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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

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Robert Orozco,

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No. CV-11-2305-PHX-FJM

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Plaintiff,

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**ORDER**

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vs.

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Mark S. Borenstein, et al.,

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Defendants.

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Before the court is defendants’ motion to dismiss for lack of subject matter jurisdiction (doc. 22), plaintiff’s response (doc. 29), defendants’ reply (doc. 42); and plaintiff’s motion to strike declarations (doc. 51), defendants’ response (doc. 57) and plaintiff’s reply (doc. 60). We also have before us plaintiff’s motion for leave to file second declaration (doc. 53), defendants’ response (doc. 58), plaintiff’s reply (doc. 59); plaintiff’s motion to certify question of state law to the Arizona Supreme Court (doc. 54), defendants’ response (doc. 63), plaintiff’s reply (doc. 64); and plaintiff’s motion to conditionally certify collective action (doc. 35), defendants’ response (doc. 48), and plaintiff’s reply (doc. 55).

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**I. Background**

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Plaintiff brings this putative class action pursuant to the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201, *et seq.*, the Arizona Wage Act, A.R.S. § 23-350, *et seq.*, and the Arizona Minimum Wage Act, A.R.S. § 23-363, *et seq.* Plaintiff worked as an oven operator

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1 in the bagel baking operations of defendant Bada Bing Baking, LLC, doing business as  
2 Chompie's Wholesale Bakery (defendants collectively referred to as the "Bakery"). Plaintiff  
3 contends that the Bakery violated the FLSA, as well as Arizona's wage statutes, by failing  
4 to pay plaintiff and other similarly situated employees the required federal and state  
5 minimum wages for covered nonexempt employees. Plaintiff contends that, although the  
6 employees are paid slightly more than the minimum wage required by federal and state law,  
7 29 U.S.C. § 206(a), A.R.S. § 23-363(A), the Bakery has implemented a policy of deducting  
8 certain work-related expenses from the employee's paychecks, leaving their net pay below  
9 minimum wage. Specifically, plaintiff alleges that the Bakery deducts \$12.50 per paycheck  
10 for uniform laundering, \$10.00 for initial and lost electronic keys, \$5.00 for initial and lost  
11 time cards, and \$24.00 for "food handlers" health cards from Maricopa County.

12 After this lawsuit was filed, the Bakery reimbursed 51 current and former "minimum  
13 wage" employees for the uniform-related fees incurred in the 2 years preceding the filing of  
14 this lawsuit, along with liquidated damages as prescribed by 29 U.S.C. § 216(b). The Bakery  
15 contends that because it has tendered full payment for all claimed violations, there is no  
16 remaining live case or controversy, rendering this case moot.

## 17 **II. Motion for Leave to File Second Declaration**

18 Plaintiff first moves for leave to file a second declaration of Nicholas J. Enoch in  
19 support of his motion to conditionally certify a collective action. The Bakery opposes the  
20 second declaration because it contains legal arguments that should have been presented in  
21 a brief, and not a declaration. We agree with the Bakery that plaintiff's second Enoch  
22 declaration is replete with legal argument and analysis, not properly included in a declaration.  
23 Plaintiff's motion for leave to file a second declaration is denied (doc. 53).

## 24 **III. Motion to Strike**

25 Plaintiff moves to strike four declarations (docs. 39, 40, 41, and 43) filed by the  
26 Bakery in connection with its reply in support of its motion to dismiss. Plaintiff contends  
27 that the declarations are improper because they contain new facts and arguments. We  
28 disagree. The Bakery's declarations were filed in response to allegations contained in

1 plaintiff's response to the motion to dismiss. In his response, plaintiff challenges the reason  
2 for his termination from the Bakery, and contends that notwithstanding the tender of payment  
3 for laundering expenses, plaintiff is also owed reimbursement for improper deductions for  
4 time, key, and health cards. The Bakery's declarations directly address these arguments. It  
5 is axiomatic that a party is entitled to present evidence in a reply brief to rebut arguments  
6 raised in the opposing party's response brief. Plaintiff's motion to strike is denied (doc. 51).

