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

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

23 Plaintiffs,

24 vs.

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

28 Defendants.

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

**PLAINTIFFS' NOTICE OF MOTION  
 AND MOTION FOR CONDITIONAL  
 CERTIFICATION UNDER 29 U.S.C.  
 § 216(B) AND PARTIAL SUMMARY  
 JUDGMENT; MEMORANDUM OF  
 POINTS AND AUTHORITIES IN  
 SUPPORT**

Date: August 12, 2013  
 Time: 8:30 a.m.  
 Place: Courtroom 9D, Santa Ana  
 Hon. David O. Carter

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**NOTICE OF MOTION AND MOTION**

**TO DEFENDANTS BANK OF AMERICA CORP., LANDSAFE, INC.,  
AND LANDSAFE APPRAISAL SERVICES, INC., AND THEIR ATTORNEYS  
OF RECORD:**

**PLEASE TAKE NOTICE** that on August 12, 2013 at 8:30 a.m. in the Courtroom of the Honorable David O. Carter, located at 411 W. Fourth St., Santa Ana, CA 92701, Plaintiffs Terry P. Boyd, Ethel Joann Parks, Sonia Medina, Linda Zanko, and Victor Galaz, through their attorneys and on behalf of all others similarly situated, will and hereby do move the Court for conditional certification under the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 216(b) and partial summary judgment under Federal Rule of Civil Procedure 56. This motion is based on: this Notice of Motion and Motion; the accompanying Memorandum of Points and Authorities; the declarations of Plaintiffs, opt-in Plaintiffs, and Bryan J. Schwartz, Esq., and exhibits thereto; Plaintiffs’ Motion for Judicial Notice, filed herewith; the pleadings and papers filed herein and such other information as may be presented to the Court at the time of the hearing.

Plaintiffs seek conditional certification of an opt-in collective action under 29 U.S.C. § 216(b) consisting of all persons who are or have been employed by Defendants as Residential Appraisers (including Staff Appraisers, Staff Appraisers II, Senior Appraisers, Review Appraisers, Senior Review Appraisers, or any titles performing similar duties thereto) at any time from April 9, 2010 (*i.e.*, three years prior to the filing of the Complaint in this matter) through the final disposition of this action. Applying the liberal standard for conditional certification, the Court should permit Plaintiffs to send notice to all persons in the class, who were uniformly classified as exempt from the minimum wage and overtime requirements of the FLSA.

Plaintiffs also seek an order granting partial summary judgment as to the inapplicability of certain FLSA exemptions to Plaintiffs and the potential class

1 members, namely, the professional, outside sales, and retail and service commissioned  
2 employee exemptions set forth in 29 U.S.C. §§ 213(a)(1) & 207(i) of the FLSA, and the  
3 regulations promulgated thereunder.

4 This motion is made following the conference of counsel pursuant to Local Rule  
5 7-3, which took place on June 20, 2013. See Declaration of Bryan J. Schwartz, dated  
6 July 9, 2013, submitted herewith, at ¶ 9.

7  
8  
9 Dated: July 9, 2013

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HARRIS HOFFMAN & HARRISON, LLP

12  
13 By: /s/ Bryan J. Schwartz  
14 BRYAN J. SCHWARTZ

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

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs Terry P. Boyd, Ethel Joann Parks, Sonia Medina, Linda Zanko, and  
4 Victor Galaz were or are employed by Defendant Bank of America Corp. and its  
5 subsidiaries Defendants LandSafe, Inc. and/or LandSafe Appraisal Services, Inc.  
6 (collectively, “BofA” or “Defendants”) as Residential Staff Appraisers and/or Review  
7 Appraisers (together, “Appraisers”).<sup>1</sup> Staff Appraisers produce appraisal reports for  
8 residential properties by obtaining required data from online databases and on-site  
9 inspections of residential properties, and then filling out information about the property  
10 in a mandatory form, thereby arriving at an estimate of the property’s value. Review  
11 Appraisers, in turn, follow detailed guidelines to proofread the appraisal reports and  
12 ensure that they follow regulatory and BofA requirements. Borrowers seeking to obtain  
13 mortgages and other home loans issued by BofA must have their homes appraised, and  
14 BofA provides this service for a fee. Appraisers are paid based on how many appraisal  
15 reports they produce (or review), and both Staff Appraisers and Review Appraisers are  
16 subject to production quotas. BofA has classified its Appraisers as exempt under the  
17 FLSA, and does not pay them overtime. Plaintiffs, individually and on behalf of all  
18 other Appraisers employed by BofA in the relevant time period, allege that they were  
19 misclassified and, among other things, improperly denied overtime wages.

20 \_\_\_\_\_  
21  
22 <sup>1</sup> The proposed class includes all employees who performed residential appraising or  
23 residential appraisal review work for Defendants, including, but not limited to,  
24 employees with the job title “Staff Appraiser,” “Staff Appraiser II,” “Senior  
25 Appraiser,” “Review Appraiser,” “Senior Review Appraiser,” and any position  
26 performing similar work. The proposed class includes all employees who held these  
27 titles during the relevant time periods. All such employees are referred to herein as  
28 “Appraisers.”

1 Plaintiffs now seek conditional certification pursuant to the FLSA, 29 U.S.C.  
2 § 216(b), on behalf of a collective class (hereafter, the “FLSA Class”) defined as:

3 All persons who are or have been employed by Defendants as Appraisers,  
4 including employees with the job title “Residential Staff Appraiser,” “Staff  
5 Appraiser” or “Residential Appraiser” and any other employee performing  
6 the same or similar duties for Defendants, and as “Review Appraisers,”  
7 and any other employee performing the same or similar duties for  
8 Defendants, within the United States at any time from three years prior to  
9 the filing of this Complaint to the final disposition of this case.

10 *See* ECF No. 42 (2d Amended Compl.) ¶ 20. Conditional certification of this Class  
11 under the lenient standard of the FLSA is appropriate here because Staff Appraisers and  
12 Review Appraisers, respectively, performed the same job duties, were paid under the  
13 same compensation formula, worked overtime hours, and were classified as exempt  
14 from the overtime laws under the same uniform nationwide corporate policy. This is  
15 true of BofA Appraisers located all over the country, as attested to by Declarants from  
16 California, Maryland, Massachusetts, and Georgia.

17 In addition, Notice should be issued to the FLSA Class immediately in order to  
18 promote the statute’s broad remedial purposes, and because the overtime claims of  
19 potential Collective Class members are diminishing with every passing day. Plaintiffs’  
20 motion for conditional certification should be granted.

21 In addition, Plaintiffs move for partial summary judgment to eliminate three  
22 FLSA exemptions that are inapplicable here as a matter of law: the exemptions for  
23 “learned professionals,” for outside salespersons, and for retail and service  
24 commissioned employees. As set forth in the declarations and exhibits submitted in  
25 support of this motion, none of these exemptions applies to Appraisers as a matter of  
26 law, and partial summary judgment should be granted.

