

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA**

KEVIN WILLIAMS,)	1:12-cv-0294 AWI DLB
)	
Plaintiff,)	MEMORANDUM OPINION
)	AND ORDER ON
v.)	DEFENDANT’S MOTION FOR
)	SUMMARY ADJUDICATION
ROBERT HILARIDES, dba)	
HILARIDES DAIRY, dba HILLARIDES)	
TRANSPORTATION and dba SIERRA)	
CATTLE COMPANY, and DOES 1-20)	
INCLUSIVE,)	Doc. # 18
)	
Defendants.)	

This is an action for money damages by plaintiff Kevin Williams (“Plaintiff”) against defendant Robert Hilarides dba Hilarides Dairy, Hilarides Transportation, and Sierra Cattle Company (collectively, “Defendant”). Plaintiff’s First Amended Complaint (“FAC”), which was removed from Kern County Superior Court on the basis of federal subject matter jurisdiction, alleges claims for relief based on unpaid overtime wages under both state and federal law, for failure of Defendant to compensate for meal breaks, rest period breaks, and for constructive termination in violation of public policy. Plaintiff also alleges a claim for recovery of unpaid wage penalties pursuant to California Labor Code §§ 203, 226.3 and 226. Currently before the court is Defendant’s motion for summary adjudication of Plaintiff’s first claim for relief only, which alleges failure to pay overtime wages in violation of state and federal law. Defendant

1 contends that Plaintiff was exempt from statutory requirements for overtime payment. Federal
2 subject matter jurisdiction exists pursuant to 28 U.S.C. § 1331. Venue is proper in this court.

3 **FACTUAL BACKGROUND/UNDISPUTED MATERIAL FACTS**

4 Defendant's motion for summary adjudication relies on a surprisingly small number of
5 undisputed material facts. Defendant's second proffered undisputed material fact alleges that
6 Plaintiff "was employed as a truck driver for Hilarides Dairy from March, 2009 to August 12,
7 2010, hauling milk from Hilarides Dairy to Hilmar Cheese Plant and hay from Rio Vista,
8 California to Hilarides Dairy." Doc. 23-2 at ¶ 2. Plaintiff disputes the proffered fact on two
9 grounds. Plaintiff first alleges he was employed by Hilarides Transportation Company, a
10 separate entity from the Dairy. Second, and perhaps more important, Plaintiff alleges the cargo
11 he hauled to Hilmar Cheese Plant was a milk product that was result of the treatment of raw milk
12 to a process of "ultra-filtration" which removed a substantial portion of the water from the
13 untreated milk.

14 Defendant's first proffered material undisputed fact alleges that Plaintiff operated a truck
15 or trucks while employed by Defendant that "had a gross vehicle weight rating of 80,000
16 pounds." Doc. # 23-2 at § 1. Plaintiff disputes the proffered fact contending that Defendant
17 lacks a factual basis for the testimony and that Defendant provided competent evidence to show
18 that the gross weight rating of the truck(s) he operated was/were less than 26,000 pounds. As to
19 Defendant's final two proffered material facts, there is no disputed that the hay Plaintiff hauled
20 from Rio Vista was used as feed for the cattle or that "Hilmar Cheese Company is a plant that
21 process the milk and makes cheese." Doc. # 23-2 at ¶¶ 3, 4.

22 **PROCEDURAL HISTORY**

23 Plaintiff's original complaint was filed in Tulare County Superior Court on May 6, 2011.
24 Plaintiff's FAC, which alleged for the first time a claim for failure to pay overtime in violation of
25 federal law, was filed in the same court on February 17, 2012. Plaintiff's FAC was removed to
26 this court on February 27, 2012. Plaintiff's motion to remand was denied on June 19, 2012. The
27

1 instant motion for summary adjudication of Plaintiff's overtime claim for relief was filed on
2 October 31, 2012. Plaintiff's opposition was filed on November 20, 2012, and Defendant's reply
3 was filed on November 26, 2012. The matter was taken under submission as of December 3,
4 2012.

