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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JASON CAMPBELL and
SARAH SOBEK, individually,
and on behalf of all other
similarly situated current
and former employees of
PricewaterhouseCoopers, LLP,,

NO. CIV. S-06-2376 LKK/GGH

Plaintiffs,

v.

PRICEWATERHOUSECOOPERS, LLP,
a Limited Liability Partnership;,
and DOES 1-100, inclusive,

ORDER

Defendant.

_____ /

This is a wage and hour action brought by plaintiffs Jason Campbell and Sarah Sobek individually and on behalf of other similarly situated individuals against defendant PricewaterhouseCoopers LLP ("PwC"). Plaintiffs allege that PwC misclassified them as exempt employees under California law and failed to pay them overtime and other benefits that an employer would normally be required to provide to non-exempt employees. Pending before the court is plaintiffs' motion for class

1 certification.¹ For the reasons explained below, the court
2 provisionally grants the motion with respect to a class comprised
3 of associates in PwC's Attest division.

4 I. Factual Background

5 A. General Background

6 Defendant PricewaterhouseCoopers LLP ("PwC") is the largest
7 public accountancy partnership in the world. Decl. of William
8 Kershaw, Ex. 3. PwC has over 30,000 employees in its United States
9 offices, which currently include six California offices in Irvine,
10 Los Angeles, Sacramento, San Diego, San Francisco, and San Jose.
11 Decl. of Carl Overstreet ¶ 4. The present suit only involves
12 employees in PwC's California offices.

13 PwC's organizational structure is complex and multi-tiered.
14 PwC's subdivision of its professional services begins with three
15 lines of service ("LOS"), which are Assurance, Tax, and Advisory.
16 Only Assurance and Tax are at issue in this action. Each line of
17 service is then further divided into divisions. Overstreet Decl.
18 ¶ 3. The divisions within each line of service may focus on
19 specialized services, such as external audits, transaction
20 structuring (e.g., mergers and acquisitions, deals), information
21 technology, or consulting work. Id.

22 There are several personnel job titles within PwC. These
23 include associate, senior associate, manager, senior manager,

24
25 ¹ Plaintiffs seek to certify a class under Federal Rule of
26 Civil Procedure 23(b)(3), which provides for an "opt out" class
action as opposed to an "opt in" class action. Cf. 29 U.S.C. §
216(b) (Fair Labor Standards Act).

1 director, managing director, and partner, Decl. of Jason Campbell
2 ¶ 4; Decl. of Sarah Sobek ¶ 4, with partners generally exercising
3 the greatest authority within PwC's organizational structure.
4 Plaintiffs contend that while PwC requires employees in the
5 positions of manager, senior manager, director, managing director,
6 and partner to hold a Certified Public Accountant ("CPA") license,
7 Campbell Decl. ¶ 5; Sobek Decl. ¶ 5, employees in the positions of
8 associate or senior associate need not be so licensed.

9 The named plaintiffs in this action, Jason Campbell and Sarah
10 Sobek, worked as associates in the Assurance line of service.
11 Campbell Decl. ¶ 2; Sobek Decl. ¶ 2. The proposed class, however,
12 consists of all unlicensed associates and senior associates who
13 worked for PwC in its Assurance and Tax lines of service in
14 California from October 27, 2002 to the present date. Plaintiffs
15 seek to certify the following class:

16 All persons employed by PricewaterhouseCoopers LLP in
17 California, from October 27, 2002 until the time when
18 class notice may be given, who: (1) assisted certified
19 public accountants in the practice of public
20 accountancy, as provided for in California Business
21 and Professions Code sections 5051 and 5053, (2)
22 worked as associates or senior associates in the
23 assurance and tax lines of service, (3) were not
24 licensed by the State of California as certified
25 public accountants during some or all of this time
26 period, and (4) were classified as exempt employees.

22 **B. Assurance and Tax Lines of Service**

23 Assurance and Tax are PwC's two largest lines of service.
24 Kershaw Decl., Ex. 3. PwC serves two classes of clients: audit and
25 non-audit (or, in PwC's nomenclature, Channel 1 and Channel 2
26 clients). Overstreet Decl. ¶ 7. For audit clients, PwC provides

1 external auditing and financial reporting services in addition to
2 other limited services. Id. For non-audit clients, PwC provides
3 consulting services but no auditing or financial reporting
4 services. Id. This distinction is said to ensure an arm's length
5 relationship between PwC and its audit clients.

6 There are three divisions within the Assurance line of service
7 in California: Attest, Systems Process Assurance ("SPA"), and
8 Transaction Services. Attest provides financial statement and
9 internal control audits, and only serves audit clients, id. ¶¶ 7-8,
10 while SPA provides services related to information technology
11 ("IT") management controls. Decl. of Michael Corey ¶ 6. SPA
12 services include reviews of database security controls and
13 infrastructure security. Id. ¶ 5. Finally, Transaction Services
14 advises clients on such transactions as mergers and acquisitions
15 and initial public offerings. SPA and Transactional Services both
16 serve audit and non-audit clients. Decl. of Curt Moldenhauer ¶¶
17 5, 7; Corey Decl. ¶ 6.

18 Tax contains a greater number of divisions than Assurance.
19 These include divisions such as International Tax Services, Private
20 Company Services, and State and Local Tax. Decl. of Margaret
21 Barron ¶ 4. The services provided by Tax include tax estimate and
22 tax return preparation for a variety of entities, Decl. of Jacquie
23 Wilson ¶ 7; Decl. of Brian Hunt ¶ 8; Decl. of Joseph Hillsted ¶ 5,
24 advice on compliance with the Internal Revenue Code and
25 international tax treaties, Decl. of Paul Klopping ¶ 6, and review
26 of tax-related entries in quarterly and year-end reports, Decl. of

1 Angela Lam ¶ 8. Tax serves both audit and non-audit clients.
2 Barron Decl. ¶ 5.

3 **C. Recruiting, Education, and Training**

4 PwC recruits candidates from a variety of backgrounds for its
5 various positions. PwC employs on-campus recruiting, targeting
6 students graduating in the near future, and experienced recruiting,
7 targeting individuals who have already worked at accounting and
8 professional services firms. Barron Decl. ¶ 7. PwC also recruits
9 internally. Moldenhauer Decl. ¶ 9.

10 Educational background is sometimes a factor in recruiting.
11 Id. at ¶ 10. For example, preferred candidates for Attest and Tax
12 either hold a degree in accounting or the requisite number of
13 college courses enabling that candidate to sit for the CPA exam.
14 Overstreet Decl. ¶ 11; Barron Decl. ¶ 8. PwC also generally
15 requires that SPA candidates hold a bachelor's or master's degree
16 in Accounting, Finance, or Computer Science. PwC, however, may
17 also hire recent college graduates with little or no prior work
18 experience. Moldenhauer Decl. ¶ 12; Campbell Dep., Ex. 1 (resume);
19 Sobek Dep., Ex. 1 (resume).

20 PwC requires a minimum 40 to 150 hours of annual training for
21 Tax associates and senior associates. Decl. of Keith Larson ¶ 7.
22 Nevertheless, prior work experience or a previous internship with
23 PwC may decrease the amount of training required for an employee.
24 Decl. of Daniel Goepf ¶ 10. In addition, training and continuing
25 education requirements vary between lines of service and between
26 divisions. For example, training offered to new employees in the

1 Attest division may focus on the risk assessment and analytical
2 procedures used in audits, while Tax training may include technical
3 issues associated with tax and simulations focusing on client
4 interaction. Id.; Larson Decl. ¶¶ 7-12.

5 **D. Duties of Associates and Senior Associates**

6 PwC employed Campbell for a year, from August 2005 to August
7 2006, and employed Sobek for slightly less than two years, from
8 August 2004 to June 2006. Campbell and Sobek both characterize
9 their job duties as primarily assisting CPAs in performing audits.
10 Campbell Decl. ¶ 2; Sobek Decl. ¶ 2. Both claim that their job
11 duties on audits involved verifying financial statement items by
12 obtaining and reviewing the underlying documentation that supported
13 the items. Campbell Decl. ¶¶ 6-7; Sobek Decl. ¶¶ 6-7. Campbell
14 and Sobek both maintain that they worked in excess of eight hours
15 per day and worked on weekends and holidays without overtime pay.
16 Campbell Decl. ¶ 12; Sobek Decl. ¶ 12.

