UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JOSE RAMIREZ, all those similarly situated and JOEL SANTANA, all those similarly situated,

Plaintiffs,

v. **Case No: 8:17-cv-1753-T-35AEP**

STATEWIDE HARVESTING & HAULING, LLC,

Defendant.

ORDER

THIS CAUSE comes before the Court for consideration of the Motion for Summary Judgment, (Dkt. 27), filed by Defendant, Statewide Harvesting & Hauling ("Defendant" or "Statewide"), LLC; the response in opposition, (Dkt. 35), filed by Plaintiffs, Jose Ramirez and Joel Santana ("Plaintiffs"); the Motion for Summary Judgment, (Dkt. 32), filed by Plaintiffs; the response in opposition thereto, (Dkt. 39), filed by Defendant, the reply in support of Plaintiff's Motion for Summary Judgment, (Dkt. 40); the Report and Recommendation entered on February 27, 2019 entered by United States Magistrate Judge Anthony E. Porcelli, (Dkt. 53), the objection and response filed thereto, (Dkts. 54, 55); and the Report and Recommendation entered on May 24, 2019 entered by Judge Porcelli, (Dkt. 60), and the objections and response filed thereto. (Dkts. 61, 62, 63) Upon consideration of all relevant filings, case law, and being otherwise fully advised, the Court hereby **SUSTAINS** Plaintiffs' objections to the May 24, 2019, Report and Recommendation, **OVERRULES** Defendant's objections to the May 24, 2019, Report and

Recommendation and **ORDERS** that Plaintiffs' Motion for Summary Judgment is due to be **GRANTED IN PART** and **DENIED IN PART** and Defendant's Motion for Summary Judgement is due to be **DENIED** for the reasons discussed herein.

I. BACKGROUND

The facts relevant to the resolution of this matter are undisputed by the Parties. Plaintiffs are former seasonal Crew Foremen employed by Statewide, an agricultural harvesting and hauling business, providing harvesting labor to its clients in the citrus, blueberry, peach and strawberry industries. (Dkt. 33 at ¶¶ 1, 6) Defendant is an "employer" within the meaning of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§201 et seq. ("FLSA"). (Id. at ¶ 2) During the period of Plaintiffs' respective employment relevant to their asserted claims in this litigation, July 20, 2014 through July 20, 2017, Plaintiffs were employees of Statewide within the meaning of the FLSA. (Id. at ¶ 3)

During the relevant period of Plaintiffs' employment, Statewide was an H-2A Labor Contractor ("H-2ALC"), insofar as it had petitioned and relied on the federal H-2A Program to employ seasonal harvest laborers ("H-2A workers"). (Id. at ¶ 7) Plaintiffs' seasonal job responsibilities for Statewide included the transportation of H-2A workers to the groves and fields in company-owned buses, the supervision of the H-2A workers' harvesting work, the creation of accurate records of the hours the harvesters worked, and the accurate recording the piece-units of fruit harvested so that the harvesters would be properly compensated. (Id.) Each of the Plaintiffs was also responsible for recording his own hours worked, as well as the time spent operating his assigned bus to transport H-2A workers to and from the groves and fields, and to other required destinations. (Id.)

Further, as Crew Foremen, Plaintiffs were also responsible for driving H-2A workers to and from various places for basic needs such as the laundromat, convenience store, and bank. (Id. at ¶ 12) The store and bank were located approximately 15 miles from the housing where Plaintiffs' H-2A workers lived during the harvest season. (Id.) Worker housing was off the site of the farm: in some instances nearby and in others, some distance away. (Dkt. 29 at 35:10–19) Plaintiffs spent approximately 4 hours per week during the harvest seasons performing these transportation duties. (Id.) While it appears from the evidence that in some instances the workers were picked up from the farm site, all of the transportation activities were off the farm. (Dkt. 31 at 34:14–18, 35:19–23)

For the relevant seasons at issue in this matter, Plaintiffs were paid by Statewide consistent with their reported hours. (Id. at ¶¶ 18–19) However, Plaintiffs generally did not receive overtime compensation when they worked more than forty (40) hours in a workweek. (Id.) Thus, Plaintiffs commenced this action alleging violations of the FLSA for Defendant's failure to pay overtime compensation. (Dkt. 20) The Parties filed cross motions for summary judgment, (Dkts. 27, 32), which were referred to Magistrate Judge Anthony E. Porcelli for entry of a Report and Recommendation. (Dkt. 41)

