

“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

Labor Standards Act (FLSA) claims and employer's claims were not largely the same, none of employer's counterclaims would be barred by claim preclusion in a subsequent state court action as counterclaims were not identical to employees' claims, substantially the same evidence would not support or refute the claims and counterclaims, and there was otherwise no logical relationship between the claims and counterclaims. Fair Labor Standards Act of 1938, § 1, 29 U.S.C.A. § 201 *et seq.*

5. Judgment \approx 540

Under Maryland law, the doctrine of *res judicata*, or claim preclusion, bars the relitigation of a claim if (1) the parties in the present litigation are the same or in privity with the parties to the earlier litigation; (2) the claim presented in the subsequent action is identical to that determined or that which could have been raised and determined in the prior litigation; and (3) there was a final judgment on the merits in the prior litigation.

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Sandra Long, Baltimore, MD, pro se.

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MEMORANDUM OPINION

J. FREDERICK MOTZ, District Judge.

Plaintiffs Jill Williams and Erin Dechowicz, on behalf of themselves and others similarly situated, have brought a collective action against defendant Sandra Long, owner of Charm City Cupcakes, under the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. §§ 201 *et seq.* Plaintiffs allege that defendant willfully violated

29 U.S.C. § 206 and section 7(a)(1) of FLSA by failing to pay plaintiffs minimum wage and overtime. (Compl. ¶¶ 18–19.) Further, plaintiffs allege that defendant's actions also violated Baltimore City's Wage and Hour Law (Baltimore City Code Art. 11, §§ 3–1, 3–3) and Maryland's Wage Payment and Collection Law (Maryland Labor and Employment Art. § 3–501 *et seq.*) (*Id.* ¶¶ 20–26.) Defendant has brought counterclaims alleging breach of contract, breach of fiduciary duty, and invasion of privacy. (Def.'s Countercl. ¶¶ 20–40.) Plaintiffs have moved to dismiss defendant's counterclaims pursuant to Federal Rule of Civil Procedure 12(b)(1) on the ground that this Court does not have supplemental jurisdiction over the counterclaims under 28 U.S.C. § 1367. (Pls.' Mot. to Dismiss at 1.) For reasons that follow, I will grant plaintiffs' motion to dismiss.

I.

The facts, as alleged in plaintiffs' complaint, are as follows. From October 2007 through November 2007, plaintiffs at various times were employed by defendant to prepare, bake, and serve cupcakes at defendant's business establishment or at the site of customers. (Compl. ¶ 11.) Defendant promised plaintiffs Williams and Dechowicz that they would receive an hourly wage of \$15.00 per hour and \$6.25 per hour, respectively. (*Id.*) Despite working "a couple hundred hours" between them—including overtime—the only wage that either of these plaintiffs received was \$20.00, which defendant gave Dechowicz as a cash advance against her pay. (*Id.* ¶¶ 11, 13.) Defendant has refused to pay any wages to plaintiffs. (*Id.* ¶ 16.)

II.

[1–3] In cases such as this one, where neither diversity nor federal question ju-

jurisdiction 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?

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

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-

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 rela-

tionship. 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.)

trade secrets in Wilhelm, and breach of contract and non-payment of a promissory note in *Kirby*. *Wilhelm*, 2008 WL 640733, at *1; *Kirby*, 2006 WL 228880, at * 1. In both cases, the courts granted plaintiffs' motion to dismiss defendants' counterclaims because they did not share a common nucleus of operative fact with plaintiffs' FLSA claims. *Wilhelm*, 2008 WL 640733, at *3; *Kirby*, 2006 WL 228880, at *2. *Wilhelm* dismissed the counterclaims "[b]ecause defendant relie[d] solely on its employer-employee relationship with plaintiffs to support supplemental jurisdiction, and [did] not identify a more specific factual connection between its counterclaims and plaintiffs' FLSA claim. . . ." *Wilhelm*, 2008 WL 640733, at *3. Likewise, *Kirby* found that while "[t]he FLSA claims deal[t] only with the question of the number of hours worked and the compensation paid[,] the state counterclaims "necessarily involve[d] different and separate factual matters." *Kirby*, 2006 WL 228880, at *2.