17 Plaintiffs also maintain that the scope of their duties were
18 necessarily constrained by two standards: (1) Section 5053 of the
19 California Business and Professions Code, which requires the
20 control and supervision of unlicensed accountants, and (2) the
21 professional standards set by the American Institute of Certified
22 Public Accountants, which contain a similar directive. Plaintiffs
23 allege that PwC's compliance with these rules is evidenced in their
24 policies regarding who is allowed to sign various documents,
25 letters, and reports.

26 PwC has submitted approximately fifty declarations from

1 individuals in a wide array of positions at PwC (e.g., from
2 associates and senior associates to managers and partners) and from
3 various divisions within both the Assurance and Tax lines of
4 service. They demonstrate not insignificant variations in the type
5 of work performed by division and by line of service. They show
6 that the work of the SPA division within Assurance, for example,
7 is centered around information technology (IT). Decl. of Irina
8 Majstrova ¶ 5. Similarly, they show that looking across lines of
9 service, Tax associates spend most of their time on the
10 significantly different task of preparing tax returns or tax
11 estimates. Decl. of Jesse Dang ¶ 7; Decl. of Jacquie Wilson ¶ 7
12 (80% of time spent on tax returns). One associate stated that
13 “[i]t is difficult to compare the job duties of, for instance, a
14 SPA Senior Associate with those of an Associate in the Tax line of
15 service because the nature and purpose of the duties are entirely
16 different.” Dang Decl. ¶ 7.

17 In addition, there are said to be significant differences
18 between the work performed by associates and senior associates,
19 because one of the primary duties of senior associates is to
20 supervise associates. See, e.g., Decl. of Joseph Gomez ¶ 11 (“When
21 I became a Senior Associate, I spent about 50% to 60% of my time
22 reviewing the work of other Associates.”). The degree of
23 supervision is limited by, inter alia, the legal and professional
24 standards that govern the accounting profession. As explained
25 below, however, whether the differences between associates and
26 seniors associates are material is a difficult issue, and not

1 without uncertainty.

2 **II. Standard**

3 A party seeking to certify a class must demonstrate that it
4 has met all four requirements of Rule 23(a) and at least one of the
5 requirements of Rule 23(b). *Zinser v. Accufix Research Inst.,*
6 *Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). Rule 23(a) allows a
7 class to be certified

8 only if (1) the class is so numerous that joinder of
9 all members is impracticable, (2) there are questions
10 of law or fact common to the class, (3) the claims or
11 defenses of the representative parties are typical of
the claims or defenses of the class, and (4) the
representative parties will fairly and adequately
protect the interests of the class.

12 In other words, the class must satisfy the requirements of
13 numerosity, commonality, typicality, and adequacy.

14 Rule 23(b) provides for three types of class actions. Here,
15 plaintiff seeks to certify the class under Rule 23(b)(3), which
16 allows for a class to be certified if "the court finds that the
17 questions of law or fact common to the members of the class
18 predominate over any question affecting only individual members,
19 and that a class action is superior to other available methods for
20 the fair and efficient adjudication of the controversy." Fed. R.
21 Civ. P. 23(b)(3).

22 The matters pertinent to the findings include:

23 (A) the interest of members of the class in
24 individually controlling the prosecution or defense of
25 separate actions; (B) the extent and nature of any
26 litigation concerning the controversy already
commenced by or against members of the class; (C) the
desirability or undesirability of concentrating the
litigation of the claims in the particular forum; and

1 (D) the difficulties likely to be encountered in the
2 management of a class action.

3 Id.

4 The court must conduct a "rigorous analysis" of the moving
5 party's claims to examine whether the requirements are satisfied,
6 Gen. Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 161 (1982).
7 Generally, however, the court should not consider whether the party
8 seeking class certification has stated a cause of action or is
9 likely to prevail on the merits. Eisen v. Carlisle & Jacquelin,
10 417 U.S. 156, 178 (1974). Nevertheless, the court is not only "'at
11 liberty to' consider evidence which goes to the requirements of
12 Rule 23" but in fact is required to consider such evidence, "'even
13 [if] the evidence may also relate to the underlying merits of the
14 case.'" Dukes v. Wal-Mart, 509 F.3d 1168, 1178 n.2 (9th Cir. 2007)
15 (quoting Hanon v. Dataproducts Corp., 976 F.2d 497, 509 (9th Cir.
16 1992)). If the court concludes that the moving party has met its
17 burden of proof, the court has broad discretion to certify the
18 class. Zinser, 253 F.3d at 1186.

19 **III. Analysis**

20 **A. Ascertainability of Class**

21 Separate from the requirements under Rules 23(a) and (b), and
22 as a threshold to their analysis, defendant argues that plaintiffs
23 have failed to propose an ascertainable class.

24 An adequate class definition specifies "a distinct group of
25 plaintiffs whose members [can] be identified with particularity."
26 Lerwill v. Inflight Motion Pictures, Inc., 582 F.2d 507, 512 (9th

1 Cir. 1978). One of the primary purpose of the class definition is
2 to make it "administratively feasible" for the court to determine
3 individual class membership. Aiken v. Obledo, 442 F. Supp. 628,
4 658 (E.D. Cal. 1977). The class definition should therefore
5 provide the court with objective criteria to discern the class's
6 members. See O'Connor v. Boeing N. Am., Inc., 197 F.R.D. 404, 416
7 (C.D. Cal. 2000). Such criteria may include, for example, a
8 defendant's own actions and the damages caused by such actions,
9 Int'l Molders' & Allied Workers' Local Union No. 164 v. Nelson, 102
10 F.R.D. 457, 464-65 (N.D. Cal. 1983), or even just geographical
11 boundaries, Berlowitz v. Nob Hill Masonic Mgmt., 1996 WL 724776,
12 at *5 (N.D. Cal. Dec. 6, 1996).

13 Nevertheless, the class definition may not consider the merits
14 of the action in determining individual class membership. See
15 Eisen, 417 U.S. at 177-78; Moore v. Hughes Helicopters, Inc., 708
16 F.2d 475, 480 (9th Cir. 1983); Hagen v. City of Winnemucca, 108
17 F.R.D. 61, 63-64 (D. Nev. 1985) (finding definition of class
18 insufficient when it involved violations of proposed members'
19 constitutional rights).

20 Defendant's attack on plaintiffs' motion stems from
21 plaintiffs' partial reliance on two statutes to define the class.
22 The proposed class would include individuals who "assisted
23 certified public accountants in the practice of public accountancy,
24 as provided for in California Business and Professions code
25 sections 5051 and 5053." Section 5051 defines seven acts that are
26 deemed as the "practice of public accountancy," including holding

1 oneself out to the public as skilled in public accountancy,
2 maintaining an office for the business of a public accountant, and
3 offering to perform certain services such as an audit for
4 compensation. Section 5053 states that nothing shall preclude an
5 individual who is not certified as an accountant from assisting one
6 who is, so long as the former is under the control and supervision
7 of the latter.

8 Defendant argues that plaintiffs' reliance of these statutes
9 makes it difficult to discern who should be included in the class.
10 For instance, defendant argues that some of the categories of work
11 in Section 5051 are nonsensical in this context (e.g., they argue
12 that a PwC associate cannot "assist" a CPA in holding himself or
13 herself out to the public as one skilled in public accountancy, or
14 "assist" a CPA in maintaining an office for his or her business).
15 The argument does not lie. It is far from clear that the proposed
16 ambiguities exist. Just as a matter of common sense, by assisting
17 the licensed accountant, the employees accomplish the tasks
18 enumerated in the statute, and attacked by defendant.