1 **II. STATEMENT OF FACTS**

2 **A. The Members of the Proposed Collective Class Perform the Same Job**  
3 **Duties.**

4 BofA Staff Appraisers across the country perform the same job duties and are  
5 paid in the same manner. Likewise, BofA Review Appraisers across the country  
6 perform the same job duties and are paid in the same manner. Appraisers tend to work  
7 in excess of forty hours per week (sometimes as much as eighty hours per week), and  
8 all were classified as exempt and not paid overtime wages.

9 **1. Staff Appraiser Duties Are Uniform Throughout BofA.**

10 Staff Appraisers generate reports providing estimated values of residential  
11 properties – primarily single family dwellings. To produce a report for a given property,  
12 a Staff Appraiser gathers a specified list of data about the property, visits and  
13 photographs the property, looks up data about the prices for which comparable  
14 properties in the neighborhood have recently sold, and fills out a standardized  
15 government-issued form for the property. *See* Staff Appraiser Decls. ¶¶ 3, 6-9.<sup>2</sup> Staff  
16 Appraisers typically produce an average of two to four appraisal reports per day. *Id.*  
17 ¶ 11. Over time, Appraisers produce thousands of appraisal reports. *Id.* ¶ 17. The  
18 properties in question are being appraised because they are the subject of mortgage  
19 transactions that BofA is offering to the property owner (*i.e.*, the borrower), including  
20

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21  
22 <sup>2</sup> All citations to “Staff Appr. Decl. ¶ X” are to Paragraph X of the Declarations of Staff  
23 Appraisers Terry P. Boyd, Ethel Joann Parks, Sonia Medina, Linda Zanko, Gerald J.  
24 Robbins, Eric Costa, Ricky Leung, Tom DeChant, Harvey Waggoner, Carol L. Garcia,  
25 Karen Lampert, and Michael Petris. When cited in this manner, the factual support for  
26 the stated proposition is found in the same paragraph number in each Staff Appraiser’s  
27 declaration.  
28

1 home mortgages, refinances, home equity lines of credit, and other loan products sold  
2 by BofA. *Id.* ¶ 3. Obtaining an appraisal of the subject property is a required step for  
3 borrowers who hope to purchase such a loan product from BofA. *Id.* BofA generally  
4 charges the borrower a fee for the report produced by an Appraiser. *Id.*

5 The most common residential appraisal form is the Fannie Mae Form 1004 for  
6 single family dwellings. *Id.* ¶ 5. Other standardized forms are used for other types of  
7 residential property, such as condominium units and 2-4 unit residential properties. *Id.*  
8 Producing appraisal reports requires Staff Appraisers to perform the same set of rote  
9 tasks repeatedly. Before conducting an on-site inspection of the property being  
10 appraised (the “subject” property), the Appraiser locates data about the property using  
11 several free and subscription-only databases (with database access and computer  
12 equipment provided by BofA). *Id.* ¶ 6. This data is necessary to fill out the applicable  
13 appraisal form. *Id.* The Appraiser also identifies a specified number of “comps” –  
14 comparable properties that were recently sold or listed for sale in the vicinity of the  
15 subject property. *Id.* This data, too, is required to be entered in the applicable form. *Id.*  
16 ¶ 7. After gathering the necessary data, the Appraiser travels to the subject property and  
17 inspects it. *Id.* The inspection consists of obtaining additional data to complete the  
18 Form 1004 (or other applicable form), such as: the number of rooms; the materials of  
19 the walls, roof, windows, screens, and floors; the presence of a basement or attic; and  
20 so on. *Id.* Appraisers must also take pictures of the subject property and the comps, to  
21 be attached to the applicable form and submitted as a mandatory part of the appraisal  
22 report. *Id.* ¶¶ 7-8. The Form 1004 is used not only by all BofA Staff Appraisers across  
23 the country, but by all appraisers, regardless of their employer. *Id.* ¶ 5. A copy of a  
24 blank Form 1004 is submitted herewith. *See* Declaration of Bryan J. Schwartz, Esq.,  
25 dated July 9, 2013, (“Schwartz Decl.”) ¶ 3 & Ex. A (blank Fannie Mae Form 1004); *see*  
26  
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28

1 *also* Plaintiffs’ Mot. for Judicial Notice, dated July 9, 2013, at 4 (requesting judicial  
2 notice of the existence and form of the Form 1004).

3         Once a Staff Appraiser has gathered the necessary information, he or she inserts  
4 it into the Form 1004 using a software program made available by BofA. *See* Staff  
5 Appr. Decl. ¶ 9. The program provides drop-down menus for many of the fields. *Id.*  
6 The Appraiser then notes in the report the sale prices of the comps, and explains how  
7 the comps differed from the subject property (*e.g.*, whether the comp had more or fewer  
8 bedrooms, more or fewer square feet, newer kitchen appliances, etc.). *Id.* Based upon  
9 the sale prices of the comps and the characteristics of the subject property, the Staff  
10 Appraiser arrives at an estimated value of the subject property. *Id.* The process of  
11 arriving at a value is broken down into detailed, prescribed, standardized steps, largely  
12 dictated by the applicable Form. *Id.* ¶ 17. This process is closely controlled by  
13 regulatory and company guidelines. *Id.* The value range of the subject property is  
14 largely limited by the values of the comps. *Id.*

15         After completing a Report, a Staff Appraiser submits it for review. *Id.* ¶ 10.  
16 Reports are generally then proofread by a Review Appraiser and, potentially, reviewed  
17 by the Staff Appraiser’s manager. *Id.* A Staff Appraiser does not have final decision-  
18 making authority on an appraisal – the appraisal can be rejected, and the Staff  
19 Appraiser’s compensation can be docked as a result. *Id.* The Appraisals also do not bind  
20 Bank of America or LandSafe – the bank can decide to issue a loan based upon its  
21 business judgment regardless of the appraisal values. *Id.*

22         In addition to obtaining data from online databases and on-site inspections, Staff  
23 Appraisers must perform the logistical work necessary to coordinate appointments and  
24 visit the homes of BofA borrowers, including making repeated phone calls to the  
25 borrowers, coordinating meeting times, driving to properties, and driving to view the  
26 comps. *See* Staff Appraiser Decls. ¶¶ 13-14. Staff Appraisers also must check their  
27  
28

1 work email throughout the day and respond to emails from their managers or from  
2 reviewers. *Id.*

3 Staff Appraisers' schedules and tasks are controlled through BofA's internal  
4 software and electronic communication system, which is called Appraisal Port. *Id.* ¶ 13.  
5 This is true regardless of where Appraisers are located in the country. *Id.* ¶¶ 11, 13.  
6 Through this site, BofA provides Appraisers with their assignments (*i.e.*, their  
7 "pipeline"), which are automatically assigned to each Staff Appraiser by the Computer.  
8 *Id.* ¶ 13. Once Staff Appraisers receive an assignment on Appraisal Port, all of their  
9 actions are timed. *Id.* ¶ 14. They must make contact with the borrower within 24 hours,  
10 and must record their attempts to do so in Appraisal Port. *Id.* They must complete the  
11 appraisal and submit their Report within a specified "turn-time," upon penalty of a  
12 reduction in their pay. *Id.* ¶¶ 11, 14.