5 LEGAL STANDARD

6 Summary judgment or summary adjudication is appropriate when it is demonstrated that
7 there exists no genuine issue as to any material fact, and that the moving party is entitled to
8 judgment as a matter of law. Fed. R. Civ. P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144,
9 157 (1970); Poller v. Columbia Broadcast System, 368 U.S. 464, 467 (1962); Jung v. FMC
10 Corp., 755 F.2d 708, 710 (9th Cir. 1985); Loehr v. Ventura County Community College Dist.,
11 743 F.2d 1310, 1313 (9th Cir. 1984).

12 Under summary judgment practice, the moving party always bears the initial
13 responsibility of informing the district court of the basis for its motion, and
14 identifying those portions of "the pleadings, depositions, answers to
interrogatories, and admissions on file, together with the affidavits, if any," which
it believes demonstrate the absence of a genuine issue of material fact.

15 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Although the party moving for summary
16 judgment always has the initial responsibility of informing the court of the basis for its motion,
17 the nature of the responsibility varies "depending on whether the legal issues are ones on which
18 the movant or the non-movant would bear the burden of proof at trial." Cecala v. Newman, 532
19 F.Supp.2d 1118, 1132-1133 (D. Ariz. 2007). A party that does not have the ultimate burden of
20 persuasion at trial – usually but not always the defendant – "has both the initial burden of
21 production and the ultimate burden of persuasion on the motion for summary judgment." Nissan
22 Fire & Marine Ins. Co., Ltd. v. Fritz Companies, Inc., 210 F.3d 1099, 1102 (9th Cir. 2000). "In
23 order to carry its burden of production, the moving party must either produce evidence negating
24 an essential element of the nonmoving party's claim or defense or show that the nonmoving party
25 does not have enough evidence of an essential element to carry its ultimate burden of persuasion
26 at trial." Id.

1 If the moving party meets its initial responsibility, the burden then shifts to the opposing
2 party to establish that a genuine issue as to any material fact actually does exist. Matsushita Elec.
3 Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); First Nat'l Bank of Arizona v. Cities
4 Serv. Co., 391 U.S. 253, 288-89 (1968); Ruffin v. County of Los Angeles, 607 F.2d 1276, 1280
5 (9th Cir. 1979). In attempting to establish the existence of this factual dispute, the opposing
6 party may not rely upon the mere allegations or denials of its pleadings, but is required to tender
7 evidence of specific facts in the form of affidavits, and/or admissible discovery material, in
8 support of its contention that the dispute exists. Rule 56(e); Matsushita, 475 U.S. at 586 n.11;
9 First Nat'l Bank, 391 U.S. at 289; Strong v. France, 474 F.2d 747, 749 (9th Cir. 1973). The
10 opposing party must demonstrate that the fact in contention is material, i.e., a fact that might
11 affect the outcome of the suit under the governing law, Anderson v. Liberty Lobby, Inc., 477 U.S.
12 242, 248 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th
13 Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could
14 return a verdict for the nonmoving party, Anderson, 477 U.S. 248-49; Wool v. Tandem
15 Computers, Inc., 818 F.2d 1433, 1436 (9th Cir. 1987).

16 In the endeavor to establish the existence of a factual dispute, the opposing party need not
17 establish a material issue of fact conclusively in its favor. It is sufficient that “the claimed factual
18 dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at
19 trial.” First Nat'l Bank, 391 U.S. at 290; T.W. Elec. Serv., 809 F.2d at 631. Thus, the “purpose
20 of summary judgment is to ‘pierce the pleadings and to assess the proof in order to see whether
21 there is a genuine need for trial.’” Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)
22 advisory committee's note on 1963 amendments); International Union of Bricklayers v. Martin
23 Jaska, Inc., 752 F.2d 1401, 1405 (9th Cir. 1985).