19 Even if the court were to agree that incorporation of these
20 two statutes into the class definition introduces an element of
21 ambiguity, courts retain the discretion to alter an inadequate
22 class definition. See Lamumba Corp. v. City of Oakland, 2007 WL
23 3245282, at *5 (N.D. Cal. Nov. 2, 2007); Hagen, 108 F.R.D. at 64
24 (altering definition to remove condition of constitutional
25 violation). Accordingly, the court could strike the reference to
26 Sections 5051 and 5053 from the class definition, although it

1 appears to the court unnecessary. In any event, defendant does not
2 challenge the remainder of the class definition, which is
3 sufficiently definite, ascertainable, and administratively
4 feasible.

5 **B. Requirements under Rule 23(a)**

6 As noted, Rule 23(a) lists the prerequisites for a class
7 action. These requirements are (1) the impracticability of joining
8 all members ("numerosity"); (2) the existence of common questions
9 of law or fact ("commonality"); (3) typicality of the claims and
10 defenses of the parties with respect to the proposed class
11 ("typicality"); and (4) adequate representation of the proposed
12 class by the parties before the court ("adequacy of
13 representation"). Fed. R. Civ. P. 23(a); see also Stanton v.
14 Boeing Co., 327 F.3d 938, 953 (9th Cir. 2003).

15 **1. Numerosity**

16 Rule 23(a)(1)'s requirement that an attempt to join all
17 parties be "impracticable" does not equate to "impossible." See
18 Fed. R. Civ. P. 23(a)(1); Harris v. Palm Springs Alpine Estates,
19 Inc., 329 F.2d 909, 913-14 (9th Cir. 1964). Instead, an attempt
20 to join all parties must only be difficult or inconvenient.
21 Harris, 329 F.2d at 913-14. Although impracticability does not
22 hinge only on the number of members in the putative class, joinder
23 is usually impracticable if a class is "large in numbers." Jordan
24 v. Los Angeles County, 669 F.2d 1311, 1319 (9th Cir. 1982), vacated
25 on other grounds, 459 U.S. 810 (1982). While there is no set
26 number of members required, courts have generally found classes

1 numbering in the hundreds to be sufficient to satisfy the
2 numerosity requirement. See, e.g., Gay v. Waiters' & Dairy
3 Lunchmen's Union, Local No. 30, 549 F.2d 1330, 1332-34 (9th Cir.
4 1977) (reversing district court's finding that 184 potential
5 members is insufficient to fulfill Rule 23(a)(1)'s requirements);
6 Sagers v. Yellow Freight Sys., Inc., 529 F.2d 721, 734-35 (5th Cir.
7 1976) (holding class of approximately 110 members satisfied
8 numerosity requirement); see also James Wm. Moore, Moore's Federal
9 Practice § 23.22[1][b] (Daniel R. Coquillete et al. eds., 3d ed.
10 2007) (noting forty-one or more members is "usually sufficiently
11 numerous").

12 Here, plaintiffs contend that they anticipate a class
13 numbering over one thousand members. Kershaw Decl. at ¶ 12.
14 Defendant does not challenge that the numerosity requirement is
15 met. The court therefore finds that plaintiffs have satisfied the
16 numerosity requirement.²

17 **2. Commonality**

18 Commonality exists when "there are questions of law or fact
19 common to the class." Fed. R. Civ. P. 23(a)(2). Rule 23(a)(2)
20 does not require that every or all questions of fact or law be
21 common or identical. Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019
22 (9th Cir. 1998). Rule 23(a)(2) is also more lenient than the
23 related requirement under Rule 23(b)(3) that common questions of
24 law or fact predominate. Id. In other words, common questions

25 ² This remains true even if the class were limited to Attest
26 associates.

1 exist; but they need not be the predominant questions in the case.
2 Id. Commonality may exist where there is a common legal issue with
3 varied factual predicates, or where there is a common factual basis
4 with varied legal remedies. Id. at 1019-20.

5 Here, plaintiffs have adequately pled common questions of law
6 or fact. Common legal questions include whether a license is
7 required to satisfy the professional exemption, whether assistants
8 to licensed accountants may exercise discretion and independent
9 judgment under the laws and professional standards governing
10 accounting, and which duties performed by the class members, to the
11 extent they are shared, should be classified as exempt. Common
12 factual questions include whether defendant implemented policies
13 and procedures requiring the supervision of class members. These
14 questions are similar to those that other courts have found
15 sufficient to constitute common questions of law or fact for
16 purposes of Rule 23(a)(2). See, e.g., Sepulveda v. Wal-Mart
17 Stores, Inc., 237 F.R.D. 229, 242 (C.D. Cal. 2006). Accordingly,
18 the court finds that the requirement of commonality is satisfied.

19 **3. Typicality**

20 Typicality requires that "the claims or defenses of the
21 representative parties are typical of the claims or defenses of the
22 class." Fed. R. Civ. P. 23(a)(3). For typicality to be met,
23 plaintiffs need not possess identical claims to those of the
24 putative class members. Hanlon, 150 F.3d at 1020. Instead,
25 plaintiffs' claims need only be "reasonably coextensive" with the
26 claims of the putative class. Id. The inquiry focuses on the

1 claims themselves -- not the factual predicates from which the
2 claims arise. Hanon v. Dataprods. Corp., 976 F.2d 497, 508 (9th
3 Cir. 1992). "The test of typicality 'is whether other members have
4 the same or similar injury, whether the action is based on conduct
5 which is not unique to the named plaintiffs, and whether other
6 class members have been injured by the same course of conduct.'" Id.

8 Here, the named plaintiffs allege the same injury as that
9 allegedly suffered by the other class members, e.g., defendant's
10 failure to pay overtime, as a result of the same conduct by
11 defendants, i.e., misclassification. Their legal claims (and the
12 corresponding statutory bases of such claims) are also the same as
13 those of the other class members. For example, in addition to
14 failure to pay overtime, plaintiffs also allege that defendant
15 failed to provide meal periods in violation of California Labor
16 Code § 512(a), and failed to provide the statutorily defined
17 compensation for missed meal periods in violation of California
18 Labor Code § 226.7.³

19 Defendant contends, however, that plaintiffs' employment in
20 only a single division of a line of service precludes a finding of
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24 ³ Plaintiffs also allege violations of numerous other sections
25 of the California Code, including sections 17200 of the Business
26 and Professions Code and sections 203, 226, 510, 1174, and 1194 of
the Labor Code. However, these violations are contingent upon a
finding that plaintiffs were in fact misclassified as exempt
employees.

1 typicality.⁴ This argument is not without foundation. See Kelley
2 v. SBC, Inc., 1998 U.S. Dist. LEXIS 18643, at *43 (N.D. Cal. Nov.
3 13, 1998) (limiting certification to positions plaintiffs actually
4 held). Plaintiff responds that there need not be a named plaintiff
5 with respect to every possible job category. See Stanton, 327 F.3d
6 938, 957 (9th Cir. 2003) (finding named plaintiffs to satisfy
7 typicality with respect to fifteen thousand putative class members,
8 even though plaintiffs did not represent "various sub-groups" of
9 class); Cornn v. United Parcel Services, Inc., 2005 WL 588431, at
10 *7 (N.D. Cal. 2005) (no need for separate class representative for
11 certain positions).

12 In Staton, however, there was a broad cross-section of thirty-
13 two named employee plaintiffs, which is not the case here. 327
14 F.3d at 957 ("The named plaintiffs ... include a very broadly
15 selected cross-section of the different categories of Boeing
16 employees. Salaried and hourly, management and line-worker, union
17 and non-union are all represented, as are each of the major
18 geographic hubs . . . and each of the pre-merger companies.>").
19 Additionally, in Cornn, the court found that there was no material
20 distinction between the positions that were represented and those
21 that were not. 2005 WL 588431, at *7.

22 The court finds that class certification is appropriate as to
23

24 ⁴ Defendant alternately argues that typicality is lacking
25 because the named plaintiffs would be preoccupied with unique
26 defenses pertaining to their poor job performance, but they have
failed to articulate how this performance impacts whether or not
they should have been classified as exempt.

