M (Mandel) 184:17-24.

[7] Ex. B (Parks) 130:23-131:13; Ex. E (Medina) 92:15-25; Ex. G (Petris) 194:16-19; Ex. I (Leung) 172:20-25; Ex. K (Boyd) 170:21-171:24; Ex. M (Mandel) 216:1-4.

the required data, deciding which comps to use.[8] Eighth, they "adjust" the prices of the comps to account for form-specified features that may differ between the comp and the subject property, and assign the subject property a value in the range determined by the comps.[9] And ninth, they submit the report, and begin the next appraisal.[10]

Of these routine steps, the Opposition argues that adjusting the price of comps requires discretion, supporting Defendants' exemption defenses. Opp'n 6-7. More to the point, all Appraisers make the adjustments similarly. They employ the "market grid" on page two of Form 1004. *See, e.g.*, 2d Schwartz Decl. Ex. E (Medina) 102:2-13 (explaining grid); *see also id.,* Exs. F, H, J (Form 1004s) at 2. Appraisers list each comp at the top of a column, with specific features pre-listed on each row of the form, such as bedroom-count, view, and gross living area. *Id.* Appraisers make an adjustment if a particular feature differs significantly between the subject property and the comp.

All six Appraiser deponents testified they use the same "paired sales" (also called "matched pair" or "compared sales") approach to making adjustments. As Mr. Petris explained: "If you have one comparable with a view and one comparable without a view and…everything else being equal, their sales prices are different, it pretty much shows you what effect the view has" on the price. 2d Schwartz Decl. Ex. G (Petris) 151:20-154:15; *accord id.* Ex. E (Medina) 100:9-25 ("[W]hen you use match pair analysis, … there is a formula to that … you look for properties that are in the same neighborhood, same area, but no views, … and the difference in price is the view."); *id.*

---

[8] Ex. B (Parks) 134:20-140:3; Ex. E (Medina) 96:6-98:8; Ex. G (Petris) 154:22-24; Ex. I (Leung) 194:14-197:14; Ex. K (Boyd) 181:1-190:16; Ex. M (Mandel) 175:9-22, 192:1-14.

[9] Ex. B (Parks) 136:5-137:9; Ex. E (Medina) 98:19-100:25; Ex. G (Petris) 150:24-152:17, 166:4-168:3; Ex. I (Leung) 198:21-199:20, 286:17-287:4; Ex. K (Boyd) 190:13-192:17, 195:13-196:25; Ex. M (Mandel) 176:6-180:6.

[10] Ex. B (Parks) 246:2-247:6; Ex. E (Medina) 109:18-24; Ex. G (Petris) 183:4-17, 195:4-15; Ex. I (Leung) 214:12-14; Ex. K (Boyd) 95:22-96:3, 163:19-164:11; Ex. M (Mandel) 219:9-221:5.

102:14-103:5 (same); *id.* Ex. K (Boyd) 192:9-17 ("Based on the circulars and the guidelines … you would provide a comparable that has a pool and … a comparable that does not have a pool…. [T]he difference between [them] … is where the adjustment would be basically made."); *id.* Ex. B (Parks) 138:21-140:3 ("[Y]ou would find one that has a barn that sold within a certain time frame, and then you would find one that doesn't have a barn, and you would extract the value of that barn through the sales price."); *id.* Ex. M (Mandel) 179:18-180:6 (paired sales analysis to adjust for different views); *id.* Ex. I (Leung) 201:18-202:21 (compared sales analysis to adjust for pool).

Contrary to the Opposition, Ms. Parks did not "acknowledge" that there was no guideline on adjustments. Opp'n 7. Rather, she testified that she follows "the guidelines that are provided that we have to use that will talk about line adjustments." *See* 2d Schwartz Decl. Ex. B (Parks) 191:23-192:13; 139:6-140:3, 200:6-15.

LandSafe's guidelines dictate this uniform process for making adjustments. *See* 1st Schwartz Decl. Ex. B, "Unacceptable Appraisal Practices #7 – Comparable Selection and Adjustments to Comparables," at 3 ("Paired sale analysis" required for comps outside subject neighborhood); *id.* at 2 ("LandSafe encourages the appraiser to include a paired sale analysis using market sales."); *id.* Ex. G, "Property and Appraisals," at LSAS 4625 ("[A]djustments must be based on the market data for the particular neighborhood …, not on predetermined or assumed dollar adjustments.").

Boyd's approach was not "far different" from Parks's, in "cutting-and-pasting" and using "canned" language. Opp'n 7. Mr. Boyd explained: "It was very common that the manager, reviewers or other production appraisers would send this type of [canned] verbiage to each other to address very common statements that are used in standard appraisals across the country … to help fill out the reports in a consistent manner." 2d Schwartz Decl. Ex. K (Boyd) 131:11-134:9. This was not "contrary to specific instruction." Opp'n 7. Defendants' 30(b)(6) witness agreed: *all* Appraisers must use standardized language. 2d Schwartz Decl. Ex. A (30(b)(6) Dep.) 290:2-8 ("It's consistency in reporting, how you write it on the report so it is standardized.").

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

The record of Appraiser duties is not "varied." Appraisers do the same thing.