24 In resolving the summary judgment motion, the court examines the pleadings,
25 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if
26 any. Rule 56(c); Poller, 368 U.S. at 468; SEC v. Seaboard Corp., 677 F.2d 1301, 1305-06 (9th
27
28

1 Cir. 1982). The evidence of the opposing party is to be believed, Anderson, 477 U.S. at 255, and
2 all reasonable inferences that may be drawn from the facts placed before the court must be drawn
3 in favor of the opposing party, Matsushita, 475 U.S. at 587 (citing United States v. Diebold, Inc.,
4 369 U.S. 654, 655 (1962)(per curiam); Abramson v. University of Hawaii, 594 F.2d 202, 208
5 (9th Cir. 1979). Nevertheless, inferences are not drawn out of the air, and it is the opposing
6 party's obligation to produce a factual predicate from which the inference may be drawn.
7 Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff'd, 810 F.2d
8 898, 902 (9th Cir. 1987).

9 DISCUSSION

10 Plaintiff's claims for failure to pay overtime compensation are alleged in Plaintiff's first
11 claim for relief pursuant to California Business & Professions Code § 17200 which provides a
12 cause of action for "any unlawful, unfair, or fraudulent business act or practice . . ." Id. The
13 violation of a federal statute may serve as the predicate for a claim pursuant to section 17200.
14 See Citizens for a Better Environment - California v. Union Oil Co. Of California, 996 F.Supp.
15 934, 938 (N.D. Cal. 1997) ("The fact that most violations of § 17200 are based on violations of
16 state law does not preclude the use of a violation of federal law as a grounds for § 17200
17 liability"). Plaintiff alleges that Defendant failed to pay overtime wages due in violation of
18 California Labor Code § 1194 and Wage Order No. 9-2001 and failed to pay overtime in
19 violation of the Fair Labor Standards Act ("FLSA") 29 U.S.C. §§ 201 and 207. There is no
20 dispute that Plaintiff commonly worked between 12 and 17 hours per day – an amount that
21 would warrant overtime pay if Plaintiff were not exempt from the overtime statutes in question.
22 Thus, in order to prevail on the motion for summary adjudication on Plaintiff's first claim for
23 relief, Defendant must show that Plaintiff was exempt from both the state and federal overtime
24 statutes.

25 I. Overtime Requirements – California Law

26 California law regarding conditions of labor, including regulation of maximum hours of
27

1 work and overtime pay, is committed to the Industrial Welfare Commission (“IWC”). Cal. Labor
2 Code § 1198. Regulations developed by the IWC are promulgated through “Wage Orders.”
3 Collins v. Overnite Transportation Co., 105 Cal.App.4th 171, 174-175 (1st Dist. 2003) (IWC has
4 “a quasi-legislative power” to promulgate wage orders). As an initial matter, the court notes that
5 the parties cast the statutory underpinning of the obligation, if any, of Defendant to pay overtime
6 wages to Plaintiff differently. Plaintiff contends that the obligation to pay overtime wages is
7 governed by Wage Order 9, the wage order that governs wage relationships in the transportation
8 industry and is codified at Cal. Admin. Code § 11090. Defendant contends that Defendant is
9 subject to the terms and conditions imposed by Wage Order 14, which pertains to persons
10 working in agricultural occupations.

11 For purposes of determining overtime obligations under California law it is not necessary
12 to make a determination whether Plaintiff is properly classified as a transportation worker or as
13 an agricultural worker. Both Wage Orders 9 and 14 contain the identical language:

14 The provisions of [the basic overtime regulation set forth in subsection 3(A)] are
15 not applicable to employees whose hours of service are regulated by:

- 16 (1) The United States Department of Transportation Code of Federal
17 Regulations , Title 49, Sections 395.1 to 395.13, Hours of Service of
18 Drivers, or;
- 19 (2) Title 13 of the California Code of Regulations, subchapter 6.5, Section 1200 and
20 the following sections, regulating hours of drivers.