1 the positions that plaintiffs actually held. As noted below, this
2 issue might be better framed as a problem of predominance.
3 Regardless of how the issue is framed, the fact remains that
4 plaintiffs have virtually no knowledge of what associates in other
5 divisions do. Moreover, based on the evidence submitted by PwC,
6 there appear to be significant differences between the work
7 required by an audit versus the work involved in securing a
8 client's IT infrastructure, or in creating tax provisions for a
9 trust. In light of the such differences, the court finds that
10 certification is only appropriate to a class of Attest associates.

11 **4. Adequacy of Representation**

12 Adequacy of representation requires that "representative
13 parties will fairly and adequately protect the interests of the
14 class." Fed. R. Civ. P. 23(a)(4). In order for plaintiffs to
15 adequately represent the putative class members, they must
16 demonstrate, first, that they do not possess any conflicts of
17 interest with the class members and, second, that both plaintiffs
18 and their counsel will work to "prosecute the action vigorously"
19 with respect to the entire class. Stanton, 327 F.3d at 957.

20 Here, there is no serious dispute as to either part of the
21 analysis. There is no purported conflict of interest between
22 Campbell and Sobek, on the one hand, and the putative class
23 members, on the other. Turning to the second part of the analysis,
24 a key consideration is the competency of counsel. Hanlon, 150 F.3d
25 1020. Plaintiffs' counsel has ample experience in California wage-
26 and-hour class action suits. Kershaw Decl. ¶ 2, Ex. 1.

1 Additionally, both of the named plaintiffs have participated in the
2 litigation process -- a relevant factor to determining adequacy of
3 representation. See Sepulveda, 237 F.R.D. at 244. The court
4 therefore finds that plaintiffs satisfy the adequacy of
5 representation requirement.

6 **B. Requirements under Rule 23(b) (3)**

7 In addition to the requirements set forth in Rule 23(a),
8 plaintiffs must also satisfy one of the requirements set forth in
9 Rule 23(b). Here, plaintiffs seek certification pursuant to Rule
10 23(b) (3), which requires that common questions of law or fact
11 "predominate over any question affecting only individual members"
12 and that a class action be "superior to other available methods for
13 the fair and efficient adjudication of the controversy." Fed. R.
14 Civ. P. 23(b) (3). As with the other components of the class action
15 inquiry, the court's function is not to pass on the merits. Eisen,
16 417 U.S. at 178.

17 **1. Predominance**

18 The predominance requirement "tests whether proposed classes
19 are sufficiently cohesive to warrant adjudication by
20 representation." Hanlon, 150 F.3d at 1022 (internal quotation
21 marks omitted). The inquiry "presumes that the existence of common
22 issues of fact or law have been established pursuant to Rule
23 23(a) (2)." Id. "When common questions present a significant
24 aspect of the case and they can be resolved for all members of the
25 class in a single adjudication, there is clear justification for
26 handling the dispute on a representative rather than on an

1 individual basis.’”⁵ Id. (quoting 7A Wright & Miller, Federal
2 Practice & Procedure § 1778 (2d ed. 1986)).

3 Defendant argues that three exemptions -- professional,
4 administrative, and executive -- may apply to each proposed class
5 member. The court first discusses the requirements unique to each
6 exemption, and then separately addresses the requirement common to
7 all three exemptions regarding the exercise of independent judgment
8 and discretion. The latter requirement is arguably the single most
9 important issue, because it is required for every exemption. In
10 other words, if an employee does not exercise independent judgment
11 and discretion, then that employee is not exempt from overtime,
12 regardless of whether other exemption requirements may be
13 satisfied.

14 **a. Requirements Unique to Each Exemption**

15 **i. Professional Exemption**

16 Plaintiffs first argue that common proof can establish that
17 no class member is entitled to the professional exemption.⁶ This
18 common proof consists of the nonexistence of a CPA license from
19

20 ⁵ Though predominance may be marginal, actions addressing what
21 are, in reality, several individual claims may not be practically
22 pursued unless a class action is authorized. Indeed, such may be
true in the instant case.

23 ⁶ Section 515 of the California Labor Code states, “[t]he
24 Industrial Welfare Commission may establish exemptions from the
25 requirement that an overtime rate of compensation be paid.” The
26 regulation for the professional exemption is found in Wage Order
No. 4-2001, which governs “PROFESSIONAL, TECHNICAL, CLERICAL,
MECHANICAL AND SIMILAR OCCUPATIONS.” The same regulation is also
published in the California Code of Regulations at title 8, section
11040.

1 the State of California for each member of the class. It is true
2 that, with respect to one avenue for satisfying the requirements
3 of the professional exemption, a license is required. Cal. Code
4 Regs., tit. 8., § 11040(1)(A)(3) (exemption applies to those who
5 are licensed or certified in the practice of law, medicine,
6 dentistry, optometry, architecture, engineering, teaching, or
7 accounting).⁷

8 This is not, however, the only avenue for satisfying the
9 requirements of the professional exemption. The exemption
10 provides for two separate avenues: the first (the professional
11 exemption) applies to employees who are duly licensed or
12 certified, whereas the second (the learned professional
13 exemption) applies to those who are "primarily engaged in an
14 occupation commonly recognized as a learned or artistic
15

16 ⁷ The exemption provides:

17 (3) Professional Exemption

18 A person employed in a professional capacity means any
19 employee who meets all of the following requirements:

20 (a) Who is licensed or certified by the State of
21 California and is primarily engaged in the
22 practice of one of the following recognized
23 professions: law, medicine, dentistry, optometry,
24 architecture, engineering, teaching, or
25 accounting; or

26 (b) Who is primarily engaged in an occupation
commonly recognized as a learned or artistic
profession. . . .

Cal. Code Regs., tit. 8, § 11040(A). In addition, the employee
must satisfy other requirements, such as exercise independent
judgment and discretion.

1 profession." Id. at § 11040(1)(A)(3)(b). Clearly, the proposed
2 class cannot possibly satisfy the first avenue -- since, by
3 definition, it only encompasses unlicensed employees.
4 Predominance, however, is measured by the significance of the
5 issue. Wamboldt v. Safety-Kleen Systems, Inc., 2007 WL 2409200,
6 at *13 (N.D. Cal. 2007).

7 Plaintiffs argue that this second avenue (the learned
8 professional exemption) cannot apply to the facts of this case,
9 because it would require disregarding the specific requirements
10 for the recognized profession of accounting in favor of the more
11 general requirements for learned professions. The argument has
12 great force. Defendant notes that in Piscione v. Ernst & Young,
13 L.L.P., 171 F.3d 527, 543-46 (7th Cir. 1999), the Seventh Circuit
14 upheld a finding that an unlicensed employee at an accounting
15 firm qualified for the learned professional exemption based on
16 his B.S. in Mathematics and the twenty hours of continuing
17 education required by his employer.⁸ Nonetheless, the court need
18 not engage in detailed examination of the issue at the present
19 juncture. Even if the learned professional exemption were
20 applicable, it would also present a common predominant question.

21 To satisfy the learned professional exemption, defendant

22
23 ⁸ Piscione did not address the threshold question of whether
24 an unlicensed employee working in the field of accounting can
25 qualify for the learned professional exemption, or if the non-
26 learned professional exemption essentially preempts the field for
accounting-related work. In this regard, it would be instructive
to consider whether unlicensed employees working in other
enumerated professions (e.g., medicine, dentistry, optometry, etc.)
have been found to qualify for the learned professional exemption.

1 would need to prove that the class members are primarily engaged
2 in an "occupation commonly recognized as a learned or artistic
3 profession" (as distinct from the non-learned professional
4 exemption, which requires a license). Cal. Code Regs., tit. 8,
5 § 11040(1)(A)(3)(b). A "learned or artistic profession" is
6 defined to include "[w]ork requiring knowledge of an advanced
7 type in a field or science or learning customarily acquired by
8 a prolonged course of specialized instruction and study, as
9 distinct from a general academic education and from an
10 apprenticeship and from training in the performance of routine,
11 manual, or physical processes." Id. at § 11040(1)(A)(3)(b)(i).