III. CLASS CERTIFICATION SHOULD BE GRANTED.

A. Commonality and Predominance Are Satisfied.

"[A] common contention need not be one that 'will be answered, on the merits, in favor of the class'[;] it only 'must be of such a nature that it is capable of classwide *resolution*—which means that the determination of its *truth or falsity* will resolve an issue that is central to the validity of each one of the claims in one stroke.'" *Stockwell*, 2014 WL 1623736, at *4 (citing, *inter alia*, *Amgen Inc. v. Conn. Ret. & Tr. Funds*, 133 S.Ct. 1184, 1191 (2013)) (emph. in original). The Opposition's merits arguments illustrate that common issues predominate. Their argument boils down to disputing whether the duties all Appraisers perform require exercising discretion and independent judgment. Opp'n at 8, 11-12. The question should be decided on a class-wide basis.

1. The Opposition's Merits Arguments Apply Class-Wide, Showing that Common Questions Predominate.

Defendants' arguments are common to all Appraisers. With respect to the administrative exemption, Defendants argue that "the critical part of the administrative exemption that dooms [Plaintiffs'] production argument" is that Appraisers are "employees who perform work directly related to the business operations of their employers' ***customers***." Opp'n 13 (emph. in original); *see also id.* at 15 (arguing all Appraisers are exempt because their work is "directly related" to Defendants' business operations). Defendants argue that even though all "Plaintiffs are on the ***low end of [Defendants'] hierarchy***," they may still satisfy the administrative exemption, as exempt "advisers or consultants to LAS's clients."[11] Opp'n 14 (emph. in original,

---

[11] Although the Opposition refers to LAS's "clients" in the plural, Defendants' 30(b)(6) witness testified that "all of the appraisals" LandSafe produces "are done for Bank of America." *See* 2d Schwartz Decl. Ex. A (30(b)(6) Dep.) 28:20-23.

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

quotations omitted); *cf. Rieve v. Coventry Health Care Inc.*, 870 F. Supp. 2d 856, 873 (C.D. Cal. 2012) (C.D. Cal. 2012) (Carter, J.) (an "employee whose value flows to the management or operation of the business would [tend to] supervise other employees"). All Appraisers perform work for the same purpose, at the same level of the hierarchy. The administrative exemption defense will be determined uniformly.

With respect to the professional exemption, Defendants argue that "to be an appraiser requires hundreds of hours of specialized coursework." Opp'n 3. The common evidence on which Defendants rely is the uniform state licensing regime. Defendants point out that some Appraisers are merely "Licensed," while others have obtained the higher "Certified" license (Opp'n 12), but this merely confirms that uniform state requirements apply, and that, at most, two sub-classes might be needed. *Cf. Rodriguez v. Hayes*, 591 F.3d 1105, 1123 (9th Cir. 2009) (subclassing does not defeat class certification). Here, even subclassing is unnecessary because the relevant fact for the professional exemption is the *minimum position requirement* – not the optional diversity in Appraisers' academic backgrounds. *Campbell v. Pricewaterhouse Coopers, LLP*, 287 F.R.D. 615, 621-22 (E.D. Cal. 2012) (class certified on professional exemption because "Rule 30(b)(6) witness … testified that although 'it's preferred' for an applicant to have an accounting degree," it is not required) (citing *Solis v. Wash.*, 656 F.3d 1079, 1081 (9th Cir. 2011)); Nicholson Decl. in Opp'n ¶ 9 (ECF No. 159-2 at p. 15 of 76) (LandSafe will "hire individuals with at least a Residential License …, although it prefers to hire individuals who possess a Certified license").

In making arguments about the nature of the independence exercised by Appraisers – arguments that apply to both the administrative and professional exemptions – the Opposition argues that *all* Appraisers are exempt based on the nature of their duties, not that *some* are exempt and *others* are not. *See* Opp'n 4-5 (arguing that "*an appraiser's* independent opinion … is developed by analyzing the subject property," and "*[t]he appraiser* must determine which comparables are most relevant," and "[r]elying on their independent judgment and discretion, *appraisers* adjust the

value of the comparable properties," and "*appraisers* must take into account a variety of factors."). The Court should certify, to weigh common liability assertions only once.

2. Defendants' Merits-Oriented Authorities Support Certification.

The non-class-action cases that Defendants cite, delving into the merits, support certification, and suggest that common evidence will be determinative. Defendants quote this Court's statement in *Reber v. AIMCO/Bethesda Holdings* that "employees can exercise discretion in highly regulated fields." Opp'n 16. The quote (underlined below) is misleading when isolated from the language on either side of it in the opinion:

> [I]nspecting a property and determining what needs repair or replacement seems to involve merely "the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources[,]" [suggesting the two plaintiffs were not administratively exempt]. 29 C.F.R. § 541.202. It is true that [Plaintiffs] have failed to identify the specific [employer] policies applying to these inspections. It is also true that employees can exercise discretion in highly regulated fields. However, *these arguments miss the mark*. Applying their construction know-how to determine whether properties need repair is not an exercise of discretion, it is an exercise of skill.