21 8 CCR § 11090(3)(L) (Wage Order No. 9); 8CCR §11140(3)(D) (Wage Order No. 14). Title 49
22 subsections 395.1 to 395.13 regulate certain aspects of driver activity including required time off
23 between assignments, hours of continuous driving, required rest breaks and similar requirements
24 pertaining to documentation of rest breaks. Defendant alleges the truck or trucks driven by
25 Plaintiff are regulated by Title 13 of the California Code of Regulations, subchapter 6.5, section
26 1200 (13 C.C.R. § 1200) because the trucks have a “gross vehicle weight” rating in excess of
27
28

1 26,000 pounds.¹ Therefore, Defendants contend that Plaintiff is exempt from the overtime
2 provisions of either Wage Order 9 or 14, because the truck(s) he drove was/were within the
3 exception language provided in both Wage Orders. Plaintiff opposes Defendant’s contention that
4 he was exempt from the overtime provisions of Wage Order 9 (and by extension, Wage Order
5 14) on the ground Defendant’s motion for summary adjudication fails to establish that the truck
6 or trucks Plaintiff drove had a gross vehicular weight greater than 26,000 pounds. Plaintiff
7 argues that the *tare* weight of the truck he drove – that is, the empty weight – is less than 26,000
8 pounds and that the tare weight of the truck is determinative of its classification. Although the
9 terms “gross vehicle weight” and “gross vehicle weight rating” are not defined by statute,
10 California courts, as well as federal safety regulations regarding brakes define “gross vehicle
11 weight” as the total weight of the truck plus cargo plus passengers and defines “gross vehicle
12 weight rating” as the maximum allowable gross weight as determined by the manufacturer. See
13 Joyce v. Ford Motor Co., 198 Cal.App.4th 1478, 1491, 1492 (3rd Dist. 2011) (citing 49 C.F.R. §
14 393.52(e)).

15 Defendants have offered evidence sufficient to establish that the truck or trucks Plaintiff
16 drove while employed by Defendant fell within the class of motor vehicles that are exempted
17 from the overtime provisions of both of the Wage Orders that could otherwise apply in Plaintiff’s
18 case. Plaintiff has failed to show that an issue of material fact remains as to Defendant’s duty to
19 pay overtime under state law. The court therefore finds that overtime pay owing to Plaintiff, if
20 any, must be required under federal law.

21 **II. Federal Overtime Wage Law**

22 The Fair Labor Standards Act of 1938 (“FLSA”) sets forth the general rule of overtime at
23 29 U.S.C. § 207(a), which provides that a workweek longer than 40 hours is prohibited unless the

24
25 ¹ 13 C.C.R. § 1200(a) provides that the section applies to vehicles listed in Cal. Vehicle Code § 34500.
26 Cal. Vehicle Code 34500(k) lists as covered any “commercial motor vehicle with a gross vehicle weight rating of
27 26,001 or more pounds” Thus, any commercial motor vehicle with a gross vehicle weight rating of more than
28 26,000 pounds is included within the exception to the application of Wage Rules for both transportation and
agricultural workers.

1 worker receives compensation for the time worked over 40 hours per week at a rate of one and
2 one-half times his standard rate of pay. Prior to the 1974, section 7 of the FLSA contained an
3 exemption for agricultural work at subsections (c) and (d) (29 U.S.C. §§ 207(c) and (d)). In
4 1974, amendments of the FLSA repealed subsections (c) and (d), leaving the agricultural
5 exemption set forth at 29 U.S.C. § 213(b)(12) which had been added by the 1966 amendments.
6 Defendant's motion for summary adjudication raises two issues with regard to federal
7 requirements and Plaintiff's opposition raises one additional issue. Defendant's motion asks the
8 court to determine whether the fact that Plaintiff occasionally transported feed for the dairy cows
9 to Defendant's dairy ranch has any effect on the court's determination of Plaintiff's exempt
10 status. Second, Defendant's motion asks the court to determine whether Plaintiff's usual activity
11 of hauling milk from the farm constitutes agricultural work within the meaning of the exemption.
12 Finally, Plaintiff's opposition to Defendant's motion raises the issue of whether application of
13 the agricultural exemption is appropriate where the product shipped by Defendant to the cheese
14 plant was a product which Plaintiff characterizes as being manufactured from raw milk by a
15 process of ultrafiltration which removes significant amounts of water. The court will give
16 consideration to each issue in turn.

