"by the time an appeals court is considering a within-Guidelines sentence on review, *both* the sentencing judge and the Sentencing Commission will have reached the *same* conclusion as to the proper sentence in the particular case. That double determination significantly increases the likelihood that the sentence is a reasonable one." *Id.* at 2463. The reasonableness presumption of the courts of appeals "recognizes the real-world circumstance that when the judge's discretionary decision accords with the Commissioner's view of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable." *Id.* at 2465.

To decide the issue of the sentence's reasonableness again would be contrary to the law of the case doctrine. Additionally, for purposes of the petitioner's argument, the rule announced in *Rita* does not constitute a "supervening" law. (*See supra* C2). Instead, the *Rita* confirms the Court of Appeal's review of this Court's calculation of the sentence for reasonableness and, pursuant to *Rita* the sentence within the Guidelines was presumptively reasonable.

For all the foregoing reasons, this Court will deny petitioner's motion for relief under 28 U.S.C. § 2255. An appropriate order will be entered.

Jill WILLIAMS, et al., Plaintiffs,

v.

Sandra LONG, Defendant.

Civil No. JFM 07–3459.

United States District Court,
D. Maryland.

June 11, 2008.

Background: Employees, on behalf of themselves and others similarly situated, brought a collective action against employer, under the Fair Labor Standards Act (FLSA), alleging that employer willfully failed to pay minimum wage and overtime. Employer counterclaimed for breach of contract, breach of fiduciary duty, and invasion of privacy. Employees moved to dismiss employer's counterclaims.

Holding: The District Court, J. Frederick Motz, J., held that employer's counterclaims were permissive and outside district court's supplemental jurisdiction.

Motion granted.

1. Federal Courts ⇨24

In cases where neither diversity nor federal question jurisdiction exists over defendant's counterclaims, the counterclaims' status as compulsory or permissive determines whether the court has jurisdiction over them.

2. Federal Courts ⇨24

A compulsory counterclaim is within the ancillary jurisdiction of the court to entertain and no independent basis of federal jurisdiction is required. Fed.Rules Civ.Proc.Rule 13(a, b), 28 U.S.C.A.

3. Federal Courts ⇨24

A permissive counterclaim that lacks its own independent jurisdictional basis is not within the jurisdiction of the court. Fed.Rules Civ.Proc.Rule 13(a, b), 28 U.S.C.A.

4. Federal Courts ⇨24

Employer's counterclaims against employees for breach of contract, breach of fiduciary duty, and invasion of privacy, were permissive, and thus outside district court's supplemental jurisdiction; issues of fact and law raised in employee's Fair

risdiction exists over defendant's counterclaims, the counterclaims' status as "compulsory" or "permissive" determines whether the court has jurisdiction over them. *Painter v. Harvey,* 863 F.2d 329, 331 (4th Cir.1988). A compulsory counterclaim "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim," while a permissive counterclaim does not. *See* Fed. R.Civ.P. 13(a)-(b). Accordingly, a compulsory counterclaim is "within the ancillary jurisdiction of the court to entertain and no independent basis of federal jurisdiction is required." *Painter,* 863 F.2d at 331. By contrast, a permissive counterclaim that lacks its own independent jurisdictional basis is not within the jurisdiction of the court.[1] *Id.*

The Fourth Circuit has suggested four inquiries to determine if a counterclaim is compulsory:

> (1) Are the issues of fact and law raised in the claim and counterclaim largely the same? (2) Would res judicata bar a subsequent suit on the party's counterclaim, absent the compulsory counterclaim rule? (3) Will substantially the same evidence support or refute the claim as well as the counterclaim? and (4) Is there any logical relationship between the claim and counterclaim?

Id. (citing *Sue & Sam Mfg. Co. v. B–L–S Constr. Co,* 538 F.2d 1048, 1051–53 (4th Cir.1976)). Painter explained that a court need not answer all of these questions in the affirmative for the counterclaim to be compulsory. Instead, the tests "are less a litmus, more a guideline." *Id.* Because I answer these four questions in the negative, I conclude that defendant's counterclaims are permissive, and thus must be dismissed.

A.

[4] I find that the issues of fact and law raised in the claims and counterclaims are not "largely the same." *Painter,* 863 F.2d at 331. Plaintiffs have brought claims alleging that defendant violated FLSA, Maryland's Wage Payment and Collection Law, and Baltimore City's Wage and Hour Law by not paying plaintiffs minimum wage and overtime for their work at Charm City Cupcakes. (Compl.¶¶ 18–26.) By contrast, Long's counterclaims assert breach of contract, breach of fiduciary duty, and invasion of privacy. (Def.'s Countercl. ¶¶ 20–40.) Specifically, Long alleges that after plaintiff Williams "made false representations with respect to her background and experiences" in the baked goods industry, Long contracted with Williams to become "joint venture working partner[s]."[2] (*Id.* ¶¶ 3–