Reber v. AIMCO/Bethesda Holdings, Inc., 2008 WL 4384147, at *8 (C.D. Cal. Aug. 25, 2008) (Carter, J.) (emphasis added); *cf.* 1st Schwartz Decl. Ex. A (ECF No.119-1) (30(b)(6) Dep.) 160:25-161:14 ("[T]he job of the appraiser is investigator....digging for information."). For purposes of class certification, what is relevant is that all class members work in the same "highly regulated field." *Reber* also confirms that the exemption determination turns on the nature of the job tasks, which are similar for all Appraisers. *See also* Opp'n at 15, citing *United Parcel Serv. Wage & Hour Cases*, 190 Cal. App. 4th 1001, 1027 (2010) (*United Parcel Serv.*) (in non-class case, plaintiff failed to identify written methods or protocols that covered employees in his position;

court acknowledged that if he had, in fact, been "constrained by stringent protocols," he would not have been "exercising discretion" under the Wage Order).

Another misclassification merits determination Defendants cite (Opp'n 15), *Bucklin v. American Zurich Insurance Co.*, 2013 WL 3147019 (C.D. Cal. June 19, 2013) (Wilson, J.), involved Claims Adjustors who "made their own decisions about which … facts to investigate," "assessed witnesses' credibility and resolved conflicts in the evidence" and "had authority to settle claims up to $75,000" and authorize "payments up to $100,000 per claim." *Id.* at *2. In finding them exempt, the Court relied on their "authority to make certain binding, affirmative decisions on behalf of Defendant," including negotiating settlements, making litigation decisions, and advising management. *Id.* at *6. Each of the *Bucklin* criteria (ability to bind the company, extent of authority, etc.) can be considered class-wide as to all Appraisers.

Defendants also cite *In re Weichey*, 405 B.R. 158 (W.D. Pa. 2009) for the notion that appraising is "more art than science." Opp'n 17 n.12. That bankruptcy case did not relate to classification, but involved battling "expert" witnesses appraising the debtor's home. *Id.* at 158. That different expert witnesses arrived at different values does not suggest that the class members' manner of performing their duties differs. The language quoted in the Opposition ("the appraiser's task is one of prudential judgment, weighing and considering all the data, rather than just mechanically selecting one of the values") was a criticism of an expert for failing to follow the *standard appraisal methodology* of using multiple comps to estimate a value. Setting aside the merits of the "art vs. science" argument, the argument applies to all Appraisers, favoring certification.

3. Defendants Cannot Defeat Certification by Arguing, Contrary to the Evidence, that Appraisers "Performed" their Uniform Duties Differently.

The appraisal industry depends on each Appraiser executing the same set of steps when producing a report, allowing appraisals to be compared to one another. This is why the governing rules are called the "*Uniform* Standards of Professional Appraisal Practice," and why "California requires all appraisers to comply with USPAP." Opp'n

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

3. Because Defendants' expectations are uniform, Defendants are reduced to arguing here that individualized questions exist "regarding whether individual appraisers performed their job *consistent with Defendants' expectations*." Opp'n 17 (emphasis added). However, unlike the cases Defendants cite, Defendants never identify any alleged difference in how Appraisers perform their job duties that would make some of them exempt and others not. Opp'n 12. Common evidence shows that all Appraisers perform the same tasks. Under Rule 23, they need not have performed their duties in an identical manner. *See Ellis v. Costco*, 285 F.R.D. 492, 517 n.16 (N.D. Cal. 2012).

The Opposition does not suggest that some Appraisers are subject to different job expectations than others. Opp'n 12; *see also id.* at 17 (describing Defendants' expectations without identifying differences). Defendants' 30(b)(6) deponent submits a Declaration stating, as to all Appraisers: "The primary duty of Residential Appraisers is to gather information about residential properties and the market conditions for those properties and then, using their independent judgment and discretion, analyze that information to formulate an opinion of the property's value." Nicholson Decl. ¶ 5. Setting aside the merits-based claim in this assertion, the predominant common question is whether the uniform "primary duty of Residential Appraisers" is exempt.

a. Defendants Identify No Differences in Performance that Require Individualized Inquiry.

Defendants vaguely assert that those Plaintiffs who "perform[ed] their job without exercising discretion and independent judgment" were "perform[ing] the job in a manner … that was not consistent with Defendants' expectations." Opp'n 11-12, 17. Unlike the cases cited in the Opposition, however, Defendants identify no differences in the work that Appraisers perform that would prevent classwide analysis.

In *Rosenberg v. Renal Advantage, Inc.*, 2013 WL 3205426 (S.D. Cal. June 24, 2013), the Court denied certification of a class of Registered Dieticians ("RDs"). There, the RDs had "different job duties across the Care Clinics, and each RD carrie[d] out their job differently depending on their own experience, the needs of the Care Center, and the needs of the patient." *Id.* at *7. The RDs could "veer[] away from [Defendant's]

policies to craft their own … protocols," and "the record show[ed] differing evidence as to how the RDs actually spent their time on the job." *Id.* at *7-8.

Marlo v. United Parcel Service, 639 F.3d 942 (9th Cir. 2011), held that the district court had not abused its discretion in decertifying a class when "[t]he declarations and deposition testimony of [employees] suggest variations in job duties that appear to be a product of employees working at different facilities, under different managers, and with different customer bases," preventing classwide analysis. *Id.* at 949. Likewise, in *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935 (9th Cir. 2009), the "outside sales" exemption turned on whether employees spent more than 50% of their time outside the office, and the evidence on this point "varied greatly." *Id.* at 938. Because "Countrywide had no common scheme or policy," the only way to resolve the merits was through individual inquiries. *Id.* at 939 (quotations omitted). The Court quoted the California Supreme Court as saying that a "dispute over how the employee actually spent his or her time … has the potential to generate individual issues." *Id.* at 945. n.11. Here, in contrast to *Rosenberg*, *Marlo*, and *Vinole*, there is no dispute over how Appraisers spend their time (they are completing 1004s and other standard forms). Rather, the dispute is over whether this work is exempt from overtime requirements.