17 Regulations applying the provisions of the FLSA provide the standards for determining
18 the applicability of any exemption from overtime pay requirements as follows:

19 An employer who claims an exemption under the [FLSA] has the burden of
20 showing that it applies (Walling v. General Industries Co., 330 U.S. 545; Mitchell
21 v. Kentucky Finance Co., 359 U.S. 290). Conditions specified in the language of
22 the Act are "explicit prerequisites to exemption" (Arnold v. Kanowsky, 361 U.S.
23 388). "The details with which the exemptions in this Act have been made
24 preclude their enlargement by implication" and "no matter how broad the
25 exemption, it is meant to apply only to" the specified activities (Addison v. Holly
Hill, 322 U.S. 607; Maneja v. Waialua, 349 U.S. 254). Exemptions provided in
the Act "are to be narrowly construed against the employer seeking to assert
them" and their application limited to those who come "plainly and unmistakably
within their terms and spirit" (Phillips v. Walling, 334 U.S. 490; Mitchell v.
Kentucky Finance Co., 359 U.S. 290; Arnold v. Kanowsky, 361 U.S. 388).

26 29 C.F.R. § 780.2.

27 ***A. Plaintiff's Occasional Delivery of Alfalfa Feed to the Farm is Not Determinative***

1 The first issue – whether the fact that Plaintiff occasionally hauled feed for the dairy cows
2 to Defendant’s farm – requires little discussion. Put simply, exemption from overtime pay
3 entitlement under FLSA is an all-or-nothing proposition. If *any* portion of the employee’s
4 workweek is spent in work that is not agricultural and therefore not exempt, no exemption may
5 be claimed by the same employer for any amount of work that is agricultural under FLSA. Wyatt
6 v. Holtville Alfalfa Mills, Inc., 106 F.Supp. 624, 629 (S.D. Cal. 1952). In other words, an
7 employee’s hours worked in a given workweek are not exempt under the agriculture exemption
8 unless all the work performed that week was exempt agricultural work. Thus, it is of no import
9 to the court’s determination of Plaintiff’s overtime exemption status that Plaintiff may have spent
10 some small amount of time hauling hay for feed for the cattle if it is determined that Plaintiff’s
11 trips to the Hilmar Cheese Plant are determined to be not agricultural in nature.

12 ***B. Agricultural Activity and Business Relationship***

13 Defendant contends that Plaintiff is among those exempted from the overtime provision
14 of section 207(a) by operation of the agricultural exemption set forth at section 213(b)(12), which
15 applies to “any employee employed in agriculture” What constitutes employment in
16 agriculture has been the subject of no small amount of judicial review and interpretation.

17 Section 3(f) of the FLSA defines “agriculture” thus:

18 “Agriculture” includes farming in all its branches and among other things includes
19 the cultivation and tillage of the soil, dairying, the production, cultivation,
20 growing and harvesting of any agricultural or horticultural commodities [. . .]
21 *performed by a farmer or on a farm* as an incident to or in conjunction with such
22 farming operations, including preparation for market, delivery to storage or to
23 market or to carriers for transportation to market.

24 29 U.S.C. § 203(f) (italics added).

25 The Supreme Court observed that the definition of agriculture set forth in section 203(f)
26 implies two related but distinct meanings:

27 First there is the primary meaning. Agriculture includes farming in all its
28 branches. Certain specific practices such as cultivation and tillage of the soil,
dairying, etc., are listed as being included in this primary meaning. Second, there
is the broader meaning. Agriculture is defined to include things other than
farming as so illustrated. It includes any practices, whether or not themselves

1 farming practices, which are *performed either by a farmer or on a farm*, incident
2 to or in conjunction with “such” farming operations.