1. This result follows from the Fourth Circuit's reasonable conclusion that Fed.R.Civ.P. 13's requirement that the claim and counterclaim "arise[ ] out of the [same] transaction or occurrence" is equivalent to 28 U.S.C. § 1367(a)'s requirement that the claim and counterclaim be "so related ... that they form part of the same case or controversy under Article III of the United States Constitution." In other words, if a court determines that a counterclaim that lacks an independent jurisdictional basis did not arise from the same transaction as the original federal claim (and thus is not compulsory), it is also concluding that the claim and counterclaim did not "derive from a common nucleus of operative fact" (and thus that the court lacks supplemental jurisdiction over the counterclaim). *See City of Chi. v. Int'l Coll. of Surgeons,* 522 U.S. 156, 164–65, 118 S.Ct. 523, 139 L.Ed.2d 525 (1997) (holding that 28 U.S.C. § 1367(a) codified the principle that federal and state law claims which arise from common nucleus of operative facts constitute a single case).

2. With respect to plaintiff Dechowitz, Long contends that "[t]he understanding of the parties was that [Dechowitz] would be working as an independent contractor for approximately three (3) weeks." (Def.'s Countercl. ¶ 17.) In addition, Long asserts that Dechow-

16.) Further, Long allegedly obtained "a substantial amount of working capital and capital financing in reliance upon Williams' false representations." (*Id.* ¶ 11.) Accordingly, when Williams "walked away from the business," she allegedly breached the contract and her fiduciary duty to Long, causing Long damages in excess of $500,000. (*Id.* ¶¶ 20–29.) Long also alleges that by filing the Complaint and "leaking it to the media for subsequent publication," plaintiffs invaded her privacy and demonstrated "a total disregard for the truth." (*Id.* ¶¶ 30–40.) Long requests damages in excess of $500,000 for the alleged embarrassment, humiliation, loss of prestige, and emotional distress that plaintiffs caused by "placing her in a false light." (*Id.* ¶¶ 35–40.)

The only issue that arises in both the claims and counterclaims is whether plaintiff Williams was an employee (as plaintiffs allege) or a joint venture partner (as defendant alleges). In every other respect, the claims and counterclaims differ in terms of the legal and factual issues they raise. The legal issues raised by a minimum wage and overtime laws are clearly distinct from those raised by the laws of breach of contract, breach of fiduciary duty, and invasion of privacy. Likewise, while plaintiffs' claims will focus on the factual issues of how many hours plaintiffs worked, and whether they were paid for that work, defendant's counterclaims would require extensive factual investigation into allegations of false representation, reliance, and emotional distress that defendant alleges caused her over $500,000 in damages.

Federal courts have been reluctant to exercise supplemental jurisdiction over state law claims and counterclaims in the context of a FLSA suit where the only connection is the employee-employer relationship. As Judge Vratil of the United States District Court for the District of Kansas has stated, "[s]everal courts have rejected the notion that the employer-employee relationship single-handedly creates a common nucleus of operative fact between the FLSA claim and peripheral state law claims." *Wilhelm v. TLC Lawn Care, Inc.,* No. 07–2465, 2008 WL 640733, at *3 (D.Kan. March 6, 2008) (citing *Lyon v. Whisman,* 45 F.3d 758, 762–64 (3d Cir. 1995) (where the employment relationship is the only link between the FLSA claim and state law claims, no common nucleus of operative fact exists and Article III bars supplemental jurisdiction); *Rivera v. Ndola Pharmacy Corp.,* 497 F.Supp.2d 381, 395 (E.D.N.Y.2007) (an employment relationship is insufficient to create common nucleus of operative fact where it is the sole fact connecting the FLSA claim to state law claims); *Hyman v. WM Fin. Servs., Inc.,* No. 06–CV–4038, 2007 WL 1657392, at *5 (D.N.J. June 7, 2007) (exercising supplemental jurisdiction over state law claims unrelated to the FLSA claim "would likely contravene Congress's intent in passing FLSA"); *Whatley v. Young Women's Christian Assoc. of Nw. La., Inc.,* No. 06–423, 2006 WL 1453043, at *3 (W.D.La. May 18, 2006) (a general employer-employee relationship does not create a common nucleus of operative fact between the FLSA claim and state claims)).

Wilhelm, 2008 WL 640733, at *3, and *Kirby v. Tafco Emerald Coast Inc.,* No. 3:05CV341, 2006 WL 228880 (N.D.Fla. Jan. 30, 2006), provide strong support for dismissing Long's counterclaims. In both cases, defendants responded to plaintiffs' FLSA minimum wage and overtime claims with counterclaims based on state law: breach of fiduciary duty, breach of the duty of loyalty, and misappropriation of

itz did not work a forty hour week and did not work overtime. (*Id.* ¶¶ 18–19.)