Just as in *Wilhelm* and *Kirby*, I find the factual and legal issues raised by plaintiffs' claims and Long's counterclaims not "largely the same." *Painter*, 863 F.2d at 331.

B.

[5] Defendant contends that *res judicata* "is a likely bar to the assertion of Defendant's counterclaim[s] in a subsequent proceeding in state court." (Def.'s Opp'n at 4.) Under Maryland law, the doctrine of *res judicata*, or claim preclusion, bars the relitigation of a claim if (1) the parties in the present litigation are the same or in privity with the parties to the earlier litigation; (2) the claim presented in the subsequent action is "identical to

that determined or that which could have been raised and determined in the prior litigation"; and (3) there was a final judgment on the merits in the prior litigation. *R & D 2001 LLC v. Rice*, 402 Md. 648, 938 A.2d 839, 848 (2008).

I find that none of defendant's counterclaims would be barred by claim preclusion in a subsequent state court action. The first and third prongs above would almost certainly be satisfied because the parties in a subsequent action would be the same, and there presumably would have been a final judgment on the merits. However, the second prong would not be met because defendant's counterclaims are not identical to plaintiffs' claims, and by definition, "could [not] have been raised and determined in the prior litigation" if I had dismissed them in that prior litigation. *Rice*, 938 A.2d at 848.

The Fourth Circuit has in at least two cases also considered collateral estoppel, or issue preclusion, as part of this second inquiry.³ See *Painter*, 863 F.2d at 332 (affirming district court's finding that issue preclusion could prove to be a bar); *Sue & Sam Mfg. Co.*, 538 F.2d at 1052 (holding that a judgment on the issue of the third-party plaintiff's negligence "would have barred a subsequent suit . . . on that issue, if not on the grounds of *res judicata*, then on the grounds of estoppel by judgment, or collateral estoppel, or related doctrines, however called"). Analytically, it is not clear to me, particularly in the instant case, that issue preclusion should be considered as part of this second inquiry. I recognize that because Long's breach of contract and breach of fiduciary duty counterclaims depend on whether Williams was an employee or a joint venture partner, a

3. However, some federal district courts in the Fourth Circuit have limited the second inquiry to claim preclusion. See, e.g., *Varnell, Struck & Assocs., Inc. v. Lowe's Cos.*, Nos.

5:06cv068, 5:07cv104, 2008 WL 1820830, *7 (W.D.N.C. April 21, 2008); *Banner Indus. of N.Y., Inc. v. Sansom*, 830 F.Supp. 325, 328 n. 4 (S.D.W.Va.1993).

finding that Williams was an employee in the instant suit might very well bar Long's two counterclaims in a subsequent suit.⁴ However, Long will have had every incentive to fully litigate the issue, not only to prevent a judgment against her in the instant suit and avoid a bar in the subsequent suit, but also because if I were to find that Williams was a joint venture partner, Long could enforce this finding offensively in a subsequent suit against plaintiff. Accordingly, requiring Long to bring her counterclaims in a subsequent suit will allow the instant suit to proceed more efficiently without creating any inefficiency or unfairness in the subsequent suit.

C.

I conclude that substantially the same evidence will not support or refute the claims and counterclaims. Plaintiffs' FLSA and state claims will rely on evidence demonstrating defendant's agreement to pay plaintiffs, plaintiffs' hours worked, and defendant's refusal to pay plaintiffs. As already made clear from the exhibits plaintiffs have attached to their briefs, this evidence will consist of e-mails, time sheets, and similar documents. In contrast, defendant's counterclaims will rely on almost completely different evidence, with the lone exception of the issue of Williams' status as an employee or joint venture partner. Otherwise, the evidence surrounding defendant's counterclaims will presumably include Williams' resume; documentation of defendant's investments and financing in reliance on Williams' alleged false representations; documenta-

tion of and testimony about defendant's alleged financial losses as a result of Williams' voluntary termination; and testimony about the emotional damage to defendant caused by the publication of plaintiffs' allegations. Accordingly, unlike the situation in *Painter*—where all the evidence focused on “a single factual issue—what transpired during [plaintiff's] arrest”—here the evidence supporting (and refuting) the claims and counterclaims will be significantly different. 863 F.2d at 332.