#### 7 **IV. Motion to Dismiss**

8 The Bakery contends that because it reimbursed plaintiff and 51 current and former  
9 "minimum wage" employees for the uniform laundering fees deducted from paychecks in the  
10 2 years preceding the filing of this lawsuit, along with an additional equal amount as  
11 liquidated damages available under 29 U.S.C. § 216(b), in full satisfaction of all claimed  
12 violations, there is no remaining live case or controversy, rendering this case moot.

13 Article III of the United States Constitution limits the jurisdiction of federal courts to  
14 "actual 'Cases' and 'Controversies.'" U.S. Const. art. III, § 2. When the issues presented in  
15 a case are no longer live or the parties lack a legally cognizable interest in the outcome, the  
16 case becomes moot and the court no longer has subject matter jurisdiction. When a Rule  
17 12(b)(1), Fed. R. Civ. P., attack is factual, we may look beyond the complaint to affidavits  
18 and other evidence properly before the court without having to convert the motion into one  
19 for summary judgment, and we need not presume the truthfulness of plaintiff's allegations.  
20 White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000). It is then incumbent upon the party  
21 opposing the motion to present affidavits or other evidence in order to satisfy its burden of  
22 establishing that the court has subject matter jurisdiction. St. Clair v. City of Chico, 880 F.2d  
23 199, 201 (9th Cir. 1989).

24 "Where the jurisdictional issue is separable from the merits of the case, the judge may  
25 consider the evidence presented with respect to the jurisdictional issue and rule on that issue,  
26 resolving factual disputes if necessary." Thornhill Publ'g Co. v. General Tel. & Elecs. Corp.,  
27 594 F.2d 730, 733 (9th Cir. 1979). Here, the Bakery's factual attack on whether plaintiff has  
28 been made whole by the Bakery's tender does not implicate the merits of plaintiff's FLSA

1 claim. The factual issue is a question of damages not liability. The existence of plaintiff's  
2 FLSA cause of action is not dependent on the amount of plaintiff's potential recovery.  
3 Therefore, because the factual attack on subject matter jurisdiction is not intertwined with  
4 the merits of plaintiff's cause of action, we may proceed under Rule 12(b)(1) to resolve the  
5 jurisdictional issues of fact.

6 Courts are hesitant to permit a defendant to render a putative class action moot by  
7 making an offer of judgment to the named plaintiff only, whether before or after a motion  
8 to certify the class is filed. See, e.g., Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339,  
9 100 S. Ct. 1166, 1174 (1980); cf. Symczyk v. Genesis Healthcare Corp., 656 F.3d 189 (3d  
10 Cir. 2011), cert. granted, 2012 WL 609478 (June 25, 2012) (holding that an FLSA action  
11 filed by a single plaintiff does not become moot when the defendants made a Rule 68 offer  
12 of judgment that satisfied only the named plaintiff's claims). But here, because the tender  
13 was made not only to the named plaintiff, but also members of the putative class, those  
14 concerns are not present. The Bakery has submitted sworn testimony and documentation that  
15 it in good faith attempted to identify all employees who might have been entitled to  
16 reimbursement, and has paid all minimum wage current and former Bakery employees  
17 double the amount previously deducted for laundering uniforms over the past 2 years.  
18 Plaintiff offers no evidence to rebut this claim.

19 Instead, plaintiff disputes that the Bakery's tender fully satisfies his claims so as to  
20 render this case moot. He contends that he has not been fully compensated for his claims  
21 because (1) he seeks damages for a third year due to the Bakery's "willful" FLSA violations,  
22 and (2) he was not reimbursed for a time, key or food handler's card. Response at 10.

23 **A.**

24 Plaintiff first argues that the amount tendered is insufficient to moot his case because  
25 it only covered a 2-year period, and he seeks enhanced damages for 3 years. Generally the  
26 statute of limitations for an FLSA violation is 2 years. 29 U.S.C. § 255(a). However, when  
27 the alleged FLSA violation is "willful," the statute of limitations extends to 3 years. Id.  
28 Plaintiff argues that because he has alleged that the Bakery's FLSA violation was "willful,"

1 see Compl. ¶¶ 31-33, he is entitled to a third year of damages.