3 Farmers Reservoir & Irrigation Co. v. McComb, 337 U.S. 755, 762-763 (1948) (“McComb”)
4 (italics added). The first prong of “agriculture” as framed in McComb incorporates all activities
5 expressly mentioned in section 3 of the FLSA. This includes, specifically, dairying. 29 U.S.C. §
6 203; Skipper v. Superior Dairies, 512 F.2d 409, 412 (5th Cir. 1975). However, “hauling products
7 to or from the farm is not primary farming.” Bayside Enter. v. N.L.R.B., 429 U.S. 298, 301
8 (1977) (“Bayside”). “Such hauling may, however be secondary farming if it is work performed
9 ‘by a farmer or on a farm as an incident to or in conjunction with such farming operations.’” Id.
10 (quoting 29 U.S.C. §203(f)). Thus, whether Plaintiff is exempt from overtime pay under FLSA
11 depends on whether his activities fall within this secondary meaning of agriculture.

12 The determination of whether an employee is engaged in agriculture for purposes of
13 FLSA requires an individualized and highly fact-dependent examination. Herman v. Continental
14 Grain Co., 80 F.Supp.2d 1290, 1292-1293 (M.D. Ala. 2000). In examining issues that implicate
15 the applicability of the agricultural exemption to overtime pay, the court focuses primarily on
16 “the nature of the employee’s activities, and not the character of the employer’s business.” Wyatt
17 v. Holtville Alfalfa Mills, Inc., 106 F.Supp. 624, 628 (S.D. Cal. 1952). Thus, the court’s analysis
18 of Plaintiff’s status as a worker in “agriculture” is not influenced by the fact that Defendant has
19 divided certain aspects of his farming operation in to separate “doing business as” components.

20 To a large extent, the court’s inquiry is guided by regulations implementing the overtime
21 provisions of the FLSA. These guidelines are set forth at 29 C.F.R. §§ 780 et seq. The
22 guidelines recognize that modern society has specialized a number of functions that were
23 traditionally performed on the farm but now are organized as separate productive activities that
24 are no longer classified as “agriculture.” See McComb, 337 U.S. at 760-761 (traditional farming
25 functions such as making of tools and production of fertilizer once performed by the farmer are,
26 in a technologically advanced society, operated as “separate and independent functions” “in
27 conjunction with the agricultural function but no longer a part of it”). “No precise lines can be

1 drawn which will serve to delimit the term ‘farmer’ in all cases. Essentially, however, the term
2 [“Farmer”] is an occupational title and the employer must be engaged in activities of a type and
3 to the extent that the person ordinarily regarded as a “farmer” is engaged in order to qualify for
4 the title. If this test is met, it is immaterial for what purpose he engages in farming or whether
5 farming is his sole occupation.” 29 C.F.R 780.130. “The question is whether the activity in the
6 particular case is carried on a part of the agricultural function or is separately organized as an
7 independent productive activity.” 29 C.F.R. § 780.104.

8 The interpretive guidelines set forth at 29 C.F.R. § 780.154 instruct as follows:

9 The term “delivery [of an agricultural commodity] to market” includes taking
10 agricultural or horticultural commodities, dairy products, livestock, bees or their
11 honey, fur-bearing animals or their pelts, or poultry to market. It ordinarily refers
12 to the initial journey of the farmer's products from the farm to the market. The
13 market referred to is the farmer's market which normally means the distributing
14 agency, cooperative marketing agency, wholesaler or processor to which the
15 farmer delivers his products. Delivery to market ends with the delivery of the
16 commodities at the receiving platform of such a farmer's market (Mitchell v.
17 Budd, 350 U.S. 473). *When the delivery involves travel off the farm (which would*
18 *normally be the case) the delivery must be performed by the employees employed*
19 *by the farmer in order to constitute an agricultural practice.*

20 Id. (italics added).

21 This interpretive guideline appears to the court to be conclusive of the issue of whether a
22 farmer or person employed by a farmer is employed in agriculture as that term is defined by for
23 purposes of determining exemption from overtime under FLSA if he transports a “dairy product”
24 from the farm to the processor. The court is well aware that the application of this guideline
25 produces a result that is directed entirely by the nature of the employees business relationship –
26 or lack of relationship – with the farmer, not by the nature of the worker’s activity. There is a
27 large body of case authority, perhaps typified by the Supreme Court case of Holly Farms Corp. v.
28 N.L.R.B., 517 U.S. 392 (1996), that firmly establishes that persons who haul farming
commodities off of the farm but are employed by someone other than the farmer whose produce
is being hauled do not work in agriculture within the meaning of the FLSA. In Holly Farms, the
plaintiff claimed that drivers who transported live-caught chickens destined for slaughter from