12 Defendant seizes upon the element of specialized instruction
13 and study to argue that the exemption will involve individualized
14 questions. For example, defendant notes that its education-
15 related hiring requirements vary by division and that it offers
16 a multitude of training courses for its employees, which are
17 utilized to varying degrees from individual to individual. But
18 the test considers whether an employee is "primarily engaged in
19 *an occupation commonly recognized as learned.*" Id. at §
20 11040(1)(A)(3)(b) (emphasis added). In other words, the
21 predicate for the learned professional exemption is a qualifying
22 occupation, not a particular individual level of educational
23 attainment. But see Piscione, 171 F.3d at 544-45 (focusing on
24 individual educational attainment). This inquiry presents a
25 common question because it focuses on whether the individual is
26 employed in a qualifying occupation.

1 Defendant's interpretation of the learned professional
2 exemption, which focuses on the education and training possessed
3 by each individual employee, cannot be reconciled with the
4 language of the exemption. To illustrate, one component of the
5 exemption may be satisfied by a prolonged course of specialized
6 instruction. Accepting defendant's interpretation of the
7 exemption would mean that an associate who takes a several month-
8 long training course is potentially employed in "an occupation
9 commonly recognized as learned," whereas that associate's
10 colleague down the hall who works in the same division and line
11 of service but who takes a two-week long training course, is not
12 employed in such "an occupation." The court cannot accept
13 defendant's interpretation, which would embrace such inconsistent
14 results.

15 Rather, the court finds that the requirements unique to the
16 professional exemption -- setting aside, for the moment, the
17 requirement of discretion and independent judgment -- are
18 susceptible to common proof.

19 **ii. Administrative Exemption**

20 California law also exempts employees who are primarily
21 engaged in the "performance of work directly related to the
22 management policies or general business operations of [their]
23 employer or [their] employer's customers." Cal. Code Regs., tit.
24 8, § 11040(1)(A)(2)(a)(i). Employees who work as advisors and
25 consultants to an employer's customers may qualify for the
26

1 administrative exemption. See Former 29 C.F.R. § 541.205(d).⁹
2 In order to qualify for the exemption, the work must be directed
3 to "matters that involve policy determinations, i.e., how a
4 business should be run or run more efficiently, not merely
5 providing information in the course of the customer's daily
6 business operations." Bratt v. City of Los Angeles, 912 F.2d
7 1066, 1070 (9th Cir. 1990). The regulations interpreting the
8 Wage Orders expressly contemplates that "many persons employed
9 as advisory specialists and consultants of various kinds
10 [including] . . . tax experts" may qualify for the exemption.¹⁰

11

12 ⁹ These regulations have been revised under federal law but
13 the Wage Orders adopted these regulations as effective on the date
14 the Wage Orders were adopted. Cal. Code Regs., tit. 8, § 11040
15 ("The activities constituting exempt work and non-exempt work shall
16 be construed in the same manner as such terms are construed in the
17 following regulations under the Fair Labor Standards Act effective
as of the date of this order . . ."). These former regulations are
therefore the legally relevant ones. A copy of the former
regulations can also be found in the current California Division
of Labor Standards Enforcement (DLSE) Manual.

18 ¹⁰ In light of this fact, plaintiffs' reliance on the
19 administrative/production worker dichotomy is less than helpful.
20 Plaintiffs argue that the dichotomy distinguishes between (a)
21 employees whose duties directly relate to the management policies
22 or general business operations of its clients versus (b) those
23 employees whose duties relate to producing the commodity (whether
24 goods or services) that the enterprise exists to produce and
25 market. See Nordquist v. McGraw-Hill Broadcasting Co., 32 Cal.
26 App. 4th 555, 563 (1995); Dalheim v. KDFW-TV, 918 F.2d 1220, 1230
(5th Cir. 1990). But the example of a tax consultant, which the
regulations list as an example of one who qualifies for the
administrative exemption, blurs that dichotomy. The tax
consultant's work directly relates to the client's business
operations, but the tax consultant's duties also relate to
producing the commodity of his or her enterprise, tax advice.
Similarly, an auditor's work directly relates to the client's
business operations, but the commodity of the auditor's enterprise
is audit advice.

1 Former 29 C.F.R. § 541.205(c) (5); id. at § 541.205(c) (2) (“[A]
2 tax consultant . . . is ordinarily doing work of substantial
3 importance to the management or operation of a business.”).

4 Here, plaintiffs contend that, for two reasons, “no
5 unlicensed associate within PwC spends more than 50 percent of
6 his or her time providing advice to PwC’s clients on matters of
7 significance.” Reply at 14. First, plaintiffs argue that the
8 rules of independence governing the accounting profession
9 prohibit even licensed professionals from functioning as
10 administrators of a customer’s business. But, as even
11 plaintiffs’ expert admitted, these rules do not prohibit licensed
12 professionals from providing advice or making recommendations “to
13 assist the client’s management in performing its functions and
14 making decisions.” Carradero Decl., Ex. 3, Ueltzen Dep. 111:8-
15 114:12 (agreeing with opinion rendered by defendant’s expert);
16 see also Decl. of John Toriello ¶ 12 (drafting memorandum to
17 evaluate client’s position of keeping separate financial
18 statements for itself and a company in which it had fifty percent
19 ownership). The regulations make clear that those who give
20 advice, such as consultants, may qualify for the administrative
21 exemption.

22 Second, plaintiffs note that PwC’s company policy directs
23 who may and may not sign various documents, letters, and reports
24 -- the effect of which is to limit giving direct advice to
25 clients to those above the senior associate level. Because this
26 policy is not only relevant to determining whether PwC associates

1 and senior associates are performing work directly related to
2 their client's general business operations under the
3 administrative exemption, but also whether the class members
4 exercise discretion and independent judgment, it is discussed
5 below in that latter context.

6 **iii. Executive Exemption**

7 PwC also argues that application of the executive exemption
8 will require case-by-case analysis. The executive exemption
9 requires, among other things, that an employee: (1) manage a
10 customarily recognized department or subdivision thereof; (2)
11 customarily and regularly direct the work of two or more other
12 employees; and (3) make recommendations as to the hiring or
13 firing, and advancement, promotion, or change of status of other
14 employees that carry particular weight. Cal. Code Regs., tit.
15 8., § 11040(1)(A)(1).

16 Here, defendant notes that many, but not all, of the
17 proposed class members serve as the "in charge" (PwC's
18 nomenclature) on engagements and thereby manage a team of other
19 employees. But a team of employees assembled for a particular
20 engagement is not a "recognized department." The California
21 Division of Labor Standards Enforcement (DLSE) Manual cautions
22 that "the term 'customarily recognized department or subdivision'
23 has a particular meaning. The phrase is intended to distinguish
24 between 'a mere collection of employees assigned from time to
25 time to a specific job or series of jobs' and 'a unit with
26 permanent status and function.'" DLSE Manual at § 53.3.1.

1 Although the question of whether a team of employees working on
2 an engagement constitutes a "recognized department" is one on the
3 merits, there is little dispute as to its answer. There is no
4 evidence that the teams over which some associates may have "in
5 charge" status are units with *permanent* status and function.
6 Accordingly, because the executive exemption does not apply at
7 all, it does not pose an individualized question for the class.

8 **b. Requirement Common to All Exemptions: Discretion**
9 **and Independent Judgment**

10 Above the court determined whether certain requirements for
11 the professional, administrative, or executive exemptions posed
12 individualized questions. The court has not yet addressed the
13 requirement common to all three exemptions, however, which is
14 whether the employees at issue "customarily and regularly
15 exercise discretion and independent judgment." Cal. Labor Code
16 § 515(a).

17 It is this requirement that requires further analysis, for
18 clearly if the class members exercise such powers differently,
19 class certification is suspect. The term discretion and
20 independent judgment "implies that the person has the authority
21 or power to make an independent choice, free from immediate
22 direction or supervision and with respect to matters of
23 significance." Former 29 C.F.R. § 541.207(a). "Discretion and
24 independent judgment involves the comparison and evaluation of
25 possible courses of conduct, and acting or making a decision
26 after considering various possibilities." Nordquist, 32 Cal.