D.

Finally, I conclude that there is no “logical relationship” between the claims and counterclaims. As discussed above, numerous federal courts have refused to exercise supplemental jurisdiction over counterclaims to a FLSA claim that depend on the “employer-employee relationship” to “single-handedly create[] a common nucleus of operative fact. . . .” *Wilhelm*, 2008 WL 640733, at *3. Here, the only connection between the claims and counterclaims is the issue of Williams' status as an employee. Just as in the many FLSA cases cited *supra*—and in contrast to *Painter*—plaintiffs' claims and defendant's counterclaims do not relate to one event or issue. See *Painter*, 863 F.2d at 331–32. Instead, while plaintiffs' claims seek minimum wage and overtime payments for the hours plaintiffs allegedly worked, Long's counterclaims seek compensation for financial and emotional damages allegedly caused by Williams' voluntary termination and plaintiffs' publication of its Complaint.

4. The Maryland Court of Appeals has articulated the doctrine of issue preclusion in the following way: “When an issue of fact or law is actually litigated and determined by a valid and final judgment, . . . the determination is conclusive in a subsequent action between the parties, whether on the same or a different

claim.” *Rice*, 938 A.2d at 848–49. In the instant case, the issue of Williams' position at Charm City Cupcakes would be identical to the one presented in state court, there would have been a final judgment on the merits, and the parties in both actions would be the same. See *id.* at 849.

For the foregoing reasons, I conclude that defendant's counterclaims are permissive, and accordingly grant plaintiffs' motion to dismiss.⁵ A separate order to that effect is being entered herewith.

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is, this 11th day of June 2008

ORDERED

1. Plaintiffs' motion to dismiss defendant's counterclaims (document # 9) is granted; and

2. Plaintiffs' motion for Rule 11 sanctions (document # 11) is denied.



AAA ANTIQUES MALL,
INC., Plaintiff,

v.

VISA U.S.A. INC., et al., Defendants.

Civil No. JFM 08-06.

United States District Court,
D. Maryland.

June 12, 2008.

Background: Retailer, an antique mall, brought putative class action against three

5. Because I conclude that this Court lacks subject matter jurisdiction over the proposed counterclaims, it is not necessary for me to address plaintiffs' motion for Rule 11 sanctions. *See, e.g., Shamblin v. City of Colchester*, 793 F.Supp. 831, 834 n. 2 (C.D.Ill.1992) (concluding the same). Nevertheless, I find that defendant's counterclaims did not violate Rule 11's requirements that a motion not be "presented for any improper purpose, such as to harass or to cause unnecessary delay or

credit card companies for unjust enrichment and fraud, alleging that retailer improperly paid a fee to companies that was in part attributable to state sales tax when retailer used credit card transaction services. Companies moved to dismiss.

Holdings: The District Court, J. Frederick Motz, J., held that:

- (1) retailer failed to state unjust enrichment claim;
- (2) statement that fees would be paid on "sales" was not fraudulent; and
- (3) fraud claims were barred by statute of limitations.

Motion granted.

1. Implied and Constructive Contracts



One of the elements a plaintiff must prove in order to prevail on a claim for unjust enrichment under Maryland law is that the defendant has accepted or retained a benefit conferred upon him by the plaintiff under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value.

2. Implied and Constructive Contracts



To prevail on an unjust enrichment claim under Maryland law a plaintiff must prove he did confer a benefit upon the defendant and that the defendant appreciated or had knowledge of the benefit.

needless increase in the cost of litigation," and that "the allegations and other factual contentions . . . are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. . . ." Fed. R.Civ.P. 11(b). At this stage, it cannot be determined that further discovery will not provide support for defendant's contention that Williams was a joint venture partner, and thus breached her contract and fiduciary duties by voluntarily leaving the business.