A. February Report and Recommendation

On February 27, 2019, Judge Porcelli issued a Report and Recommendation on the motions ("February Report and Recommendation"), recommending that Plaintiffs' Motion for Summary Judgment be granted in part and denied in part, and Defendant's Motion for Summary Judgment be denied. (Dkt. 53) Specifically, the February Report and Recommendation recommended that Plaintiffs' Motion be granted to the extent that (1) Plaintiffs' overtime is fully compensable for the two-year statute of limitations under the

FLSA and (2) Plaintiffs are entitled to liquidated damages. (Id.) This recommendation was based on Judge Porcelli's finding that Statewide was not exempt from the general requirement that FLSA employers pay employees overtime compensation for work performed over forty hours per week. (Id.) Articulating that the standard for considering exemptions to the FLSA overtime required that they be "narrowly construed" against the employer, Judge Porcelli determined that neither the Agricultural Exemption of 29 U.S.C. § 213(b)(12) ("Agricultural Exemption") nor the Motor Carrier Exemption of 29 U.S.C. § 213(b)(1) ("Motor Carrier Exemption") applied to the Plaintiffs. (Id. at 4–14) To the extent that the Plaintiffs sought to extend the statute of limitations from two to three years due to Statewide's willful violation of the FLSA, Judge Porcelli recommended that the Motion be denied because the issue of willfulness is a question of fact for the jury not appropriate for summary disposition. (Id. at 17–18)

With regard to the Agricultural Exemption, Judge Porcelli properly determined that to claim an exemption under the secondary definition of agriculture, an employer must show *all* of the following (1) that the practice is performed either by a farmer or on a farm, (2) that is it performed in connection with the farmer's own farming operations or in connection with farming operations conducted on the farm where the practice is performed, and (3) that it is performed as an incident to or in conjunction with the farming operations. (Id. at 6) In regard to the first finding Judge Porcelli was emphatic: He concluded that Statewide was ineligible to claim status as a farmer and that the activities at issue were "clearly not performed on the farm." (Id. at 6–8) Moreover, he also found that assuming *arguendo* that Statewide could meet the first requirement, it would still fall

short of meeting the requirement that the practices at issue be performed as incident to or in conjunction with farming operations. (Id. at 10–12)

Defendant timely objected to the February Report and Recommendation, arguing that Judge Porcelli erred by construing the overtime exemptions narrowly against the employer. (Dkt. 54 at 5–8) Specifically, Defendant contended that a recent Supreme Court case, Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134, 1142 (2018), dictates that absent any textual indication that its exemptions should be construed narrowly, courts "have no license to give the exemption[s] anything but a fair reading." Id. at 1142. Thus, on April 9, 2019, the Court sustained Defendant's objection and rejected the February Report and Recommendation. (Dkt. 56) The Court referred the case back to Judge Porcelli to consider Defendant's position under the legal standard set by the Supreme Court, "and to articulate the extent, if any, to which the factual analysis in the original Report and Recommendation would be affected [by] such standard." (Dkt. 56)

B. May Report and Recommendation

On May 24, 2019, Judge Porcelli issued a revised Report and Recommendation, ("May Report and Recommendation") recommending Plaintiffs' Motion for Summary Judgment be denied and Defendant's Motion for Summary Judgment be granted. (Dkt. 60) Specifically, in the May Report and Recommendation, Judge Porcelli applied the "fair reading" standard set forth in Encino Motorcars, and found that while the Motor Carrier Exemption still did not apply to Plaintiffs, the Agricultural Exemption did. (Id.) Judge Porcelli explained that, under a fair reading of the statute, "the agricultural exemption can include work activities performed neither by a farmer nor on a farm when those work activities are incidental to primary agricultural activities performed on a farm." (Id. at 9)

Relying heavily on a Fifth Circuit case, Reich v. Tiller Helicopter Services, Inc., 8 F.3d 1018 (5th Cir. 1993), he then concluded that Plaintiffs' activities were performed incidental to or in conjunction with farming operations, and thus, the Exemption applied. (Id. at 14–15) Because Judge Porcelli found that Plaintiffs should be considered exempt from the FLSA's overtime provision under the Agricultural Exemption, he recommended that Defendant's Motion be granted and Plaintiffs' Motion be denied. (Id. at 17) Defendant timely filed objections to the May Report and Recommendation, objecting only to Judge Porcelli's conclusion that the Motor Carrier Exemption does not apply to Plaintiffs, but recognizing that this contention is moot if the Court were to agree that the Agricultural Exemption applies. (Dkt. 61) Plaintiffs also timely filed objections, contending that Judge Porcelli misapplied Reich to find that the Agricultural Exemption applied to Plaintiffs under the fair reading standard. (Dkt. 62) Defendant timely filed a response to Plaintiffs' objections. (Dkt. 63)