1 App. 4th at 564.

2 There are two potential components to whether (and how
3 often) an employee exercises independent judgment and discretion:
4 one based on the employee's actual duties and one based on the
5 employer's expectations. As the California Supreme Court
6 explained it, both these components are problematic:

7 On the one hand, if hours worked on [an exempt
8 activity] were determined through an employer's job
9 description, then the employer could make an employee
10 exempt from overtime laws solely by fashioning an
11 idealized job description that had little basis in
12 reality. On the other hand, an employee who is
13 supposed to be engaged in [an exempt activity] during
14 most of his working hours and falls below the 50
15 percent mark due to his own substandard performance
16 should not thereby be able to evade a valid exemption.

17 Ramirez v. Yosemite Water Co., 20 Cal. 4th 785, 802 (1999).
18 Accordingly, Ramirez instructed trial courts to "steer clear of
19 these two pitfalls by inquiring into the *realistic* requirements
20 of the job." Id. (emphasis in original). "In so doing, the
21 court should consider, first and foremost, how the employee
22 actually spends his or her time. But the trial court should also
23 consider whether the employee's practice diverges from the
24 employer's realistic expectations." Id. Ramirez thus envisions
25 the synthesis of two components, one directed at the employee and
26 one directed at the employer.

 The California Supreme Court has also clarified the import
of Ramirez in the class action context: an employer's realistic
expectations are "likely to prove susceptible to common proof,"
but how employees actually spend their time "has the potential

1 to generate individual issues.”¹¹ Sav-On Drug Stores, Inc. v.
2 Superior Court, 34 Cal. 4th 319, 337 (2000). Of course, whether
3 these individual issues materialize in any particular case turns
4 on whether the job duties at issue vary from employee to
5 employee, or whether they are uniform across employees.¹²

6 **i. Employer’s Realistic Expectations**

7 Plaintiffs argue that the question of whether the proposed
8 class members exercise independent judgment and discretion can
9 be answered by common proof. The purported common proof is PwC’s
10 policy that unlicensed associates must be under the control and
11 supervision of licensed accountants, which plaintiffs contend is
12 a necessary product of the statutes and professional standards
13 governing the practice of public accountancy. See Cal. Bus. &
14 Prof. Code § 5053 (nothing shall preclude an individual “who is
15 not a [CPA] from serving as an employee of, or an assistant to,
16 a [CPA] . . . if the employee or assistant works under the
17 control and supervision of a [CPA].”). Section 5053 and its
18

19 ¹¹ A problem with the latter requirement is that it will
20 almost always limit class actions to jobs that are precisely the
21 same, and which are performed in the same manner. Such a
22 conclusion would defeat the effect of class actions which permit
23 suit in cases where unlawful conduct would otherwise go uncorrected
24 because of the limited recovery available in individual suits.

23 ¹² In Sav-On, for example, it appears that the duties between
24 class members did not vary significantly; rather, the only question
25 was whether each task fell on the exempt or non-exempt side of the
26 ledger. See Sav-On, 34 Cal. 4th at 330-31 (“As plaintiffs argued
to the trial court, “[t]he only difference between Defendant’s
declarations and Plaintiffs’ evidence is that the parties disagree
on whether certain identical work tasks are “managerial” or
“non-managerial.””).

1 implicit incorporation into PwC's corporate policies¹³ is
2 therefore arguably instructive as to PwC's realistic expectations
3 as an employer.¹⁴

4 PwC also has a policy that employees should be compliant
5 with applicable professional standards. Kershaw Decl., Ex. 6 at
6 00661. Similar to Section 5053, the pertinent professional rules
7 promulgated by AICPA address generally the supervision of
8 unlicensed accounting employees. Davila Decl., Ex. I (AICPA §
9 311.11) ("Supervision involves directing the efforts of
10 assistants who are involved in accomplishing the objectives of
11 the audit and determining whether those objectives were
12 accomplished."). These rules envision, however, that the amount
13 of supervision that is appropriate varies on an individual basis.
14 "The nature and extent of supervision and review must necessarily
15 reflect wide variances in practice. The auditor charged with
16 final responsibility for the engagement must exercise seasoned
17 judgment in varying degrees of his supervision and review of the
18 work done and judgment exercised by his subordinates." Id., Ex.
19 G (AICPA § 210.03). The factors to be taken into consideration
20

21 ¹³ The PwC-specific policies to which plaintiffs allude are
22 those pertaining to who may sign various documents, letters, and
23 reports.

24 ¹⁴ As discussed above, this is only half of the issue, because
25 the court must also consider "how the employee actually spends his
26 or her time." Ramirez, 20 Cal. 4th at 802. But the notion that
the company rules may be disregarded must be rejected. The fact
that in an individual case or number of cases an employee is
working contrary to the company's rules would not necessarily
undermine the propriety of class certification.

1 include the complexity of the project and the qualifications of
2 the employee. Id., Ex. I (AICPA § 311.11).

3 In order to prove that the requirement of discretion and
4 independent judgment is susceptible to common proof based on
5 these standards, plaintiffs must prevail on its argument that
6 compliance with Section 5053 and related professional standards
7 necessarily means that all unlicensed employees are performing
8 non-exempt work. Put slightly differently, the question is
9 whether being under "control and supervision" precludes the
10 exercise of meaningful discretion and judgment.

11 Defendant relies upon a California Superior Court decision,
12 which it argues is persuasive authority for the issues presented
13 here. Ruiz v. PricewaterhouseCoopers LLP, Case No. BC 287920
14 (Cal. Sup. Ct. December 8, 2003), involved a trio of overtime
15 lawsuits against several accounting firms, including PwC. They
16 were brought as private attorney general suits under California's
17 Unfair Competition Law (prior to its amendment by Proposition 64,
18 which subsequently required that all representative actions
19 proceed as class actions).¹⁵ The plaintiff in that case, like
20 the plaintiffs here, argued that the cases were appropriate for
21 representative treatment because of Section 5053.

22 The Ruiz court noted that Section 5053 "is part of the
23

24 ¹⁵ In an earlier motion, defendant argued that Ruiz
25 collaterally estopped class certification here, but the court
26 denied the motion since Ruiz was brought as a private attorney
general suit, rather than as a class action, precluding the
necessity of showing "identity of issues."

1 Accountancy Act, which regulates the licensing and practice of
2 accountants . . . and is not part of the Labor Code of the Wage
3 Orders, which regulate overtime and work conditions." Id. at *5.
4 The court characterized plaintiff's position as requiring an
5 "illogical leap between two completely unrelated statutory
6 schemes." Id. The court also noted that Ramirez required the
7 court to examine "how the employee actually spends his or her
8 time," presumably requiring an individualized inquiry. 20 Cal.
9 4th at 802. Finally, it held that "as a matter of common sense,
10 exercising discretion and independent judgment is not
11 incompatible with being under the control and supervision of
12 someone else." Id. at 6 (noting that even high-ranking company
13 officers are under the control and supervision of a board of
14 directors or shareholders).

15 It appears to this court that there is something less than
16 logic in refusing to recognize the relationship, for cases of
17 this type, between the Accountancy Act and the California Labor
18 Code. The question tendered is whether, given the limitations
19 imposed by the Accountancy Act, defendants violated the
20 California Labor Code in treating associates as exempt employees.
21 Clearly, to the extent that the statutes and professional
22 standards are implicitly incorporated into the company's rules,
23 they bear directly on the issues tendered by this motion.