2 Willfulness may be found where “the employer either knew or showed reckless  
3 disregard for the matter of whether its conduct was prohibited by the statute.” McLaughlin  
4 v. Richland Shoe Co., 486 U.S. 128, 133, 108 S. Ct. 1677, 1681 (1988). Plaintiff alleges  
5 only that the Bakery “willfully” failed to pay wages due to plaintiff and other employees.  
6 Compl. ¶¶ 31-33. This conclusory allegation is insufficient to satisfy Rule 8(a)(2), Fed. R.  
7 Civ. P., pleading requirements. Under Rule 8, “a complaint must contain sufficient factual  
8 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v.  
9 Iqbal, 556 U.S. 662, 677, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atl. Corp. v. Twombly,  
10 550 U.S. 544, 570, 127 S. Ct. 1955, 1974 (2007)). Legal conclusions couched as factual  
11 allegations are insufficient to demonstrate plausibility.

12 Plaintiff’s conclusory allegations of willfulness, without any evidentiary detail, are  
13 insufficient to state a plausible claim of “willfulness.” Because plaintiff has not adequately  
14 pled willfulness, the 2-year statute of limitations applies and plaintiff is eligible for  
15 reimbursement going back only 2 years from the date the complaint was filed. The Bakery’s  
16 uncontradicted evidence demonstrates that plaintiff has been fully reimbursed for deductions  
17 made during this period of time.

18 **B.**

19 Plaintiff next contends that the tender is insufficient to render his claim moot because  
20 he was not reimbursed for a time card, key card, or food handler’s card. He premises all of  
21 his statements regarding deductions other than uniform deductions “[u]pon the best of my  
22 recollection.” Plaintiff’s Decl. ¶ 4 (doc. 30). In other words, he thinks he remembers being  
23 charged for new time and key cards when he was hired, but he does not affirmatively state  
24 that he was. Likewise, plaintiff does not allege that he ever had to replace a time or key card.  
25 The Bakery, on the other hand, submits sworn testimony and documents demonstrating that  
26 no deductions for new or replacement time cards or key cards were ever made from  
27 plaintiff’s pay. Shaw Decl. ¶ 3 (doc. 41); Shirli Borenstein Decl. ¶ 25 (doc. 23). Plaintiff  
28 has presented no evidence to dispute this claim.

1 Similarly, plaintiff does not allege that a deduction from his pay was made for a food  
2 handler's card from Maricopa County. Rather, he states that he was required to obtain a food  
3 handler's card as a condition of his employment, and that in the past, the Bakery had covered  
4 this cost for employees. The Bakery's uncontradicted evidence demonstrates that it has  
5 never paid for employees' food handler cards. Moreover, plaintiff points to no rule or  
6 regulation requiring an employer to cover the cost of such a card. Plaintiff has failed to state  
7 a claim under the FLSA regarding time, key, or food handler's cards.

### 8 **C. Prejudgment Interest**

9 Plaintiff generically argues that this case is not moot because he seeks "interest."  
10 Response at 9, 10. Although this is an insufficient response to a motion to dismiss, we note  
11 that a plaintiff cannot recover both prejudgment interest and liquidated damages under the  
12 FLSA. Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 715, 65 S. Ct. 895, 906 (1945); see also  
13 Ford v. Alfaro, 785 F.2d 835, 842 (9th Cir. 1986) (recognizing that it is well established that  
14 "in the absence of a liquidated damage award, pre-judgment interest is necessary to fully  
15 compensate employees for the losses they have suffered").

### 16 **D. Additional Discovery**

17 Plaintiff has failed to produce a disputed issue of fact as to whether he has been fully  
18 reimbursed for improper wage deductions. Although he has requested an opportunity to  
19 conduct additional discovery, he has made no showing that, if given the opportunity,  
20 additional discovery would produce evidence supporting the requisite jurisdictional facts.  
21 Instead, the Bakery's affidavits and exhibits demonstrate that the controlling questions of  
22 fact, particularly those related to deductions from plaintiff's pay, are undisputed. Therefore,  
23 plaintiff has made no showing that additional discovery would be worthwhile.