II. LEGAL STANDARD

After conducting a careful and complete review of the findings and recommendations, a district judge may accept, reject or modify a magistrate judge's report and recommendation. 28 U.S.C. § 636(b)(1); Williams v. Wainwright, 681 F.2d 732, 732 (11th Cir. 1982), cert. denied, 459 U.S. 1112 (1983). A district judge "shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C). This requires that the district judge "give fresh consideration to those issues to which specific objection has been made by a party." Jeffrey S. v. State Bd. of Educ., 896 F.2d 507, 512 (11th Cir.1990) (quoting H.R. 1609, 94th Cong. § 2 (1976)). In the absence of specific

objections, there is no requirement that a district judge review factual findings *de novo,* Garvey v. Vaughn, 993 F.2d 776, 779 n.9 (11th Cir. 1993), and the court may accept, reject, or modify, in whole or in part, the findings and recommendations. 28 U.S.C. § 636(b)(1)(C). The district judge reviews legal conclusions *de novo,* even in the absence of an objection. See Cooper-Houston v. Southern Ry., 37 F.3d 603, 604 (11th Cir. 1994).

III. DISCUSSION

The FLSA generally requires covered employers to pay non-exempt employees overtime compensation for work performed over forty hours a week. 29 U.S.C. § 207(a)(1). The FLSA also sets forth numerous exemptions to the overtime requirement, including the Agricultural Exemption and the Motor Carrier Exemption. 29 U.S.C. §§ 213(b)(1), (12). "Whether an employee meets the criteria for an FLSA exemption, although based on the underlying facts, is ultimately a legal question." Pioch v. IBEX Eng'g Servs., Inc., 825 F.3d 1264, 1268 (11th Cir. 2016). The employer bears the burden of establishing that an employee is exempt. Id. Moreover, "an employee's performance of both exempt and non-exempt activities during the same work week defeats any exemption that would otherwise apply." Skipper v. Superior Dairies, Inc., 512 F.2d 409, 411 (5th Cir. 1975) (quoting Hodgson v. Wittenburg, 464 F.2d 1219 (5th Cir. 1972)).

A. The Agricultural Exemption

Among those employees who fall within the FLSA's overtime exemptions are employees "employed in agriculture." 29 U.S.C. § 213(b)(12). Agriculture is defined under the FLSA as follows:

> 'Agriculture' includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in

> section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed *by a farmer or on a farm* as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

29 U.S.C. § 203(f). Section 203(f) of the FLSA includes both a "primary" and "secondary" agriculture definition. Farmers Reservoir & Irrigation Co. v. McComb, 337 U.S. 755, 762 (1949). The "primary" definition includes: "farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities . . . , the raising of livestock, bees, fur-bearing animals, or poultry." 29 U.S.C. § 203(f).[1] The "secondary" definition includes: "any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market." Id.

At issue in this case is the meaning of the secondary definition. To claim an exemption under the secondary agriculture definition, the practice must be either "performed by a farmer **or** on a farm as an incident to or in conjunction with such farming operations." 29 U.S.C. § 203(f) (emphasis added). Under a fair reading of the statute, the first use of the disjunctive "or" must be construed to mean *either* performed by a farmer or on a farm before applying any additional qualifiers of the exemption, specifically before applying the qualifier: "as an incident to or in conjunction with such farming operations . . . ." See Encino Motorcars, 138 U.S. at 1137 (finding that "the use of 'or' to join 'selling'

1 Neither Party asserts an argument that transportation of workers to the grocery store, laundromat, and bank falls within the primary definition of agriculture.