24 PwC's company rules prohibit the putative class members from
25 signing their names to various documents, letters, and reports.
26 The pertinent regulation states, however, that "[t]he fact that

1 an employee's decision may be subject to review and that upon
2 occasion the decisions are revised or reversed after review does
3 not mean that the employee is not exercising discretion and
4 independent judgment." Former 29 C.F.R. § 541.207(e)(1). For
5 example, an assistant to the president of a large corporation may
6 regularly reply to correspondence addressed to the president.
7 Id. Although the president may on occasion alter or discard the
8 prepared reply and direct that another one be sent, this action
9 does not destroy the exempt character of the assistant's
10 function. Id. Similarly, a "management consultant who has made
11 a study of the operations of a business and who has drawn a
12 proposed change in organization, may have the plan reviewed and
13 revised by his superiors before it is submitted to the client."
14 Id. at § 541.207(e)(2). In addition, "[t]he policies formulated
15 by the credit manager of a large corporation may be subject to
16 review by higher company officials who may approve or disapprove
17 these policies." Id.; see also Copas v. E. Bay Mun. Util. Dist.,
18 61 F. Supp. 2d 1017, 1030 (N.D. Cal. 1999) (finding that employee
19 exercised independent judgment and discretion even though his
20 written work and reports were subject to review by supervisors).

21 Accordingly, the court finds that the fact that the work of
22 PwC associates and senior associate is subject to review is not
23 sufficient to prove that they are performing non-exempt work.
24 Nevertheless, as noted below, the court need not rely upon this
25 fact in certifying a class. Instead, the court finds that based
26 on the similarity of duties performed by Attest associates, class

1 certification is appropriate.

2 **ii. Employees' Actual Duties**

3 Regardless of what policies an employer may establish from
4 the top-down, and regardless of what professional standards may
5 apply at an industry-wide level, what employees actually do, on
6 a day-to-day basis, is a separate matter. For example, simply
7 because PwC does not have a policy expressly prohibiting
8 discretion and independent judgment does not mean that its
9 employees actually exercise such discretion and independent
10 judgment. Under Ramirez, the court must inquire "first and
11 foremost" into "how the employee actually spends his or her
12 time." 20 Cal. 4th at 802. Of course, on a motion for class
13 certification, the issue is narrower: the question is whether
14 that inquiry is susceptible to common proof.

15 Where the relevant duties performed (i.e., those that
16 arguably constitute exempt activity) vary from class member to
17 class member, many courts have found that individual issues,
18 rather than common issues, predominate. See Jimenez v. Domino's
19 Pizza, 238 F.R.D. 241, 251 (C.D. Cal. 2006) (no predominance of
20 common question where "there were many variable[s] which affected
21 a particular manager's mix of duties"; "the predominating issue
22 in this case is the actual mix of duties worked which entails a
23 need to conduct an individual inquiry for each class member");
24 Sepulveda, 237 F.R.D. at 249 (no predominance of common question
25 where there was "voluminous evidence that there actually was a
26 great deal of variance in [assistant manager] duties"); Pfohl v.

1 Farmers Ins. Group, 2004 WL 554834, at *9 (C.D. Cal. Mar. 1,
2 2004) ("The differing job duties and the individualized inquiry
3 to determine whether these varying duties meet the administrative
4 exemption preclude a collective action in this case."); Perry v.
5 U.S. Bank, 2001 WL 34920473, at *7 (N.D. Cal. Oct. 16, 2001) (no
6 predominant common question "in light of the differences in
7 individual job duties"); Dunbar v. Albertson's, 141 Cal. App. 4th
8 1422, 1431 (2006) (class treatment inappropriate where findings
9 as to one grocery manager could not be extrapolated to 900 other
10 grocery managers due to significant variation in work performed).

11 Conversely, in cases where class treatment was deemed
12 appropriate, the job duties between the class members were
13 similar. In Tierno, for example, one of the cases relied upon
14 by plaintiffs, the employer argued that the class members' job
15 duties varied from store to store, but upon examination of the
16 record, the court determined that "the Store Manager position at
17 Rite Aid is, in fact, sufficiently similar from store to store
18 in all important respects such that class treatment is
19 appropriate in this case." Tierno v. Rite Aid Corp., 2006 WL
20 2535056, at *9 (N.D. Cal. Aug. 31, 2006). Similarly, the primary
21 dispute between an employer and its employees may focus on how
22 a single activity undertaken by all class members should be
23 treated. See, e.g., Morillion v. Royal Packing Co., 22 Cal. 4th
24 575 (2000) (class action by agricultural workers alleging that
25 time spent commuting on employer's bus counted as "hours
26 worked").

1 The fact that an employer classifies all or most of a
2 particular class of employees as exempt does not eliminate the
3 need to make a factual determination as to whether class members
4 are actually performing similar duties.¹⁶ In Walsh, for example,
5 the employees argued that if they could prove that the employer
6 deliberately misclassified them as exempt, this policy would
7 constitute a common, predominant issue, "even if individualized
8 proof of a . . . member's work was required to evaluate whether
9 each member's work was exempt." Walsh v. IKON Office Solutions,
10 Inc., 148 Cal. App. 4th 1440, 1461 (2007). The court rejected
11 the argument:

12 [Plaintiffs] assume that an employer is liable if it
13 classifies employees without regard to the law or
14 investigating what work they do, even if the employees
15 were, in fact, subject to the exemption. While such
16 action on the part of an employer may be 'deliberate'
17 and 'willful,' [which might be relevant for waiting
18 time penalties] it is not 'misclassification.'

19 In other words, [plaintiffs] cannot recover under
20 Labor Code section 1194 unless the Account Manager
21 Subclass members were not, in fact, subject to the
22 outside salesperson exemption; that determination
23 requires consideration of the individual circumstances
24 of each Account Manager Subclass member.

25 Id.

26 Some courts, however, have determined that it is unfair for

27 ¹⁶ One court has noted that a "[d]efendant's initial, uniform
28 classification . . . has only minimal relevance to the facts that
29 ultimately must be determined at trial." Vinole v. Countrywide
30 Home Loans, Inc., 246 F.R.D. 637, 641 (S.D. Cal. 2007). Proving
31 a uniform classification is akin to proving the element of
32 standing: naturally, an employee must have been classified as
33 exempt to bring a misclassification claim. But once that initial
34 hurdle is cleared, the case will ultimately turn on whether the
35 employee was *wrongly* classified as exempt.

1 an employer to "on the one hand, argue that all [class members]
2 are exempt from overtime wages and, on the other hand, argue that
3 the Court must inquire into the job duties of each [class member]
4 in order to determine whether that individual is 'exempt.'" See,
5 e.g., Wang v. Chinese Daily News, 231 F.R.D. 602, 613 (C.D. Cal.
6 2005). But, under Walsh, there is no estoppel effect given to
7 an employer's decision to classify a particular class of
8 employees as exempt -- whether right or wrong, or even issued in
9 bad faith; instead, the only legally relevant issue to alleged
10 misclassification is whether the exemption in fact applies.¹⁷ If
11 the duties between class members are similar, the exemption
12 inquiry is likely susceptible to common proof, e.g., Tierno, 2006
13 WL 2535056, at *9, but if the duties are not sufficiently
14 similar, then the inquiry is unlikely to be susceptible to common
15 proof, e.g., Jimenez, 238 F.R.D. at 251.

16 Here, both parties have submitted evidence pertaining to the
17 job duties performed by class members. Plaintiffs have submitted
18 two employee declarations (their own) and defendant has submitted

19
20 ¹⁷ It may be intuitively unfair to permit an employer, who has
21 historically classified a particular group of employees as exempt
22 based on a uniform rule, to argue in the context of litigation that
23 the exemption inquiry will require an individualized analysis. But
24 the assumption behind such an intuitively appealing argument is
25 that an employer should somehow be bound by its prior position --
26 which is foreclosed by Walsh. "[I]n resolving questions of
California law, this court is bound by the pronouncement of the
California Supreme Court . . . and the opinions of the California
Courts of Appeal are merely data for determining how the highest
California court would rule . . . [but] the opinion of the Court
of Appeals on questions of California law cannot simply be
ignored." Brewster v. County of Shasta, 112 F. Supp. 2d 1185, 1188
n.5 (E.D. Cal. 2000) (internal quotation marks omitted).