1 should remain within the realm of “agriculture”, on the other. See Holly Farms, 517 U.S. at 403
2 n.8 (noting that the “or on a farm” language in the definition of agriculture was inserted to
3 address concerns raised in the Senate that wheat farmers who contract the threshing of their
4 wheat to non-employee workers should not be liable for overtime pay). Certainly, the court can
5 understand the sentiment that the mere fact that Plaintiff is employed by the farmer disqualifies
6 him for payment for overtime work where a person employed by the cheese company (or any
7 other employer) doing exactly the same work would be entitled to such compensation seems
8 uncomfortably arbitrary. This court, however, may not engage such a policy-based analysis
9 where Congress has provided clear guidelines that plainly apply under the facts of this case and
10 mandate the conclusion that Plaintiff is subject to exemption from the overtime requirement of
11 the FLSA because he is employed in agriculture.

12 ***C. “Ultrafiltration” and “Dairy Product”***

13 Plaintiff’s opposition to Defendant’s motion for summary adjudication raises the issue of
14 whether the product that Plaintiff transported from Defendant’s farm to the cheese plant was a
15 “dairy product” or was an industrial product such that the agriculture exemption was
16 inapplicable. Defendant’s reply to Plaintiff’s contention is essentially limited to the claim that
17 the product hauled by Plaintiff to the cheese plant was milk destined to be made into cheese and
18 the fact that it was treated by ultrafiltration is of no consequence. Plaintiff cites two cases,
19 Mitchell v. Budd, 350 U.S. 473 (1956) and N.L.R.B. v. Tepper, 297 F.2d 280 (1961), to support
20 the contention that the hauling of a dairy product that is the result of the application of a process
21 that removes the dairy product from its raw, natural state does not constitute employment in
22 agriculture for purposes of the FLSA. As the court previously noted, at the time these cases were
23 decided, the overtime provisions of section 7 of the FLSA contained a subsection that exempted
24 those employed in agriculture from overtime but providing that the exemption applied only to
25 activities carried out with respect to commodities in their “raw or natural state.” 29 U.S.C. §§
26 207(c), (d) (repealed 1972); Hodgson v. Twin City Foods, Inc., 464 F.2d 246, 250 n.3 (9th Cir.

1 1972).

2 In addition, the court notes that 29 U.S.C. § 213, which lists the specific exemptions to
3 the overtime provisions of section 207(b) previously listed as exempt “any individual employed
4 within the area of [. . .] handling, [. . .] and preparing *in their raw or natural state* [. . .]
5 agricultural or horticultural commodities for market , or in making cheese or butter or other dairy
6 products” Watt, 106 F.Supp. at 629 (quoting 29 U.S.C. § 213(a)(10) as extant in 1952).
7 This section was repealed as a result of the 1966 amendments to the act and the now-extant
8 subsection (b)12 was added, which simply exempts from overtime “any employee employed in
9 agriculture” without further qualification of the term. So far as the court can determine, the
10 definition of “agriculture” quoted above from 29 U.S.C. § 203(f) has remained unchanged since
11 enactment of the FLSA in 1938. The issue that is not addressed by either party is whether the
12 repeal of section 207, subdivisions (c) and (d) in 1972 and the repeal of the former 29 U.S.C. §
13 213(a)(10) in 1966 affects the definition of “Agriculture” as set forth at section 13(f) of the FLSA
14 (29 U.S.C. § 207(f)) and/or changes the applicability of cases prior to 1972 that made
15 determinations regarding the nature of worker activity based on whether the material being
16 handled was in its raw or natural state.