and 'servicing' suggests that the exemption covers a salesman primarily engaged in either activity.")[2] Accordingly, the exemption is first limited to only those practices that are performed by a farmer or on a farm. Farmers Reservoir, 337 U.S. at 767; 29 C.F.R. § 780.134 (setting forth that, "no matter how closely related it may be to farming operations, a practice performed neither by a farmer nor on a farm is not within the scope of the 'secondary' meaning of 'agriculture.'"); 29 C.F.R. § 780.144 ("In order for practices other than actual farming operations to constitute "agriculture" within the meaning of section 3(f) of the Act, it is not enough that they be performed by a farmer or on a farm in connection with the farming operations conducted by such farmer or on such farm, as explained in §§ 780.129 through 780.143. They must also be performed 'as an incident to or in conjunction with' these farming operations."). The Eleventh Circuit has explained the statutory definition of secondary agriculture in Farmer's Reservoir to expressly mean "other farm practices, but only if they are performed by a farmer or on a farm." Ares v. Manuel Diaz Farms, Inc., 318 F.3d 1054, 1056 (11th Cir. 2003). The meaning of the statute does not change under a fair reading; in fact a fair reading as compared to a narrow reading, compels this conclusion. Therefore, the Court must first consider whether the practices of the Plaintiffs occurred by a farmer or on a farm.

If such practices fall within the meaning of "by a farmer or on a farm," the practices must also be performed as "an incident to or in conjunction with such farming operations." 29 C.F.R. § 780.105. Defendant erroneously argues and the May Report and Recommendation concludes that the practices need only meet the incidental analysis. (Dkt. 60 at 9 ("[I]n consideration of the 'fair reading' standard, and a reading of the case

2 The Supreme Court in Encino acknowledges that it is in the Court's discretion to also look to the context of the words to interpret the statute. 138 U.S. at 1141.

law under that standard, the undersigned now concludes that the agricultural exemption can include work activities performed neither by a farmer nor on a farm when those work activities are incidental to primary agricultural activities performed on a farm."); Dkt. 63 at ¶ 6) As explained above, even under a fair reading of the statute, the Court cannot consider "incident to or in conjunction with" when the practices fail to meet one of the first alternative statutory requirements that they be "performed by a farmer or on a farm." See Ares, 318 F.3d at 1056.

Even in the most recent iteration of the challenges to the Report and Recommendation, it is undisputed by the Parties that the activities were not conducted by a farmer.[3] Similarly, neither Party seriously contends that the repeated transportation of workers in four hour increments can be considered *de minimus*.[4] Additionally, the Court finds that the activities at issue were not performed on a farm for purposes of the Agricultural Exemption.

In response to Plaintiffs' objections to the May Report and Recommendation and in its objections to the February Report and Recommendation, Defendant contends that Plaintiff's transportation of the workers is analogous to the off-site activities in Wirtz v. Osceola Farms Co., 372 F.2d 584 (5th Cir. 1967)[5] and Brennan v. Sugar Cane Growers

3 In the February Report and Recommendation, Judge Porcelli found that Statewide's employees were not engaged in any practices performed "by a farmer" within the meaning of the Agricultural Exemption because Statewide was a cooperative association that did not own, lease, or control the farms or crops harvested. (Dkt. 53 at 6–8) Neither Party objected to this determination.

4 Judge Porcelli's February Report and Recommendation also makes this clear, and neither Party raised specific objections to his conclusion that the four hours per week did not meet the FLSA's *de minimus* rule based on the regularity and the ease in which Plaintiffs would be able to record these hours. (Dkt. 53 at 9–10)

5 See Bonner v. City of Prichard, Ala., 661 F.2d 1206, 1207 (11th Cir.1981) (adopting as binding precedent all decisions of the former Fifth Circuit issued on or before September 30, 1981).

Cooperative of Florida. 486 F.2d 1006 (5th Cir. 1973). In Wirtz, the plaintiffs were several different categories of employees of the defendant employer, which operated a sugar mill. 372 F.2d at 585–87. The former Fifth Circuit found that employees categorized as "Class I drivers," who drove tractors and semi-trailer tractor trucks hauling sugar cane in its raw or natural state from the fields of independent growers to the mill, "flagmen," who stopped traffic at public roads for safe passage of the vehicles driven by Class I drivers, and "equipment repairmen," who performed some work on the fields and other at the repair shop in the mill area all fell outside of the Agricultural Exemption and were thus entitled to overtime compensation under the FLSA. Id. at 588–90. However, the court found that employees categorized as "Class II drivers," who transported farm laborers employed by the defendant mill to and from the farms of the independent growers and who brought meals from points off the farms and off the mill's premises to the farm laborers on the farm site while they were working fell within the Agricultural Exemption. Id. at 589. The court reasoned that "[t]he transportation of necessary food to the on-the-farm site is incident to, or a part of, the on-the-job feeding arrangement and itself terminates on the farm." Id. Moreover, the court noted that "movement of food and workers to the fields has significance and purpose only in making it possible for the harvesting activity to take place." Id. at 589 n.4.