1 approximately fifty employee declarations (from a mix of
2 associate, senior associate, and higher-level employees). The
3 Campbell and Sobek declarations state that their "daily
4 activities involved assisting CPAs in performing audits for PwC's
5 clients" and that "[e]very audit was essentially performed in the
6 same way." Campbell Decl. ¶ 6; Sobek Decl. ¶ 6. They also
7 describe how their duties were prescribed by the "audit plan,"
8 a computerized program with a list of financial statement items
9 that needed to be verified. Id. Sobek and Campbell both stated
10 that neither they nor "any other associate or senior associate
11 had the authority to prepare or deviate from the audit plan."
12 Sobek Decl. ¶ 8; Campbell Decl. ¶ 8.

13 Crucially, however, their personal knowledge appears
14 limited, in large part, to one division (Attest) within one line
15 of service (Assurance).¹⁸ But there are other divisions within
16 Assurance in addition to Attest: Systems Processing Assurance and
17 Transactional Services. Campbell testified during his deposition
18 that he did not know much about the job duties of associates in
19 these other two divisions. Campbell Dep. 22:22-23:2.¹⁹ Sobek's

20

21 ¹⁸ This issue is also raised in defendant's motion to strike.
22 The court discusses the relevant issues raised by that motion but
23 finds that the arguments primarily go to the weight of the evidence
rather than its admissibility.

24 ¹⁹ "Q. Do you know what associates do in the [Transactional
Services] division?

25 A. No, I do not.

26 Q. Do you know what associates do in the [Systems Processing
Assurance] division do?

A. Specifically, no, I do not."

1 testimony was slightly more informed than Campbell's on this
2 issue, but she too only possessed general information. Sobek
3 Dep. 229:19-230:6; 231:4-7.²⁰ With regard to the duties
4 performed by associates in the Tax line of service, Sobek and
5 Campbell said that the associates help to perform tax returns,
6 but could not offer any specific details whatsoever.²¹ Campbell
7 Dep. 22:11-21; Sobek Dep. 230:7-13.

8 PwC has submitted a small mountain of declarations. Upon
9 review, two consistent findings emerge, both of which dovetail
10 with the limitations in Sobek and Campbell's testimony. First,
11 they attest to significant differences in the work performed
12 between divisions and between lines of services. Some employees
13 work on IT, some work on tax returns, some work on reviewing
14 quarterly and year-end reports, some work on transactions, and
15 some work audits. See, e.g., Majstrova Decl. ¶ 5; Dang Decl. ¶
16 7; Wilson Decl. ¶ 7. Whether framed as an issue of typicality
17 under Rule 23(a)(3) or predominance under Rule 23(b)(3), the
18 court finds that certification would be improper if not limited
19 to the Attest division where plaintiffs actually worked.

20 Second, it appears that there is a meaningful distinction
21

22 ²⁰ "Q. Do you know what the duties were of a [Systems
23 Processing Assurance] associate, generally?

24 A. They basically did SAS-70 type work, the controls. I'm not
sure. That's all I knew of them."

25 ²¹ Of course, plaintiffs need not personally possess such
26 information, but Campbell and Sobek's depositions and declarations
are the only pieces of evidence submitted by plaintiffs on the
duties performed by PwC associates and senior associates.

1 between associates and senior associates' duties. A significant
2 if not primary responsibility for senior associates is to review
3 the work of associates. See, e.g., Gomez Decl. ¶ 11 ("When I
4 became a Senior Associate, I spent about 50% to 60% of my time
5 reviewing the work of other Associates."); Decl. of Ryann Lucas
6 ¶ 17 ("As an associate, I spent 50% of my time on an engagement
7 preparing the documentation, whereas as a Senior Associate, I
8 spent less time preparing (no more than 30%) and more time
9 reviewing the work of others."). Senior associates also tend to
10 spend more time helping to prepare the audit plan, interacting
11 with clients, and communicating with PwC managers and partners.
12 See, e.g., Decl. of Michael Anderson ¶¶ 8-9. The question is
13 whether these duties potentially involve the exercise of
14 independent judgment such that the inclusion of senior associates
15 would render class treatment inappropriate. Under the
16 circumstances, there does seem to be a sufficiently significant
17 difference between associates and senior associates to warrant
18 exclusion of the latter group from the class.

19 Although there is also some evidence of variation in the
20 duties performed by associates within the same division, the
21 duties are nevertheless sufficiently similar to warrant class
22 treatment. For example, it appears that many Attest associates
23 test the client's "internal controls," such as the requirement
24 that checks be signed by someone other than the person who draws
25 it. Decl. of Ashlee Pierce ¶ 10; Decl. of Blair Krebs ¶ 11.
26 Similarly, many Attest associates perform "detail testing," in

1 which a sample of items from major account balances is selected
2 and a search of hard evidence of those items is performed. Decl.
3 of Denise McCurry ¶ 16; Decl. of Michael McCarvel ¶ 11. Based
4 on the similarities in duties performed by Attest associates, the
5 court finds that there is a common, predominant question of law
6 or fact. Cf. Tierno, 2006 WL 2535056, at *9.

7 **c. Other Claims**

8 Plaintiffs also allege a host of claims that are derivative
9 of, or dependent upon, a finding that PwC misclassified its
10 employees.²² Although the parties dispute whether each of these
11 claims presents individualized or common issues, even in the
12 aggregate these claim are not particularly significant. Rather,
13 the key issue upon which certification must rise or fall is
14 whether common questions of law or fact predominate in the main
15 exemption inquiry.

16 **2. Superiority of Class Resolution**

17 Rule 23(b)(3) also requires that class resolution be
18 "superior to other available methods for the fair and efficient
19 adjudication of the controversy." The relevant inquiry is
20 determined by analyzing the four factors in Rule 23(b)(3)(A-D).
21 Hanlon, 150 F.3d at 1023. Most these factors indicate that class
22 resolution is a superior method in this case.

23 First, "the interest of members of the class in individually
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25 ²² These include, for example, waiting time penalties, Cal.
26 Labor Code § 203, wage statement claims, Cal. Labor Code § 226, and
meal and rest break claims, Cal. Labor Code §§ 512(a) & 226.7.

1 controlling the prosecution or defense of separate actions" must
2 give way to two competing concerns: the reality that class
3 members may fear reprisal in pursuing individual claims against
4 their employer, and the fact that individual litigation against
5 a well-funded defendant would be cost prohibitive. See Scott v.
6 Aetna Servs., Inc., 210 F.R.D. 261, 268 (D. Conn. 2002).

7 Second, "the extent and nature of any litigation concerning
8 the controversy" is not a concern, as neither party has
9 identified any related, pending litigation.

10 Third, "the desirability or undesirability of concentrating
11 the litigation of the claims in this particular forum" does not
12 weigh heavily on either side.

13 Fourth, although there may be manageability issues, they are
14 significant only if they create a situation that is less fair and
15 efficient than other available techniques. In re Sugar Industry
16 Antitrust Litigation, 73 F.R.D. 322, 358 (E.D. Pa. 1976).
17 Manageability concerns must be weighed against the alternatives
18 and "will rarely, if ever, be in itself sufficient to prevent
19 certification of a class." Klay v. Humana, Inc., 382 F.3d 1241,
20 1272 (11th Cir. 2004).

21 Accordingly, the court finds that the requirements of Rule
22 23(b) (3) are satisfied here.

23 **IV. Conclusion**

24 For the reasons set forth above, the court GRANTS the motion
25 with respect to Attest associates but DENIES the motion with
26 respect to senior associates and non-Attest associates.

1 The court notes that the above determination is one
2 involving a controlling question of law and there is substantial
3 ground for difference of opinion and that an immediate appeal
4 from the order will materially advance the ultimate termination
5 of the litigation.

6 ACCORDINGLY, the court certifies the matter for
7 interlocutory appeal pursuant to 28 U.S.C. § 1292.²³

8 IT IS SO ORDERED.

9 DATED: March 24, 2008.

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LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT

²³ The court also calls the parties' attention to Federal Rule of Civil Procedure 23(f).