## 13 **2. Review Appraiser Duties Are Uniform Throughout BofA.**

14 Review Appraisers proofread the standardized appraisal reports submitted by  
15 Staff Appraisers. Galaz Decl. ¶ 8; Petris Decl. ¶ 22. They follow a pre-established  
16 checklist to ensure that none of the information that is required to be in the applicable  
17 Form is missing. Galaz Decl. ¶ 7; Petris Decl. ¶ 22. Like Staff Appraisers, Review  
18 Appraisers look up information in various public and subscription databases (with  
19 database access and computer equipment provided by BofA) to verify that the data in  
20 the Appraisal Reports is accurate. *Id.* Review Appraisers generally perform reviews of  
21 between 8 and 16 reports per day. *Id.* Review Appraisers' duties are similar to those of  
22 Staff Appraisers in many respects. Review Appraisers also receive their job  
23 assignments through BofA's internal software system (Galaz Decl. ¶ 9); they also have  
24 specified times for completing their reviews of reports (*Id.*); they also have a production  
25 quota and are compensated based on how many reports they review (*Id.* ¶ 10; Petris  
26 Decl. ¶ 22); their reviews of reports are also subject to review by their managers and an  
27  
28

1 internal review group called Governance (Galaz Decl. ¶ 12); and they also played no  
2 role at the bank other than completing thousands of reviews of appraisals (*Id.* ¶ 18).

3  
4 **B. The Members of the Proposed Collective Class Are Compensated  
Under the Same Compensation Plan.**

5 BofA pays Staff Appraisers and Review Appraisers using company-wide  
6 compensation formulas that are based on production levels, as determined by the  
7 number of appraisal reports that Appraisers produce or review each month. Staff Appr.  
8 Decl. ¶ 12; Galaz Decl. ¶ 10; Petris Decl. ¶ 22. BofA classifies all Appraisers – Staff  
9 and Review – as exempt, and does not track their time for purposes of compensation.  
10 Staff Appr. Decl. ¶ 16; Galaz Decl. ¶ 3. Appraisers regularly work in excess of forty  
11 hours per week. Staff Appr. Decl. ¶ 16; Galaz Decl. ¶ 13. BofA does not pay overtime  
12 wages to any of them. Staff Appr. Decl. ¶ 16; Galaz Decl. ¶ 3. Staff and Review  
13 Appraisers may have their pay reduced if they are deemed to have committed an error,  
14 or if they fail to complete their assignment within the specified turn-time. Staff Appr.  
15 Decl. ¶¶ 10, 17; Galaz Decl. ¶¶ 8, 9.

16  
17 **1. Staff Appraisers.**

18 Staff Appraisers throughout the company are paid according to the same formula.  
19 *See* Staff Appr. Decl. ¶ 12. The formula is production-based: for each appraisal that a  
20 Staff Appraiser performs, Bank of America bills the client/borrower a certain amount –  
21 the Staff Appraiser’s production numbers for such appraisals are therefore referred to as  
22 “billings.” *Id.* Average daily billings determine the Appraiser’s pay on a monthly basis,  
23 but the pay can be reduced by two factors: the Appraiser’s failure to meet turnaround  
24 times, or the determination that the Appraiser has made a “material error” in one or  
25 more reports. *Id.* ¶¶ 10, 17. Staff Appraisers also receive a monthly minimum payment,  
26 such that if an Appraiser produces so few reports in a month that her compensation  
27 would amount to less than the monthly minimum, she receives the minimum payment  
28



1 as, essentially, a “floor.” *Id.* Until January 2013, the monthly minimum was a  
2 “forgivable draw” of \$2,800 per month. *Id.* BofA provided Staff Appraisers with a  
3 document – apparently the same document for all Appraisers nationwide – explaining  
4 the formula that would determine their pay. *Id.* ¶ 12. All of the Staff Appraisers – from  
5 Maryland to California to Massachusetts to Georgia – have testified that they and all  
6 other Staff Appraisers were paid according to this formula. *Id.* Examples of the  
7 document setting forth the 2009 compensation formula and the 2011 compensation  
8 formula, which differed only slightly (*e.g.*, by tweaking the percent of the penalty that  
9 would apply if the Review failed to meet the turn-time for a report), are submitted  
10 herewith as attachments to the Declarations of Terry P. Boyd and Linda Zanko. In  
11 January 2013, BofA increased the monthly minimum payment from \$2,800 to \$4,200,  
12 but continued to calculate the Appraisers’ actual compensation based on a formula  
13 similar to that used in the 2009 and 2011 compensation plans. *See, e.g.*, Robbins Decl.  
14 ¶ 12; Waggoner Decl. ¶ 12; Petris Decl. ¶ 12.

15 Staff Appraisers did not receive any additional compensation for many of the  
16 tasks they performed. For example, if an Appraiser had to make numerous calls to reach  
17 the property owner and schedule an appointment, drive two hours to reach the property,  
18 and respond to repeated requests for additional information from the Reviewer  
19 reviewing the report, the Staff Appraiser’s compensation would not reflect any of this  
20 additional time. *See* Staff Appr. Decl. ¶¶ 13-15.

## 21 **2. Review Appraisers.**

22 Review Appraisers’ pay is similarly determined by the number of appraisal  
23 reports they review each day. Galaz Decl. ¶ 10; Petris Decl. ¶ 22. Review Appraisers’  
24 pay may be reduced if they are not able to meet their deadlines, or if their supervisors or  
25 the Governance group find errors in the reports reviewed by the Reviewer Appraisers.  
26 Galaz Decl. ¶¶ 8-9. Like Staff Appraisers, Review Appraisers receive no additional  
27

1 compensation if they spend additional work time attempting to contact a residential  
2 Appraiser to address errors in a report. *Id.* ¶ 11. Review Appraisers are compensated in  
3 the same manner throughout BofA. *Id.* ¶ 20; Petris Decl. ¶ 22.