Defendants rely on *Fjeld v. Penske Logistics, LLC*, 12-cv-3500, 2013 U.S. Dist. LEXIS 116485 (not available on Westlaw) (C.D. Cal. Aug. 9, 2013) (King, J.), in which the plaintiff, in describing his job as a trucking Operations Supervisor, "offer[ed] only evidence on how *he* performed the relevant tasks" and made "no showing that other Operations Supervisors take into account the same factors." *Id.* at *14-15 (emph. in original). There was no evidence that employees at the defendant's sixteen different "accounts" operated the same way and no "threshold showing that the putative class members are performing the tasks in a substantially similar manner." *Id.* at *14, 16. Here, the 30(b)(6) deponent, written policies, and Appraiser testimony establish that each member of the class performs the same appraisal tasks in the same manner.

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. Regulations, Guidelines, and Standardized Forms Are Common Evidence of Appraisers' Primary Duties.

Defendants claim that "regulations, guidelines, and standardized forms are not common evidence of Appraisers' primary job duties." Opp'n 15. But, as the Ninth Circuit put it, "Of course, uniform corporate policies will often bear heavily on questions of predominance and superiority. Indeed, courts have long found that comprehensive uniform policies detailing the job duties and responsibilities of employees carry great weight for certification purposes." *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 958 (9th Cir. 2009); *see also Vinole*, 571 F.3d at 946 (where "there is evidence that the duties of the job are largely defined by comprehensive corporate procedures and policies, district courts have routinely certified classes of employees challenging their classification"). As this Court wrote in *Avilez v. Pinkerton Gov't Services*, "Plaintiff's prima facie case is susceptible to common proof because Plaintiff relies on Defendant's 'own written policies as well as the company's own supervisors and 30(b)(6) deponents' testimony to make their class-wide claim." 286 F.R.D. 450, 469 (C.D. Cal. Oct. 9, 2012) (Carter, J.). Here, common forms dictate Appraisers' steps, and 30(b)(6) testimony describes their company role.

In the cases Defendants proffer for the contrary proposition, the "guidelines" offered as proof were either extremely general, or did not actually apply to the plaintiffs. *See, e.g.*, *Rosenberg*, 2013 WL 3205426 (job description consisted of broad "categories" of responsibilities, such as "provide nutrition education," which did not show what employees actually did); *United Parcel Serv.*, 190 Cal. App. 4th at 1027 (proffered guideline did not apply to plaintiff). Defendants cite *Marlo*, arguing that "the fact that [an employer] expects [employees] to follow certain procedures or perform certain tasks does not establish whether they 'customarily and regularly exercise[] discretion and independent judgment.'" Opp'n 15. But plaintiff in *Marlo* could only speculate how other employees performed their jobs. *Id.* at 945. Distinguishing *Marlo*, one court noted that when "Plaintiffs rely in large part on Defendant's own written policies as well as the company's own supervisors and 30(b)(6) deponents' testimony,"

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

and when there is "identical testimony evidencing common practices," certification is appropriate. *Delagarza v. Tesoro Ref. & Mktg. Co.*, 2011 WL 4017967, at *15 (N.D. Cal. Sept. 8, 2011). Defendants' easily distinguishable cases do not defeat certification.

c. When the Underlying Question is Whether the Tasks Plaintiffs Perform Are Exempt, Certification Is Proper.

The Opposition argues that the so-called "reasonable expectations" inquiry is relevant because Defendants "expected" their Appraisers to use "independent judgment and discretion," so "[t]o the extent [they] performed the job in a manner that might render them non-exempt…, an individualized inquiry would have to be conducted." Opp'n 17. But here, Appraisers performed exactly what Defendants required: they produced appraisal reports. The only question is whether that primary duty is exempt – a question warranting certification. *See, e.g.*, *Heffelfinger v. Elec. Data Sys. Corp.*, 2008 WL 8128621, at *3 n.23, *24 (C.D. Cal. Jan. 7, 2008) (Morrow, J.) ("Where the underlying question is whether the tasks plaintiffs perform are inherently exempt, courts have found that exemption is properly treated as a common issue."), *aff'd in relevant part*, 492 F. App'x 710, 714 (9th Cir. 2012). Because Appraisers all performed the same duties, the question can be answered for the class as a whole.[12]

Defendants rely on a line of cases, not relevant here, in which an employee's job description calls for the employee to perform exempt tasks, but the employee actually spends time performing non-exempt tasks. For example, in *Heyen v. Safeway Inc.*, 216 Cal. App. 4th 795, 828 (2013), a grocery store manager claimed that even though her job description called for her to spend more than 50% of her time performing exempt

[12] Defendants also cite *Dailey v. Sears, Roebuck & Co.*, 214 Cal. App. 4th 974 (2013), for the proposition that the employer's expectations are relevant. But in *Dailey*, there was a dispute about what authority employees did or did not have. *Id.* at 992-95 (evidence contradicted plaintiff's claims that managers could not determine prices, assign shifts, or design store layout). No such dispute exists here.

management tasks, she was actually required to spend most of her time performing non-exempt tasks such as bagging groceries and stocking shelves. In such cases, if the employer's expectations were "reasonable," and plaintiff's unreasonable failure to adhere to those expectations caused her to perform non-exempt tasks, the employee cannot thereby "evade a valid exemption." *Id. Heyen* has no bearing here – Appraisers all performed appraisal duties, which should be evaluated class-wide.

d. The Testimonial Evidence Confirms that Common Questions Predominate.