In Brennan, the former Fifth Circuit found that employees who were employed as cooks and attendants, responsible for preparing meals for sugar cane field laborers and maintaining the barracks and appurtenant facilities used by those workers fell within the Agricultural Exemption of the FLSA. 486 F.2d at 1007–11. Specifically, the court found that the work done by the cooks and attendants was performed "on a farm" for purposes

of the Agricultural Exemption because it was being performed at a labor camp that was adjacent to the farmland, "as close . . . as it is physically possible for such 375 man camps to be." Id. at ¶1010–11. The court did not extend the exemption to any remote locations. Id.

The Defendant, in its response to Plaintiffs' objections, and Judge Porcelli, in the May Report and Recommendation both also rely heavily on the Fifth Circuit's analysis in Reich v. Tiller Helicopter Servs., Inc., 8 F.3d 1018, 1028 (5th Cir. 1993). In Reich, William J. Tiller, Sr. was the owner and operator of the defendant helicopter company, which owned and operated several helicopters used to dust lawns, herd cattle, and spray herbicides, insecticides, and fertilizers on crops for various farmers. 8 F.3d at 1022. The helicopter company was headquartered on Tiller's farm in south Texas. The Fifth Circuit found that for purposes of the Agricultural Exemption, the helicopter company's employees were neither employed by a farmer or on a farm, despite the fact that Tiller himself was a farmer and the employees performed certain tasks on Tiller's farm by virtue of the helicopter company's headquarters being located there. Id. at 1028.

Even so, the court found that the activities of loading the trailer and tanks at Tiller headquarters, traveling to and from job sites, and the flushing of the tanks used to spray herbicides, insecticides, and fertilizers on the fields of farmers still fell within the Agricultural Exemption because they were "incidental to the primary agricultural tasks that the employees perform[ed] on clients' farms." 8 F.3d at 1028. Specifically, the court reasoned that "aerial spraying necessarily involves off-farm activities that fall within the agricultural exemption," and, like the drivers in Wirtz, the time Tiller helicopter employees spend traveling from farm to farm and the time they spent loading and flushing tanks and

trailers at the defendant's headquarters was "incidental to the primary agricultural activities that they perform on the farms of Tiller Helicopter's client farmers." Id. at 1029. "Because the only purpose of these activities [was] to make spraying operations possible on clients' farms," the off-farm activities of the employees was held to fall within the scope of the Agricultural Exemption. Id.

To the extent that the Fifth Circuit in Reich found that the secondary definition of agriculture was met by virtue of the activities being performed "as an incident to or in conjunction with such farming operations" despite the fact that they were neither performed on a farm or by a farmer, the Court finds that such a holding is inconsistent with the express language of the statute and binding Eleventh Circuit case law, as explained above, and the Court declines to follow it. In any event, as Plaintiffs correctly note in their objections, the Fifth Circuit in Reich was not required to address the district court's additional holding that the employees' off-the-farm work activities of maintaining and cleaning spraying equipment was not exempt because no one challenged that finding. See Martin v. Tiller Helicopter Services, Inc., 778 F. Supp. 1395, 1397 (S.D. Tex. 1991), aff'd sub nom. Reich v. Tiller Helicopter Services, Inc., 8 F.3d 1018 (5th Cir. 1993). As such, the Court finds Reich to be inapposite. Moreover, the Court finds that the transportation of workers for personal errands in the instant case is factually distinct from the agricultural activity described in Brennan and Wirtz, and, thus, the reliance on these cases to find that Plaintiffs fall within the Agricultural Exception is also improper.

Plaintiffs' activities of transporting workers on personal errands were performed as a separate service, independent from the farm property and the agricultural activities. See Farmers Reservoir & Irrigation Co., 337 U.S. at 767–68, 69. The undisputed facts

establish that, as Crew Foremen, Plaintiffs spent approximately four hours per week driving H-2A workers to and from various locations, such as the laundromat, convenience store, and bank, for personal errands. (Dkt. 33 at ¶ 12) The store and bank were located approximately fifteen miles from the housing where the H-2A workers lived during the harvest season. (Id.) The Plaintiffs' transportation of the workers for these weekly personal errands bore no relation to agriculture. Unlike in Brennan, where the employees were preparing food for laborers at a site immediately adjacent to the farm, the errands in the instant case were being wholly performed at remote locations. Nor are the instant activities similar to those that were found to be "on the farm" in Wirtz, which activities were connected to an on-the-job feeding arrangement and were, in fact, completed *on the farm*. The Court lacks the authority to broaden the definition of "on a farm" as requested by Defendant to include activity not on a farm. Thus, because the relevant activity was neither performed by a farmer or on a farm, the Court finds that Plaintiffs' activity fails to meet the first requirement of the Agricultural Exemption's secondary definition of agriculture.