4  
5 **C. Appraisers Are Not Required to Achieve Advanced Degrees Through  
6 Prolonged Academic Study.**

7 To become a Staff or Review Appraiser, there is no requirement to achieve an  
8 advanced degree of any kind. *See* Staff Appr. Decl. ¶ 20; Galaz Decl. ¶ 19. Nearly half  
9 of the opt-in plaintiffs have only a high school degree. *See* Robbins Decl. ¶ 20; Lampert  
10 Decl. ¶ 20; Waggoner Decl. ¶ 20; Petris Decl. ¶ 20. Others have obtained only an  
11 associate's degree, rather than a four-year college degree. *See* Costa Decl. ¶ 20; Parks  
12 Decl. ¶ 20. Those who have obtained degrees have studied topics having nothing to do  
13 with appraising. *See* Garcia Decl. ¶ 20 (bachelor's degree in business management);  
14 Medina Decl. ¶ 20 (M.S. in Counseling); Boyd Decl. ¶ 20 (B.A. in Business  
15 Administration); Zanko Decl. ¶ 20 (B.S. in Psychology); Leung Decl. ¶ 20 (B.A. in  
16 Political Science); Galaz Decl. ¶ 19 (B.S. in Engineering). There is no such thing as a  
17 bachelor's degree, much less an advanced degree, in appraising. *Id.*

18 Appraisers must be licensed by their state. Staff. Appr. Decl. ¶ 20. Licensing  
19 requirements are similar, if not identical, from state to state: they require a limited  
20 number of hours of classroom training, and more extensive hours of on-the-job  
21 experience under the supervision of a licensed appraiser, and they require passage of  
22 the state's licensing test. *Id.* The currently required amount of classroom training in  
23 every state from which an opt-in plaintiff has joined this case is 150 hours. *See*  
24 Schwartz Decl. ¶¶ 4-7 & Ex. B (Cal. Code Regs. tit. 10 ch. 6.5 art. 3 § 3543(a)(1)  
25 (incorporating Appraiser Qualification Board's 150-hour requirement), Ex. C. (Ga.  
26 Comp. R. & Regs. § 539-1-.16(2)(d)), Ex. D. (Md. Code Regs. § 09.19.02.01(A)), Ex.  
27 E (Mass. Code Regs. tit. 264 ch. 5 § 5.03(2)); *see also* Pls.' Mot. for Judicial Notice, at  
28 5 (seeking judicial notice of the state statutes and regulations containing the

1 requirements for licensure as an appraiser). The required number of hours of supervised  
2 on-the-job experience to become licensed to sign reports independently is the same in  
3 the four states: 2,000 hours. *See* Schwartz Decl. Ex. B (Cal. Code Regs. tit. 10 ch. 6.5  
4 art. 3 § 3541(c), Ex. C. (Ga. Comp. R. & Regs. § 539-1-.16(2)(e)), Ex. D. (Md. Bus.  
5 Occ. & Prof. Code § 16-302(d)(1)), Ex. E (Mass. Code Regs. tit. 264 ch. 5 § 5.03(4))

6  
7 **D. Appraisers Have No Sales Duties.**

8 Neither Staff Appraisers nor Review Appraisers have any “sales” component to  
9 their jobs. Staff Appr. Decl. ¶ 19; Galaz Decl. ¶ 18. Neither category of employees  
10 generates, nor is expected to generate, any business. *Id.* Staff Appraisers and Review  
11 Appraisers simply receive assignments through their pipeline on Appraisal Port, and  
12 complete them. *Id.* By the time they receive an assignment, the borrower has already  
13 applied for the associated loan (or other financial product) and generally has already  
14 agreed to pay the appraisal fee. *Id.*

15 **E. Appraisers Are Employees of a Banking Institution that Is in the**  
16 **Business of Issuing Loans**

17 The Appraisers are or were employees of Bank of America. Staff Appr. Decl. &  
18 Galaz. Decl. ¶¶ 1-2. BofA is a banking institution that, among other financial services,  
19 sells loans to customers. Staff Appr. Decl. ¶ 3; Galaz Decl. ¶ 4. The appraisal reports  
20 produced by Staff Appraisers and proofread by Review Appraisers are a step in the  
21 process of issuing loans consisting of mortgages, refinancings, and home equity loans.  
22 *Id.*

23 **F. Appraisers Are Production Workers Whose Duty Is to Help Produce**  
24 **Loans.**

25 Appraisers’ primary job duty is to produce and review appraisal reports – many  
26 thousands every day in total across the country – each of which supports a single  
27 mortgage transaction issued by BofA. Staff Appr. Decl. ¶¶ 3-4; Galaz Decl. ¶¶ 4-5. For  
28 BofA to sell a mortgage, home refinancing, or home equity loan, an appraisal of the

1 property must be performed, and BofA generally bills the borrower directly for that  
2 service. *Id.* Apart from performing the same assigned task over and over as quickly and  
3 efficiently as possible, Appraisers play no role for BofA as a company – they do not  
4 formulate or administer management policies; they do not advise management; they do  
5 not make policy recommendations about the appraisal process or appraisal procedures  
6 or criteria. Staff Appr. Decl. ¶ 4; Galaz Decl. ¶ 5. As noted, Staff Appraisers’  
7 compensation is almost entirely determined by their productivity, in terms of the  
8 number of “billings” (*i.e.*, appraisals) they produce per month. Staff Appr. Decl. ¶ 12.  
9 They help on the front lines of the mortgage sale business, and it is not uncommon for  
10 them to churn out appraisals for up to 80 hours a week, through weekends, holidays and  
11 meals. *Id.* ¶¶ 4, 16.

12 To produce and review appraisal reports, Appraisers rely on pre-established,  
13 standardized criteria dictated by the fields of the standardized form they are filling out.  
14 Staff Appr. Decl. ¶ 17; Galaz Decl. ¶ 15. They are subject to rigid time limits for  
15 completing their tasks. Staff Appr. Decl. ¶ 11, 17; Galaz Decl. ¶ 9. If they fail to meet  
16 these clearly delineated requirements, they are penalized. *Id.* Neither Staff Appraisers  
17 nor Review Appraisers have authority to deviate from the criteria for completing an  
18 appraisal report. Staff Appr. Decl. ¶ 17; Galaz Decl. ¶ 7. The values that they arrive at  
19 for the homes they appraise are closely circumscribed by the values of the comparable  
20 properties, which are obtained from public records and entered into the form. Staff  
21 Appr. Decl. ¶ 17; Galaz Decl. ¶ 15. Appraisers do not negotiate with BofA’s customers.  
22 Staff Appr. Decl. ¶ 10; Galaz Decl. ¶ 8.

23 Neither Staff Appraisers nor Review Appraisers are responsible for supervision  
24 of any other employee. *See* Staff Appr. Decl. ¶ 18; Galaz Decl. ¶ 17. They are directly  
25 accountable to a manager who supervises their work. *Id.* They do not have any  
26 interaction with the Company’s upper management or policy-makers. *Id.*

1 **III. ARGUMENT**

2 The Court should conditionally certify the FLSA class, because Plaintiffs are  
3 similarly situated to the proposed Collective Class, and easily meet the low threshold to  
4 provide Notice to the Class under FLSA § 216(b). Absent conditional certification and  
5 Notice, potential class members may lose valuable portions of their claims as the statute  
6 of limitations elapses.

7 The Court should also grant partial summary judgment to Plaintiffs and hold that,  
8 as a matter of law, Appraisers do not fall within the FLSA exemptions for “learned  
9 professionals,” outside sales employees, or retail and service commissioned employees.