All six Appraiser deponents testified their duties were the same. *See supra* § II.C. Defendants' 30(b)(6) witness repeatedly testified about what *all* Appraisers do. In an internal BofA audit of the classification of Appraisers, he provided information on "what an appraiser does...," without suggesting that the question could not be answered as to Appraisers as a group. 2d Schwartz Decl. Ex. A (30(b)(6) Dep.) 177:9-178:6.

Likewise, Defendants' fifteen merits-focused declarations from Appraisers submitted in Opposition actually support Plaintiffs' certification motion. With respect to the professional exemption, Defendants' Appraiser declarations establish that all Appraisers must complete a uniform number of hours to obtain and maintain their license.[13] Defendants claims that all Appraisers need to know the real estate market and use "judgment" and "discretion."[14] Whether or not these facts support application of the professional and administrative exemptions is a predominant common question. Setting aside the merits of whether the declarants' work was "directly related to the management of Defendants or their customers," their testimony reveals no differences

---

[13] *See, e.g.*, Ashley Decl. ¶ 3 (56 hours of continuing education every 4 years); Carroll Decl. ¶ 3 (same); Dyer Decl. ¶ 3 (same); Jow Decl. ¶ 3 (same); Mann Decl. ¶ 3 (same); McGrath Decl. ¶ 3 (same); Ostrow Decl. ¶ 3 (same); Tsuchiyama Decl. ¶ 3 (same).

[14] *See, e.g.*, Ashley Decl. ¶¶ 6-10; Carrol Decl. ¶¶ 6-10; Cruickshank Decl. ¶¶ 5-8; Dyer Decl. ¶¶ 4-7; Harris Decl. ¶¶ 6-9; McGrath Decl. ¶¶ 4-9; Michaels Decl. ¶¶ 7-9; Noblin Decl. ¶¶ 8-10; Ostrow Decl. ¶¶ 5-8; Quinn Decl. ¶¶ 4-7; Savlo Decl. ¶¶ 4-7; Smith Decl. ¶¶ 6-11; Tsuchiyama Decl. ¶¶ 4-7; Vescera Decl. ¶ 11; Von Esch Decl. ¶¶ 6-9.

among Appraisers that would result in inconsistent answers to that question. None supervised anyone. None advised management or set policies.

Defendants' declarants assert that they prefer the job being exempt, but the law determines whether the job is exempt, not the preferences of employees. As this Court has explained, "happy camper" declarations have little value as to certification:

> An employee has every incentive to answer "yes" when her employer's attorney asks if she likes her employer's current practice, as … a negative answer may endanger her job, earning her at best the reputation of having a "bad attitude" … and at worst a retaliatory termination. The incentives to answer untruthfully are even more skewed where, as here, the employer's question concerns a practice *currently being litigated in a putative class action as an illegal practice.*

See Avilez, 286 F.R.D. at 458 (emph. in original).

With respect to meal and rest breaks, Defendants' declarants do not establish that Defendants had a meal/rest break policy, but assert that they set their own schedules, so they can take breaks if they want.[15] This does not change the common question: whether Defendants' misclassification of their Appraisers as exempt also results in a class-wide violation of section 226.7, for lack of a policy providing for and making available meal and rest periods. Under California law, "an employer is obligated to *provide* the rest and meal breaks, *and if an employer does not do so*, the fact that an employee did not take the break cannot reasonably be considered a waiver." *Bradley v. Networkers Int'l, LLC*, 211 Cal. App. 4th 1129, 1145, 1150-51 (2012) (*review denied*)

[15] *See, e.g.*, Ashley Decl. ¶¶ 11-12; Carroll Decl. ¶¶ 13; Cruickshank Decl. ¶ 9; Dyer Decl. ¶ 7; Grier Decl. ¶ 18; Harris Decl. ¶ 10; Jackson Decl. ¶ 34; Jow Decl. ¶ 10; Kingston Decl. ¶ 9; Mann Decl. ¶ 9; McGrath Decl. ¶ 10; Michaels Decl. ¶ 12; Noblin Decl. ¶ 14; Ostrow Decl. ¶ 8; Quinn Decl. ¶ 9; Rivera Decl. ¶ 13; Salvo Decl. ¶ 8; Smith Decl. ¶ 14; Tsuchiyama Decl. ¶ 8; Vescera Decl. ¶ 12; Von Esch Decl. ¶¶ 11-12.