Upon the Court's *de novo* review of this matter, the Court finds that the February Report and Recommendation, (Dkt. 53), correctly reasoned that Plaintiffs are ***not*** "employed in agriculture" under the exemption and are entitled to overtime compensation, albeit under an articulated "narrow" construction of the exemption. The Court finds that this conclusion is not altered under a "fair reading" of the statute. Therefore, Plaintiffs' Objection to the May Report and Recommendation, (Dkt. 62), is due to be **SUSTAINED.**

A. Motor Carrier Exemption

Judge Porcelli recommends, in both the February and May Reports and Recommendations, that the Court find that the Motor Carrier Exemption under 29 U.S.C. § 213(b)(1) does not apply to Plaintiffs. (Dkts. 53, 60) Defendant objected to this conclusion after the issuance of both Reports and Recommendations. (Dkts. 54, 61) Upon independent review, the Court finds that Judge Porcelli correctly applied the Motor Carrier Exemption in the February Report and Recommendation, even under a fair reading of the statute. The record fails to demonstrate that Plaintiffs engaged in interstate or foreign commerce [6] Therefore, Plaintiffs' transportation of workers to the grocery store, laundromat, and bank falls outside the statutory requirements of the Motor Carrier Exemption as explained thoroughly in the February and May Reports and Recommendations, and Defendant's Objection to this analysis, (Dkt. 61), is due to be **OVERRULED**.

B. Damages

Judge Porcelli recommended in the February Report and Recommendation that Plaintiffs' Motion for Summary Judgment be granted in part and denied in part, recommending that the court find "(1) Plaintiffs' overtime is fully compensable for the two-year statute of limitations under the FLSA; and (2) Plaintiffs are entitled to liquidated

6 Section 207 of the FLSA does not apply when the Secretary of Transportation "has power to establish qualifications and maximum hours of service pursuant to the provisions" of the Motor Carrier Act on an employee. 29 U.S.C. § 213(b)(1). "[T]he controlling consideration is whether the employee comes within his power to do so." 29 C.F.R. § 782.1. The Secretary holds that power only if employees are "employed by carriers whose transportation of passengers or property by motor vehicle is subject to the Secretary's jurisdiction under the Motor Carrier Act; **and** (2) engage in activities of a character directly affecting the safety of operation of motor vehicles in the transportation on the public highways of passengers or property in interstate or foreign commerce within the meaning of the Motor Carrier Act." 29 C.F.R. § 782.2(a) (emphasis added).

damages; otherwise, the Motion should be denied." (Dkt. 53) Specifically, Judge Porcelli recommended denial of Plaintiffs' Motion to the extent that it sought damages under a three-year statute of limitations, which applies if a cause of action arises from a "willful violation." 29 U.S.C. § 255(a). As correctly noted in the February Report and Recommendation, the issue of willfulness is a question of fact for the jury not appropriate for summary disposition. (Id. at 17–18) Plaintiffs did not object to this determination in the February Report and Recommendation. Therefore, the Court adopts the reasoning in the February Report and Recommendation and finds that Plaintiffs are entitled to overtime in accordance with a two-year statute of limitations in addition to liquidated damages, but that the question of whether Defendant's violation was willful is not appropriate for summary disposition.

IV. CONCLUSION

Upon consideration of the applicable law, and in conjunction with an independent examination of the file, the Court is of the opinion that Plaintiffs' Objection to the May Report and Recommendation should be **SUSTAINED** to the extent set forth herein. Accordingly, it is **ORDERED** as follows:

1. Plaintiffs' Objection, (Dkt. 62), to the May Report and Recommendation, (Dkt. 60), is **SUSTAINED,** and Defendant's Objection, (Dkt. 61), is **OVERRULED**.
2. Defendant's Motion for Summary Judgment (Dkt. 27) is **DENIED**;
3. Plaintiff's Motion for Summary Judgment (Dkt. 32) is **GRANTED in part and DENIED in part**;

4. The Court will reset pretrial deadlines and set this matter for trial on the remaining issues in an Amended Case Management Scheduling Order by separate notice.

DONE and **ORDERED** in Tampa, Florida, this 30th day of September, 2019.

MARY S. SCRIVEN
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel of Record
Any Unrepresented Person