10 **A. Conditional Certification Under FLSA § 216(b) Is Proper Because All**  
11 **BofA Appraisers Are Similarly Situated.**

12 The FLSA’s collective action provision allows one or more employees to bring  
13 an action for overtime compensation on “behalf of himself or themselves and other  
14 employees similarly situated.” *See* 29 U.S.C. § 216(b). District courts have broad  
15 discretion to conditionally certify an FLSA collective action and to allow a party  
16 asserting FLSA claims to notify other potential plaintiffs that they have the right to  
17 “opt-in” to the suit. *See Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165, 169 (1989).  
18 Court-authorized Notice protects against misleading communications by the parties,  
19 resolves the parties’ disputes regarding the content of the Notice, prevents the  
20 proliferation of multiple individual lawsuits, assures that joinder of additional parties is  
21 accomplished properly and efficiently, and expedites resolution of the dispute. *Id.* at  
22 170-72.

23 To establish that conditional certification and Notice are appropriate under  
24 Section 216(b), a plaintiff need only show that he is bringing suit for himself and other  
25 employees “similarly situated.” *See Hill v. R & L Carriers, Inc.*, 690 F. Supp. 2d 1001,  
26 1008 (N.D. Cal. 2010). Plaintiffs’ claims and positions need not be identical to those of  
27  
28

1 potential opt-ins; they need only be similar. *Trauth v. Spearmint Rhino Cos. Worldwide,*  
2 *Inc.*, 2012 WL 4755682, at \*4 (C.D. Cal. Oct. 5, 2012) (Phillips, J.).

3 As this Court has recognized, obtaining conditional FLSA certification requires  
4 only a “modest factual showing that they and other nationwide Defendants’ employees  
5 who worked [in the same general job classifications] were ‘victims of a common policy  
6 or plan that violated the law.’” *Misra v. Decision One Mortg. Co., LLC*, 673 F. Supp.  
7 2d 987, 995 (C.D. Cal. 2008) (Carter, J.); *Trauth*, 2012 WL 4755682, at \*4 (citing  
8 *Mitchell v. Acosta Sales, LLC*, 841 F. Supp. 2d 1105, 1115 (C.D. Cal. 2011) (Feess,  
9 J.)). Courts routinely grant conditional certification under the FLSA for classes with  
10 varied job titles performing similar duties. *See, e.g., Misra*, 2009 WL 4581276, at \*4.  
11 Court-facilitated Notice to the class regarding the FLSA collective action is warranted  
12 when a plaintiff demonstrates that there are others who may wish to opt in who have  
13 similar job requirements and pay provisions. *See Mitchell*, 841 F. Supp. 2d at 1120.

14  
15 **1. Conditional Certification Should Be Determined Using the Two-  
16 Step Approach, and the Parties Are at Step One.**

17 Courts regularly apply a two-step approach to determine whether the named  
18 plaintiffs are “similarly situated” to potential collective action plaintiffs. *See Misra*,  
19 673 F. Supp. 2d at 992-93; *Mitchell*, 841 F. Supp. 2d at 1115-6; *Sanchez v. Sephora*  
20 *USA, Inc.*, 2012 WL 2945753, at \*3 (N.D. Cal. Jul. 18, 2012); *Hill*, 690 F. Supp. 2d at  
21 1009. The first step occurs before discovery is complete, and imposes only a “light  
22 burden” on the plaintiff. *Trauth*, 2012 WL 4755682, at \*4. The step-one analysis  
23 “typically results in a conditional certification.” *Wynn v. Nat’l Broad. Co., Inc.*, 234 F.  
24 Supp. 2d 1067, 1082 (C.D. Cal. 2002) (Wilson, J.) (internal quotations omitted). Once  
25 the Court determines that plaintiffs have met the burden, it may grant conditional  
26 certification, order the defendants to produce “the names and addresses of potential  
27 class members to Plaintiffs,” and authorize plaintiffs to send notice to potential class  
28

1 members allowing them an opportunity to opt in. *Delgado v. Ortho-McNeil, Inc.*, 2007  
2 WL 2847238, at \*3 (C.D. Cal. Aug. 7, 2007) (Carney, J.).

3 “The second step in this approach occurs after discovery is complete, at which  
4 time the defendants may move to decertify the class.” *Misra*, 673 F. Supp. 2d at 993.  
5 *See also Carter v. Anderson Merchandisers, LP*, 2010 WL 1946784, at \*3 (C.D. Cal.  
6 May 11, 2010) (Phillips, J.) (“The second stage of the two-tiered approach usually...  
7 occurs after discovery is largely complete and the matter is ready for trial.”) (internal  
8 quotations omitted); *Adams v. Inter-Con Security Sys., Inc.*, 242 F.R.D. 530, 536 (N.D.  
9 Cal. 2007); *Gerlach v. Wells Fargo & Co.*, 2006 WL 824652, at \*2 (N.D. Cal. 2006).

10 First-step analysis is appropriate in this case. Discovery has not begun. *See*  
11 *Schwartz Decl.* ¶ 2. Plaintiffs’ initial Complaint was filed only on April 9, 2013 (ECF  
12 No. 1) and the (operative) Second Amended Complaint was filed on June 26, 2013  
13 (ECF No. 42, notice of e-filing generated July 3, 2013). Thus, second-step analysis  
14 would be inappropriate, and the lenient step-one standard applies.

## 15 **2. Plaintiffs Meet Their Light Burden.**

16 Plaintiffs readily meet the “modest factual showing” or “light burden” to show  
17 that they are similarly situated to the potential collective FLSA class. Based upon  
18 Plaintiffs’ and numerous opt-in Plaintiffs’ declarations, Plaintiffs and the potential  
19 FLSA class members all shared one of two very similar basic Appraiser job types –  
20 either they produced appraisal reports according to strict, detailed guidelines dictated by  
21 the applicable form, or they reviewed appraisal reports for compliance with the same  
22 strict, detailed guidelines. The fact that these are two different, though similar and  
23 related, job types does not make conditional certification inappropriate. *See Misra*, 673  
24 F. Supp. 2d at 995-98 (granting conditional certification for two different job types).  
25 Plaintiffs and the proposed Collective Class are similarly situated because they had the  
26 same basic job duties. *See supra* § II.A. Staff and Review Appraisers across the country  
27  
28

1 gathered or verified the same data for residential properties being appraised or their  
2 comps. *Id.* Staff Appraisers across the country performed the basic task of scheduling  
3 visits to residential properties, viewing the properties, noting the features of the  
4 properties, and photographing the properties. *See supra* § II.A.1. Review Appraisers ran  
5 through a checklist to verify that the Staff Appraiser producing a report had, in fact,  
6 performed the required tasks and documented them properly. *See supra* § II.A.2.

7 BofA classified all Staff and Review Appraisers as exempt, and did not track the  
8 number of hours they worked. *See supra* § II.B. Staff Appraisers throughout the  
9 company were paid according to the same formula, which emphasized production of  
10 appraisal reports, and which imposed penalties for failing to meet turn-time  
11 requirements or for making errors in reports. *See supra* § II.B.1. Review Appraisers  
12 were paid according to a formula that similarly rewarded production and penalized  
13 untimeliness and mistakes. *See supra* § II.B.2.