(applying *Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012)); *see also Faulkinbury v. Boyd & Assocs.*, 216 Cal. Ap. 4th 220 (2013) (applying *Brinker*) (review denied); *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952 (9th Cir. 2013) (discussing these authorities). As *Bradley* explained: "*Brinker* … expressly rejected this court's reasoning that evidence showing some employees took rest breaks and other employees were offered rest breaks but declined to take them made class certification inappropriate." 211 Cal. App. 4th at 1143. "No issue of waiver ever arises for a rest break that was required by law but never authorized; if a break is not authorized, an employee has no opportunity to decline to take it." *Brinker*, 53 Cal. 4th at 1033. As explained in *Bradley*, and followed in *Faulkinbury* and *Abdullah*, "[t]he lack of a meal/rest break policy and the uniform failure to authorize such breaks are matters of common proof." *Bradley*, 211 Cal. App. 4th at 1150. Thus, Defendants' declarations, in which employees purport to "decide" not to take a meal or rest break, but identify no policy of Defendants to provide breaks or make them available, fail to establish that individualized issues predominate.

4. The California Commission Exemption Is Inapplicable Based on the Common Fact that Appraisers Do Not Sell Anything.

The California Commission exemption applies only to employees "involved principally in selling the product or service." *Ramirez v. Yosemite Water Co.*, 20 Cal. 4th 785, 804 (1999); *cf. Muldrow v. Surrex Solutions Corp.*, 208 Cal. App. 4th 1381, 1391-92 (2012) (recruiters were engaged in "sales" because company only made money if recruiters persuaded clients to pay for services). Appraisers do not sell anything or play any role in procuring business. 1st Schwartz Decl. Ex. A (30(b)(6) Dep.) 124:12-17; Staff Appr. Decl. ¶ 19. The exemption is inapplicable class-wide.

5. Common Proof Establishes Defendants' Violations of the Itemized Wage Statement Provisions of Labor Code § 226.

The Legislature amended Labor Code section 226 in 2013 to clarify that workers presumptively satisfy the injury requirement upon proof of the employer's failure to provide compliant wage statements. Under Section 226, an "employee is deemed to

suffer injury" if the employer fails to provide accurate, complete information on the wages required to be paid, preventing the employee from easily determining from the wage statement alone what he or she has earned. Defendants' section 226 argument relies on district court holdings rejected by the California Legislature in 2013.[16]

Even without the clarifying amendment, the damage asserted here constitutes injury under the former line of authorities. *See, e.g.*, *Price v. Starbucks*, 192 Cal. App. 4th 1136, 1142-43 (2011) (injury requirement satisfied when "inaccurate or incomplete wage statements" would require employee to engage "in discovery and mathematical computations to reconstruct time records to determine if they were correctly paid"). Here, all class members will rely on the same evidence of misclassification to prove violations, which would warrant certification even under the pre-amendment law.

6. Individualized Damages Issues Do Not Defeat Certification.

Individualized differences in number of overtime hours worked and number of meal- and rest-break violations do not weigh against a predominance finding. Damages determinations "are individual in nearly all wage-and-hour class actions." *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 513 (9th Cir. 2013) (discussing *Brinker*). Thus, individualized damages questions do not defeat class action treatment. *See id.* at 513-14 (citing *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975); *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1089 (9th Cir. 2010)).

[16] The legislative history of the amendment indicates that the Legislature merely clarified existing law, presuming an injury when a wage statement fails to reflect overtime. *See* Request for Judicial Notice, Ex. A (clarifying standard for "suffering injury" under section 226). Such a clarification is retroactive. *See ABKCO Music, Inc. v. LaVere*, 217 F.3d 684, 691 (9th Cir. 2000).

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. Plaintiffs Establish the Adequacy of the Class Representatives.

Defendants do not dispute that named plaintiff Sonia Medina is an adequate representative. Therefore, adequacy is not a ground to deny certification. *See In re Wal-Mart Stores, Inc. Wage & Hour Litig.*, 2008 WL 413749, at *12 (N.D. Cal. Feb. 13, 2008) ("It is well settled that . . . even a single plaintiff may represent the entire class."). In any event, Defendants' arguments against the other named plaintiffs are meritless.

1. Terry Boyd

Without Boyd, the first representative plaintiff in this case (*see* Complaint (ECF No. 1)), none of the Appraisers or Review Appraisers would have had an opportunity to recover. Yet, Defendants argue that Boyd cannot represent the class because he purportedly lacks credibility. "Character attacks made by opponents to a class certification motion and not combined with a showing of a conflict of interest have generally not been sympathetically received," because the question for purposes of adequacy is whether Boyd's "interests are antagonistic to those of the class members." *Marsh v. First Bank of Del.*, 2014 WL 554553, at *9 (N.D. Cal. Feb. 7, 2014). Defendants show no conflict between Boyd and the class. Unlike cases in which the Court has found a class representative inadequate due to inconsistent deposition testimony *on an issue directly relevant to the litigation*, Defendants' allegations about Boyd are irrelevant to the claims here. *Compare Jovel v. Boiron Inc.*, 2014 WL 1027874, at **2-5 (C.D. Cal. Feb. 27, 2014) (Wilson, J.) (credibility affected adequacy) *with Balasanyan v. Nordstrom, Inc.*, 294 F.R.D. 550, 563 (S.D. Cal. 2013) (refusing to disqualify wage and hour class representative who disputed the allegation that he lied about his commissions, because "[w]here credibility has been considered, courts have generally found inadequacy only where the representative's credibility is questioned on issues directly relevant to the litigation or there are confirmed examples of dishonesty, such as a criminal conviction for fraud"); *Harris v. Vector Mktg. Corp.*, 753 F. Supp. 2d 996, 1015 (N.D. Cal. 2010) (refusing to disqualify class representative who lied about matters not directly related to claims asserted). Boyd's termination is irrelevant, and he disputes BofA's view of the facts. *See* 2d Schwartz Decl. Ex. K (Boyd) 95:19-21.