17 The court has searched for federal cases that specifically addresses the effect of the 1972
18 statutory changes in the context of activities involving agricultural commodities not in their raw
19 or natural state and can find none. Neither do there appear to be any cases after 1972 that use the
20 term “raw or natural” to differentiate agricultural from manufactured commodities. On the other
21 had, there appears to be no case law indicating that holdings in cases such as Hodgson were
22 invalidated as a result of the statutory amendments. Lacking any case authority, the court turns
23 again to the application guidelines set forth in 29 C.F.R. §§ 780 et seq.

24 At 29 C.F.R. § 780.147, the regulations instruct in pertinent part:

25 In determining whether a practice performed on agricultural or horticultural
26 commodities is incident to or in conjunction with the farming operations of a
27 farmer or a farm, it is also necessary to consider the type of product resulting from
the practice--*as whether the raw or natural state of the commodity has been*

1 *changed*. Such a change may be a strong indication that the practice is not within
2 the scope of agriculture (Mitchell v. Budd, 350 U.S. [at] 473); the view was
3 expressed in the legislative debates on the Act that it marks the dividing line
4 between processing as an agricultural function and processing as a manufacturing
5 operation (Maneja v. Waialua, 349 U.S. 254, citing 81 Cong. Rec. 7659–7660,
6 7877–7879). *Consideration should also be given to the value added to the product*
7 as a result of the practice and whether a sales organization is maintained for the
8 disposal of the product.

9 Id. (italics added). In a similar vein, 29 C.F.R. § 780.151 instructs that “the following activities
10 are, among others, activities that may be performed in the ‘preparation for market’ of the
11 indicated commodities and may come within [29 U.S.C. § 20]3(f). [¶ . . . ¶] (f). Dairy products.
12 Separating, cooling, packing, and storing.”

13 Defendant urges the court to view the product Plaintiff hauled to the cheese factory as
14 being unaltered by the ultrafiltration process such that it should be considered the agricultural
15 commodity “milk.” The court disagrees. The evidence clearly establishes the chemical
16 composition of the milk is changes because a significant amount of water is removed. See
17 Wyatt, 106 F.Supp at 631 (dehydration changes the chemical content of the commodity).
18 Further, the process adds value to the product over what the raw commodity because Defendant
19 admits that he is able to ship more “milk” to market using substantially fewer trips because the
20 volume is reduced. For that admission to make any business sense, the only interpretation is that
21 the ultrafiltered milk fetches a higher price per unit of volume than raw or natural milk would so
22 that the decrease in volume is at least made up by an increase in price per unit of volume.
23 Finally, Defendant admits that he is the only dairy farmer, so far as he knows, that engages in the
24 process of ultrafiltration of milk in preparation for shipment. Thus, it cannot be held that
25 ultrafiltration is a practice that has become by common use a traditional dairy function. The
26 court can find no facts that support the proposition that ultrafiltration of milk prior to shipment is
27 a function that lies on the agriculture side of the line that divides agriculture from manufacturing.

28 As noted above, Defendant has the burden to show that there is no issue of material fact
as to whether Plaintiff is exempt from the overtime provisions of 29 U.S.C. § 207(b). Where

1 Defendant fails to carry his burden is in the failure to show the process of transforming milk into
2 the ultrafiltered product that Plaintiff transported to the cheese factory is, in fact, an agricultural,
3 as opposed to manufacturing, function. If the court has no basis upon which it can conclude that
4 the product Plaintiff was hauling to the cheese plant was a “dairy product” (as opposed to a
5 manufactured product), the court cannot conclude that Defendant was engaged in “agriculture”
6 when he shipped his product to the cheese plant or that Plaintiff was correspondingly carrying out
7 an agricultural function. Defendant’s motion for summary adjudication must therefore fail.
8 There is no question that reasonable minds could differ as to both sub-parts (B) and (C) of this
9 opinion. However, the court finds that the application of guidelines established by Congress
10 clearly prevent Defendant from meeting the high burden of production of proof that would allow
11 the court to grant summary adjudication.

12
13 THEREFORE, it hereby ORDERED that Defendant’s motion for summary adjudication
14 of Plaintiff’s first claim for relief for non-payment of overtime wages is DENIED.

15 IT IS SO ORDERED.

16 Dated: February 4, 2013



SENIOR DISTRICT JUDGE