14 Defendants may attempt to argue here, as the defendants did in *Misra*, that  
15 “geographic and branch-related differences” across the country prevent Plaintiffs from  
16 making the modest step-one showing. *See Misra*, 673 F. Supp. 2d at 996-98. For the  
17 same reasons as in *Misra*, the Court should reject this argument. Plaintiffs’ declarations  
18 here, like those of the mortgage lender Account Managers in *Misra*, allege that all  
19 Appraisers were misclassified under the same BofA policy. As in *Mira*, Plaintiffs’  
20 declarations are “sufficient to satisfy a modest factual showing that they were similarly  
21 situated, in that they routinely worked unpaid overtime in violation of the FLSA.” *Id.* at  
22 996. Indeed, Plaintiffs’ and opt-in Plaintiffs’ declarations attest that all BofA Staff  
23 Appraisers and Review Appraisers, respectively, had the same duties, were paid under  
24 the same compensation plans, did not have their hours tracked, and worked overtime  
25 without being compensated for it.



1           Some courts considering requests for conditional certification have also taken  
2 into account whether individuals have exhibited a desire to opt into the suit, and  
3 whether they are similarly situated to those bringing the suit. *See, e.g., Dybach v. State*  
4 *of Fla. Dep't of Corr'ns*, 942 F.2d 1562, 1567-68 (11th Cir. 1991). Where, as here,  
5 numerous parties have filed consents to join the case within the first several months  
6 after the case was filed, a desire on the part of others to join the suit is apparent, and  
7 should be considered by the Court. *Id.* In this case, 13 individuals, representing  
8 different offices of BofA in California, Massachusetts, Georgia, and Maryland have  
9 filed consents to join this action, weighing in support of first-step FLSA conditional  
10 certification.

11           Ultimately, Courts routinely grant conditional certification and authorize the  
12 sending of Notice to the class in cases alleging misclassification of employees  
13 performing similar duties and subject to the same pay policy. *See, e.g., Misra*, 673 F.  
14 Supp. 2d at 999; *Mitchell*, 841 F. Supp. 2d at 1118-20; *Hill*, 690 F. Supp. 2d at 1010-1;  
15 *Sanchez*, 2012 WL 2945753, at \*3-4; *Campanelli v. Hershey Co.*, 2010 WL 3219501 at  
16 \*7 (N.D. Cal. Aug. 13, 2010); *Prentice v. Fund for Public Interest Research, Inc.*, 2007  
17 WL 2729187, at \*2, 4 (N.D. Cal. Sept. 18, 2007). The Court should do so here.

### 18                           **3. Public Policy Reasons and the Running Statute of Limitations** 19                           **Support Granting this Motion.**

20           Conditional certification and Notice should be issued to the FLSA Class  
21 immediately in order to promote the broad remedial purposes of the FLSA and to  
22 prevent the diminution of claims for unpaid wages. *See Tenn. Coal, Iron & R. Co. v.*  
23 *Muscoda Local No. 123*, 321 U.S. 590, 597 (1944) (the FLSA is “remedial and  
24 humanitarian in purpose.... Such a statute must not be interpreted or applied in a  
25 narrow, grudging manner.”); *Barrentine v. Arkansas–Best Freight System, Inc.*, 450  
26 U.S. 728, 739 (1981) (FLSA was enacted “to protect all covered workers from  
27 substandard wages and oppressive working hours.”). Unlike Rule 23 class actions, in  
28

1 which the statute of limitations is tolled for potential class members with the filing of  
2 the Complaint, the statute of limitations under the FLSA is not tolled with the  
3 commencement of the action or even with an order granting conditional certification.  
4 *Parks v. Eastwood Ins. Servs., Inc.*, 2002 WL 34370244, at \*3 (C.D. Cal. July 29, 2002)  
5 (Taylor, J.). Rather, “[t]he statute of limitations is tolled [only] from the time the person  
6 seeking to opt into the lawsuit files a consent to join with the court, not from the time  
7 the named Plaintiffs filed the Complaint.” *Id.*; *see also* 29 U.S.C. § 216(b) (“No  
8 employee shall be a party plaintiff to any such action unless he gives his consent in  
9 writing to become such a party and such consent is filed in the court....”). Although the  
10 notice process does not stop the statute of limitations, it does notify the potential  
11 collective class members of the case and the running statute of limitations. *Hoffmann-*  
12 *La Roche Inc.*, 493 U.S. at 170 (“The judicial system benefits by efficient resolution in  
13 one proceeding of common issues of law and fact arising from the same alleged  
14 discriminatory activity. These benefits, however, depend on employees receiving  
15 accurate and timely notice concerning the pendency of the collective action, so that they  
16 can make informed decisions about whether to participate.”). Accordingly, the Court  
17 should authorize issuance of Notice here.

#### 18 **4. Plaintiffs’ Proposed Notice and Timeline.**

19 To facilitate the Notice process and allow potential class members to be informed  
20 of their rights, Plaintiffs have submitted a proposed “Notice and Consent” form, of  
21 which they seek the Court’s approval. *See* Schwartz Decl. ¶ 8 & Ex. F.

22 In addition, Plaintiffs request an Order from this Court adopting the following  
23 schedule with respect to the provision of Notice:  
24  
25  
26  
27  
28

| DEADLINE   | SUBJECT  |
|--|--|
| <b>10 Days From Order Approving Notice to Putative Class Members</b>         | Defendants shall disclose, in Excel format, the names, last known addresses and email addresses, dates and places of employment with Defendants, and position(s) held of all members of the Proposed Collective Class, as defined in Paragraph 20 of the Second Amended Complaint. |
| <b>20 Days From Receipt of the Class Contact Information from Defendants</b> | Plaintiffs' Counsel shall mail a copy of the Court-approved Notice and Consent Form to the Potential Class Members.  |
| <b>90 Days From Date Notice is Mailed to Putative Class Members</b>          | The Potential Class Members shall have 90 days to mail in their signed Consent forms for filing with the Court.  |
| <b>50 Days from Date Notice is Mailed to Putative Class Members</b>          | Plaintiffs' Counsel is authorized to mail a second identical copy of the Notice and Consent form to the Potential Class Members reminding them of the postmark deadline for the submission of the Consent forms.   |

The proposed Notice and timeline are appropriate to allow potential Class members the opportunity to assert their rights. In *Misra*, this Court issued an order similar to the Order that Plaintiffs request here, stating:

Defendants are ordered to produce a class list, in Excel format, containing the names, addresses, dates of employment, location(s) of employment, and employee numbers of all Account Manager III's, Account Executives who worked prior to November 2006, and all Fully-Qualified Inside Account Executives outside of California and Illinois who worked after November 2006, from the date three years prior to July 14, 2008 to the

1 present, incorporating the relevant tolling. The Court will not impose the  
2 additional financial burden of a third-party administrator on Plaintiffs, nor  
3 will the Court require that social security numbers or phone numbers be  
4 included in the list. The list shall be produced on or before July 14, 2008.