Moreover, contrary to Defendants' representation that the Labor Commission found him exempt, the Commission simply exercised its discretion under Labor Code Section 98 not to proceed with a claim. *See* Decl. of Michael Mandel (ECF No. 163) Ex. 5. Boyd did not receive "a final judgment on the merits" that could "bar[] further claims by parties." *Batts v. Bankers Life & Cas. Co.*, 2014 WL 296925, at *2 (N.D. Cal. Jan. 27, 2014) (quotation omitted). The Commission's decision not to proceed with his case was discretionary. *See* Lab. Code § 98 ("Commissioner *may* provide for a hearing in any action to recover wages….") (emph. added); *see also Post v. Palo/Haklar & Assoc.*, 23 Cal. 4th 942, 946 (2000). There was no hearing, final order or decision, or mechanism by which Boyd could challenge the decision, which was apparently based on an erroneous understanding.[17] *Id.* at 952; *Corrales v. Bradstreet*, 153 Cal. App. 4th 33, 49-50 (2007) (to issue order, Labor Commission must hold hearing). No *res judicata* or collateral estoppel effect applies. Boyd is an adequate representative.[18]

2. Ethel Joann Parks

Defendants also fail to disqualify Parks, based on the incorrect assertion that she filed for bankruptcy without disclosing this case. Judicial estoppel requires a factual determination, appropriate for summary judgment, but not class certification. *See Ah Quin v. Cnty. of Kuaua Dep't of Transp.*, 733 F.3d 267, 276 (9th Cir. 2013); *see also Martinez v. Extra Space Storage, Inc.*, 2013 WL 3889221 (N.D. Cal. July 26, 2013). Even if such a factual inquiry were appropriate, on May 7, 2013, even before she had

[17] The Labor Commissioner's decision not to proceed stemmed from evidence that a portion of Mr. Boyd's pay resembled commissions. Mandel Decl. (ECF No. 163) Ex. 5. Whether Mr. Boyd received commissions is relevant only if he engaged in *sales*, which he did not. *See supra* § III.A.4. The DLSE's letter has no bearing on this case.

[18] Even if there were a question about the res judicata effect of the Labor Commission's decision, an affirmative defense does not make Boyd an inadequate representative. *See Parra v. Bashas', Inc.*, 291 F.R.D. 360, 383 (D. Ariz. 2013).

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

joined this case, Parks amended her bankruptcy petition to identify claims against BofA. *Compare* Mandel Decl. (ECF No. 163) ¶ 35, Ex. 22 (Doc. 10, Sheet 3 of 3), *with* ECF No. 13 (First. Amend. Compl.) at Ex. B (Parks Consent, signed May 15, 2013).

Even if Defendants could ultimately have a cognizable judicial estoppel defense, "[a] plaintiff should not be disqualified as a class representative simply because the defendant may have good defenses against that plaintiff." *Parra*, 291 F.R.D. at 383.

3. Linda Zanko

Defendants attack Zanko's adequacy based on her temporary unavailability due to surgery for a double mastectomy. Defendants chose not depose Zanko in October 2013 when they deposed Boyd and Galaz, and had months thereafter to notice her deposition. Defendants waited until immediately prior to their deadline to oppose class certification to seek to take her deposition. *See* Mandel Decl. ¶¶ 3-5. Zanko underwent surgery on March 3, 2014, and required time to recover, including daily radiation treatments. *See* Decl. of Linda Zanko, submitted herewith, in Support of Pls.' Mot. for Class Cert. ¶¶ 7-8. Defendants made no attempt to reschedule her deposition or take it in writing as provided in the Federal Rules. *See* 2d Schwartz Decl. ¶ 16. Zanko has otherwise been available during this lawsuit and has actively participated. Zanko Decl. ¶¶ 5-6; 2d Schwartz Decl. ¶ 16. She responded to written discovery, including 109 requests for production. *Id.* She participated in mediation for the class in January 2014. *Id.* Defendants do not challenge undersigned counsel's adequacy, nor the vigor with which counsel and Zanko have pursued this case. *See, e.g.*, *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1021 (9th Cir. 1998). Inquiry into adequacy should not be based on a class representative's health. *See Kriendler v. Chem. Waste Mgmt., Inc.*, 877 F. Supp. 1140, 1159 (N.D. Ill. 1995). Zanko is an adequate class representative.

C. Proceeding on a Class Basis Is Manageable and Superior.

1. The Advantages of Determining Common Issues Outweigh Any Individual Interest in Separate Adjudications.

The choice before the Court is whether to proceed on a class basis to resolve common issues or to determine each of the approximately two hundred claims of

misclassification individually. At this point, there are already over 125 Appraisers who have opted into the FLSA collective action. 2d Schwartz Decl. ¶ 18. In the absence of class certification, many putative class members from California would bring individual claims based on the same theory. Class proceedings conserve significant resources.