24 While the voluntary cessation of challenged conduct does not ordinarily render a case  
25 moot because of the possibility of a resumption of the challenged conduct in the future, Knox  
26 v. Serv. Emp. Int'l Union, 132 S. Ct. 2277, 2287 (2012), here, plaintiff is no longer employed  
27 by the Bakery, is not eligible for rehire, 2nd Borenstein Decl. ¶ 5 (doc. 43), and is thus  
28 unaffected by the Bakery's future conduct.

1 We conclude that plaintiff's FLSA claim is moot because there is no longer a live case  
2 or controversy. Therefore, we grant the Bakery's motion to dismiss this claim for lack of  
3 subject matter jurisdiction (doc. 22).

#### 4 **V. Motion to Conditionally Certify Collective Action**

5 Because plaintiff's personal claims are moot, he has no standing to represent a class.  
6 A "class representative must be part of the class and possess the same interest and suffer the  
7 same injury as the class members." Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 156, 102  
8 S. Ct. 2364, 2370 (1982) (quotation omitted). Individuals without claims themselves cannot  
9 represent a class who may have claims. Id. If "none of the named plaintiffs purporting to  
10 represent a class establishes the requisite of a case or controversy with the defendants, none  
11 may seek relief on behalf of himself or any other member of the class." O'Shea v. Littleton,  
12 414 U.S. 488, 494, 94 S. Ct. 669, 675 (1974). Here, plaintiff may not represent the potential  
13 class because his personal claims are moot. Therefore, he has no standing to raise claims on  
14 behalf of other potential class members. Plaintiff's motion to conditionally certify collective  
15 action is denied (doc. 35).

#### 16 **VI. Supplemental Jurisdiction/Motion to Certify Question of State Law**

17 Plaintiff has also asserted various state law claims based on Arizona's wage payment  
18 statutes. Where a court dismisses a federal claim for lack of subject matter jurisdiction, it has  
19 no discretion to exercise supplemental jurisdiction over the state law claims. Herman Family  
20 Rev. Trust v. Teddy Bear, 254 F.3d 802, 806 (9th Cir. 2001); 28 U.S.C. § 1367(a)  
21 (supplemental jurisdiction may only be invoked after a court has established original  
22 jurisdiction). Because we have dismissed the federal claim as moot, we had no original  
23 jurisdiction upon which supplemental jurisdiction could attach. Accordingly, the state law  
24 claims are also dismissed. Even if jurisdiction existed, having dismissed the federal claim,  
25 we would decline to exercise jurisdiction over the state claims under 28 U.S.C. § 1367(c)(3).

26 Plaintiff also asks us to certify the question of attorney's fees under A.R.S. § 23-  
27 364(G) to the Arizona Supreme Court. Because we have dismissed all state law claims, the  
28 motion to certify the question is denied as moot (doc. 54).

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**VII. Attorney's Fees under the FLSA**

Remaining is plaintiff's argument related to attorney's fees under the FLSA. Pursuant to 29 U.S.C. § 216(b), mandatory attorney's fees are awarded once a plaintiff secures a judgment on an FLSA claim. The Bakery argues that because plaintiff's FLSA claim is moot after the tender of payment, there is no judgment and therefore no fees are required. We decline to resolve this issue at this time. Issues related to an award of attorney's fees will be resolved upon the filing of a motion pursuant to LRCiv 54.2.

**VIII. Conclusion**

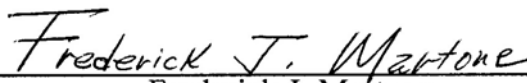
**IT IS ORDERED GRANTING** defendants' motion to dismiss for lack of subject matter jurisdiction (doc. 22).

**IT IS ORDERED DENYING** plaintiff's motion to strike declarations (doc. 51), and **DENYING** plaintiff's motion for leave to file second declaration (doc. 53).

**IT IS ORDERED DENYING** plaintiff's motion to conditionally certify collective action (doc. 35).

**IT IS ORDERED DENYING** plaintiff's motion to certify question of state law to Arizona Supreme Court (doc. 54).

DATED this 28<sup>th</sup> day of August, 2012.

  
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Frederick J. Martone  
United States District Judge