5 *Misra*, 673 F. Supp. 2d at 998-99. A similar Order is merited in the present case.

6  
7 **B. Summary Judgment Is Proper as to the Inapplicability of the FLSA**  
8 **Exemptions for “Learned Professionals,” Outside Salespersons, and**  
9 **Retail and Service Commissioned Employees**

10 Plaintiffs seek partial summary judgment because, as a matter of law, Appraisers  
11 do not fall within the following FLSA exemptions: the “learned professional”  
12 exemption, 29 C.F.R. § 541.301; the outside salespersons exemption, 29 C.F.R.  
13 § 541.500 *et seq.*; and the retail and service commissioned employees exemption, 29  
14 U.S.C. § 207(i).

15 The FLSA requires employers to pay employees overtime unless certain narrow  
16 exemptions apply. Courts construe those exemptions narrowly against the employer,  
17 and limit them to those employees who are “plainly and unmistakably within [their]  
18 terms.” *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945); *Arnold v. Ben*  
19 *Kanowsky, Inc.*, 361 U.S. 388, 392 (1960) (“[FLSA] exemptions are to be narrowly  
20 construed against the employers seeking to assert them”); *Alvarez v. IBP, Inc.*, 339 F.3d  
21 894, 905 (9th Cir. 2003), *aff’d*, 546 U.S. 21 (2005) (exemptions construed narrowly  
22 against employer). The burden is on the employer to demonstrate that the employees  
23 fall within such an exemption. *See Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S.  
24 190, 206 (1969); *Mitchell v. Kentucky Fin. Co.*, 359 U.S. 290, 291 (1959).

25 Summary judgment is appropriate when there is no genuine issue as to any  
26 material fact, and the moving party is entitled to judgment as a matter of law. *Rieve v.*  
27 *Coventry Health Care, Inc.*, 870 F. Supp. 2d 856, 861 (C.D. Cal. 2012) (Carter, J.). The  
28 Court views the facts and draws inferences in the manner most favorable to the non-

1 moving party. *Id.* The moving party bears the initial burden of demonstrating the  
2 absence of a genuine issue of material fact for trial, but it need not disprove the other  
3 party's case. *Id.*

4 Here, there is no genuine issue of disputed fact with respect to the inapplicability  
5 of the aforementioned exemptions to Appraisers, and such exemptions are inapplicable  
6 as a matter of law.

7  
8 **1. Summary Judgment Is Available to Plaintiffs at the Pre-Certification Stage**

9 As a threshold matter, Plaintiffs anticipate that Defendants will argue that a  
10 motion for summary judgment brought prior to the granting of conditional certification  
11 is impermissible, but courts can and do grant such motions. *See, e.g., Wong v. HSBC*  
12 *Mortg. Co. (USA)*, 2008 WL 753889, at \*8-9 (N.D. Cal. 2008) (granting FLSA  
13 conditional certification and partial summary judgment simultaneously as to several  
14 exemption defenses); *Raper v. State of Iowa*, 165 F.R.D. 89, 92 (S.D. Iowa 1996)  
15 (permitting plaintiffs to opt into FLSA case following summary judgment in plaintiffs'  
16 favor, despite defendants' concerns about one-way intervention). Concerns that exist  
17 with respect to "one-way intervention" and grants of summary judgment to *defendants*  
18 prior to certification (*see, e.g., Aguilera v. Pirelli Armstrong Tire Corp.*, 223 F.3d 1010,  
19 1013 n.1 (9th Cir. 2000) (summary judgment order against uncertified class bound the  
20 named class members only), are *not* present when it is the *Plaintiffs* – not the  
21 Defendants – who seek partial summary judgment prior to conditional certification. *See*  
22 *Mendez v. Radec Corp.*, 260 F.R.D. 38, 47 (W.D.N.Y. 2009) (“[P]re-certification  
23 dispositive motions filed by plaintiffs and defendants implicate different concerns”). As  
24 *Mendez* explains:

25 [U]nlike a putative class member to whom no notice has been sent,  
26 defendants were well aware that this action had been brought against them  
27 as a class action, and they must have known that any determinations  
28

1 against them might well inure to the benefit of the class as a whole. Their  
2 awareness of that possibility should have been heightened by the fact that  
3 plaintiffs had moved for class certification and for summary judgment at  
4 the same time. Unlike an absent class member, then, defendants were fully  
5 aware of the nature of the claims against them, and they had every  
6 incentive to litigate the issues presented by plaintiff's motions.

7 *Id.* at 48.

8 Although *Mendez* suggests that defendants can seek to have certification heard  
9 first, the *Mendez* also points out that such is a hollow choice: even if a partial summary  
10 judgment order would not be binding in and of itself with respect to the rest of the class,  
11 the Court's ruling would be tantamount to a declaratory judgment or law of the case  
12 stating that certain practices were unlawful, and "any class member who establishes  
13 that he was subjected to those policies [would] be entitled to damages." *Id.* at 48. The  
14 *Mendez* court noted in a footnote that "even if the class were decertified, putative class  
15 members might still be able to make use of the Court's rulings in this case through  
16 offensive collateral estoppel, which 'permits a plaintiff to bar a defendant from re-  
17 litigating an issue that was decided in a prior case against the defendant.'" *Id.* at 48 n.5  
18 (citing, *inter alia*, *Roe v. City of Waterbury*, 542 F.3d 31, 41 (2d Cir. 2008)).

19 Accordingly, Plaintiffs' partial summary judgment motion is appropriately  
20 brought in conjunction with their motion for conditional certification.

21  
22 **2. The "Learned Professionals" Exemption Does not Apply**  
23 **Because Appraisers Do Not Require Advanced Knowledge in a**  
24 **Field of Science or Learning Gained Through a Prolonged**  
25 **Course of Specialized Intellectual Instruction.**

26 The exemption for "learned professionals" does not apply because Appraisers are  
27 not required to have "knowledge of an advanced type in a field of science or learning  
28

1 customarily acquired by a prolonged course of specialized intellectual instruction.” 29  
2 C.F.R. §§ 541.300(a)(2)(i), 541.301.

3 The phrase “field of science or learning” includes “the traditional professions of  
4 law, medicine, theology, accounting, actuarial computation, engineering, architecture,  
5 teaching, various types of physical, chemical and biological sciences, pharmacy and  
6 other similar occupations that have a recognized professional status *as distinguished*  
7 *from the mechanical arts or skilled trades* where in some instances the knowledge *is of*  
8 *a fairly advanced type*, but is not in a field of science or learning.” 29 C.F.R.  
9 § 541.301(c) (emphasis added).