Defendants contend that the size of potential individual recoveries overwhelms the obvious advantage of class prosecution. Opp'n 25. "[W]hile the impracticability of bringing an individual action for comparatively small potential recovery [is] a consideration in favor of permitting a class action, the converse is not necessarily controlling, *i.e.*, the possibility of a potential recovery for each class member larger than a nominal sum does not militate against the maintenance of such an action." *Krzesniak v. Cendant Corp.*, 2007 WL 1795703, at *19 (N.D. Cal. June 20, 2007) (quotation omitted) (rejecting argument in misclassification case that possibility of large recoveries "vitiates the superiority of class treatment"). Defendants cite no authority to the contrary. Courts certify classes when Defendants cannot establish that individual class members must control their litigation, and when judicial economy favors it. *See Heffelfinger*, 2008 WL 8128621, at *28 (employment class actions favored because employees are reticent to challenge an employer alone). Here, the size of the proposed class (approximately 185 California Staff Appraisers) is manageable, and class members may opt out and proceed individually if they prefer.[19]

2. This Court Can Manage the Litigation.

Plaintiffs believe that liability in this action should eventually be resolved in their favor by summary judgment. If Plaintiffs succeed, no trial on Defendants' liability will be necessary, nor will there be attendant concerns about manageability. If the liability

---

[19] Defendants assert that many Appraisers are high wage-earners. Opp'n at 1, 25. Defendants' declaration showing annual earnings of 18 plaintiffs suggests that in most years, they earned less than $100,000. Opp'n at 25, citing 2d Binongcal Decl. ¶ 7.

issue proceeds to a jury, Plaintiffs will rely upon the common proof described above, including "the words and conduct of the defendants," making class treatment manageable. *Avilez*, 286 F.R.D. at 475 (citing *Vinole*, 571 F.3d at 946 ("[E]ach member of the class pursuing a claim individually would burden the judiciary, which is contrary to the goals of efficiency and judicial economy advanced by Rule 23.")).

Similarly, the Court can determine aggregate damage manageably, and individualized damages do not defeat manageability. *See Leyva*, 716 F.3d at 513-14; *Amgen*, 133 S. Ct. at 1196 (Rule 23(b)(3) "does *not* require a plaintiff seeking class certification to prove that each elemen[t] of [her] claim [is] susceptible to classwide proof" (emph. in original)).[20] Likewise, Defendants possess the data necessary to calculate individual class members' damages. *See* Opp'n 25 (citing Michael Mandel Decl. ¶¶ 10-14); *see also Leyva*, 716 F.3d at 514 (noting that Defendants had calculated damages exposure for purposes of their removal effort, "demonstrat[ing] that damages could feasibly and efficiently be calculated once the common liability questions are adjudicated"). In addition to the common evidence described above (records of turn-times, numbers of appraisals, and commissions), Plaintiffs' classwide damages evidence may include expert testimony, surveys, and statistical sampling, or alternatively, damages proceedings before a special master. Such methods have been approved and accepted in both California and federal courts. *See, e.g.*, *Tierno v. Rite Aid Corp.*, 2006 WL 2535056, at *11 (N.D. Cal. Aug. 31, 2006) ("[C]ourts in overtime cases such as this may properly couple uniform findings on common issues regarding the proper classification of the position at issue with innovative procedural tools that

---

[20] Defendants' reliance on *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013) is misplaced. The Ninth Circuit in *Leyva* distinguished *Comcast* from wage and hour class actions: "Here, unlike in *Comcast*, if putative class members prove [] liability, damages will be calculated based on the wages each employee lost…." *Leyva*, 716 F.3d at 514.

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

can efficiently resolve individual questions regarding eligibility and damages. Such tools include administrative mini-proceedings, special master hearings, and specially fashioned formulas or surveys.") (citing *Sav-On Drug Stores. v. Sup. Ct.*, 34 Cal. 4th 319, 332-35, 337 & n.12 (2004); *Romero v. Producers Dairy Foods, Inc.*, 235 F.R.D. 474, 487 (E.D. Cal. 2006)); *see also*, regarding manageability, *Dilts v. Penske Logistics, LLC*, 267 F.R.D. 625, 641 (S.D. Cal. 2010); *In re AutoZone, Inc., Wage & Hour Employ. Practices Litig.*, 289 F.R.D. 526, 536 (N.D. Cal. 2012). *See generally In re Sugar Indus. Antitrust Litig.*, 73 F.R.D. 322, 353 (E.D. Pa. 1976) ("Upon the establishment of such aggregate damages as may be assessed against defendants the problem of allocations among classes and distribution within each class largely becomes plaintiffs' problem."); *Bell v. Farmers Ins. Exch.*, 115 Cal. App. 4th 715, 758 (2004) (after aggregate damages are proven, defendant may present evidence of the precise amount of work performed or evidence to negate the reasonableness of the inference to be drawn from the employee's evidence) (citing *Anderson v. Mt. Clemens*, 328 U.S. 680, 687-88 (1946)). Defendants will have the opportunity to challenge Plaintiffs' methodology, and to cross-examine a representative sample of class members regarding individual damages, testing their credibility.

This Court can manage a class action.

IV. CONCLUSION

Plaintiffs respectfully request that the Court: (1) certify the California Class and subclasses; (2) approve the Plaintiffs' proposed judicial notice; and (3) appoint the named Plaintiffs as Class Representatives and the undersigned as Class Counsel.

DATED: April 30, 2014

BRYAN SCHWARTZ LAW
SCHONBRUN DESIMONE SEPLOW HARRIS & HOFFMAN, LLP

By: /s/ *Bryan J. Schwartz*
Bryan J. Schwartz (SBN 209903)
Attorneys for Plaintiffs