10 The phrase “prolonged course of specialized *intellectual* instruction” “restricts  
11 the exemption to professions where specialized *academic* training is a standard  
12 prerequisite for entrance into the profession.” *Id.* § 541.301(d) (emphasis added). As a  
13 result of the “specialized intellectual instruction” requirement:

14 [T]he learned professional exemption is not available for occupations that  
15 customarily may be performed with only the general knowledge acquired  
16 by an academic degree in any field, with knowledge acquired through an  
17 apprenticeship, or with training in the performance of routine mental,  
18 manual, mechanical or physical processes. The learned professional  
19 exemption also does not apply to occupations in which most employees  
20 have acquired their skill by experience rather than by advanced specialized  
21 intellectual instruction.

22 *Id.*

23 Short courses of study for a certification do not satisfy the “prolonged course of  
24 specialized intellectual instruction.” *See Solis v. Washington*, 656 F.3d 1079, 1088 (9th  
25 Cir. 2011) (“If six weeks of additional training, only four weeks of which is in the  
26 classroom, were sufficient to qualify as a specialized course of intellectual instruction,  
27

1 nearly every position with a formal training program would qualify.”). The court in  
2 *Solis* also emphasized that a prolonged course of study is not sufficient to meet the  
3 learned professionals exemption if it was not required to be employed in the profession  
4 in question. *Solis*, 656 F.3d at 1084 (“[P]ositions that do not require a particular course  
5 of intellectual instruction directly related to the employee’s professional duties do not  
6 come within the ‘learned professional’ exemption, even if they also require substantial  
7 practical experience.”); *see also Dybach*, 942 F.2d at 1565 (learned professionals  
8 exemption did not apply to probation officer whose job required college or advanced  
9 degree but not in any particular field because “the determinative factor is the job  
10 requirement and not the education in fact acquired by the employee”).

11 Following *Dybach*, federal courts have not applied the “learned professionals”  
12 exemption merely because a job requires specialized knowledge if such knowledge was  
13 not obtained through a prolonged course of specialized intellectual study, even if the  
14 employee has a general academic degree. *See, e.g., Bohn v. Park City Grp., Inc.*, 94  
15 F.3d 1457, 1462 (10th Cir. 1996) (computer programmer not necessarily exempt based  
16 on extensive education because job did not require it); *Pignataro v. Port Auth. of New*  
17 *York & New Jersey*, 593 F.3d 265, 270 (3d Cir. 2010) (helicopter pilots not within  
18 learned professionals exemption because they “are not required to spend a significant  
19 amount of time in a classroom in order to earn their certifications-nearly all of the  
20 instruction takes place in the air”); *Young v. Cooper Cameron Corp.*, 586 F.3d 201, 205  
21 (2d Cir. 2009) (“[I]f advanced and specialized education is not customarily required,  
22 the [learned professionals] exemption cannot apply, regardless of the employee’s  
23 duties.”); *cf. Reich v. State of Wyo.*, 993 F.2d 739, 743 (10th Cir. 1993) (game wardens  
24 exempt because “[t]he degrees required of Wyoming wardens specifically prepare them  
25 for the jobs they are expected to accomplish.”).



1 Here, Plaintiffs were not required to complete a “prolonged course of specialized  
2 intellectual instruction.” *See supra* § II.C. Many of them have only a high school  
3 diploma, and there is no such thing as an undergraduate or advanced degree in  
4 appraising. *Id.* The requirements to obtain an Appraiser license fall squarely within the  
5 Regulations’ description of what is *not* sufficient to satisfy the exemption: a short  
6 period of vocational classroom training that is entirely unrelated to any degree program  
7 or prolonged course of intellectual study, and a period of on-the-job apprenticeship  
8 under the supervision of a licensed appraiser. *Id.* Although 2,000 hours of on-the-job  
9 apprenticeship are required before an Appraiser can obtain a license to sign his or her  
10 own appraisals without supervision, the “learned professional” exemption does not  
11 apply to occupations in which employees acquire their skill by experience rather than  
12 advanced intellectual instruction. 29 C.F.R. § 541.301(d). Appraising is not a “field of  
13 science or learning,” as that phrase is defined in the regulations; rather, it is a  
14 “mechanical art[] or skilled trade[] where in some instances the knowledge is of a fairly  
15 advanced type.” 29 C.F.R. § 541.301(c). Thus, Appraisers fall outside the exemption.

16 There can be no fact dispute about the educational and training requirements to  
17 become an Appraiser. Those requirements are such that, as a matter of law, Appraisers  
18 do not fall within the learned professional exemption, and summary judgment is  
19 appropriate.

20  
21 **3. Appraisers Do not Fall within the Outside Sales Exemption  
22 Because Appraisers Do Not Sell Anything.**

23 Plaintiffs do not sell anything. *See supra* § II.D.

24 The outside sales exemption requires that the defendants prove that Plaintiffs’  
25 “primary duty” consisted in “making sales ... or obtaining orders or contracts for  
26 services.” 29 C.F.R. § 541.500(a); *Campanelli v. Hershey Co.*, 765 F. Supp. 2d 1185,  
27 1189-90 (N.D. Cal. 2011). Because Appraisers do not perform any sales role, the  
28 exemption does not apply as a matter of law, and summary judgment is appropriate.

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

3                   Appraisers do not fall within the retail and service commissioned employee  
4 exemption under 29 U.S.C. § 207(i), because banks, credit companies, finance  
5 companies, and loan offices lack the “concept of retail selling or servicing” necessary to  
6 qualify for this exemption. *See* 29 C.F.R. §§ 779.316-17 (“[T]he terms ‘retail or service  
7 establishment’ ... do[] not encompass establishments in industries lacking a ‘retail  
8 concept.’ ... [E]stablishments to which the retail concept does not apply” include:  
9 “Banks (both commercial and savings), ... Credit companies, including small loan and  
10 personal loan companies, ... Finance companies, ... [and] Loan offices.”); *Mitchell*,  
11 359 U.S. at 295 (personal lending institution lacked retail concept necessary to fall  
12 under exemption); *Barnett v. Wash. Mut. Bank, FA*, 2004 WL 1753400, at \*3-6 (N.D.  
13 Cal. 2004) (lending institution that sold home mortgages and home equity loans not  
14 within retail or service exemption). As a financial institution selling loans, Defendants  
15 fall outside the exemption as a matter of law. 29 C.F.R. § 779.316. Therefore, partial  
16 summary judgment should be granted.

17                   **IV. CONCLUSION**

18                   Plaintiffs respectfully request that the Court (1) conditionally certify this action  
19 for purposes of notice and discovery; (2) order that judicial notice be sent to all putative  
20 collective class members; (3) approve the form and content of Plaintiffs’ proposed  
21 judicial notice and reminder notice; (4) order BofA to produce to Plaintiffs’ Counsel the  
22 contact information for each putative collective class member within ten days; and (5)  
23 authorize a ninety day notice period for putative plaintiffs to join the case. For the  
24 foregoing reasons, the Court should grant Plaintiffs’ Motion to conditionally certify the  
25 class, order production of the class list and issuance of notice to the FLSA class  
26 promptly, and grant partial summary judgment on the afore-mentioned exemptions. A  
27 proposed Order is attached hereto.

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DATED: July 9, 2013

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