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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Maria Tolano, et al.,

10 Plaintiffs,

11 v.

12 El Rio Bakery, et al.,

13 Defendants.
14

No. CV-18-00125-TUC-RM

ORDER

15 Pending before the Court is Plaintiffs' "Motion to Court for Entry of Default
16 Judgment and Request for Monetary Relief" as to Defendants El Rio Bakery and Carlos
17 Guillermo Vargas Mendoza. (Docs. 29, 30.) For the reasons explained below, the Court
18 will grant Plaintiffs' Motion and award the requested relief.

19 **I. Background**

20 Plaintiffs filed a Complaint on March 7, 2018 (Doc. 1) and the operative Amended
21 Complaint on June 24, 2018 (Doc. 12). Plaintiffs allege that Defendants El Rio Bakery and
22 its owner, Defendant Carlos Guillermo Vargas Mendoza, failed to pay Plaintiffs for all
23 hours worked, failed to pay overtime, and retaliated against Plaintiffs after they
24 complained. (Doc. 12.) Plaintiffs raise claims for overtime violations under the Fair Labor
25 Standards Act ("FLSA"), 29 U.S.C. § 207(a); failure to pay the minimum wage in
26 compliance with the Arizona Minimum Wage Act ("AMWA"), A.R.S. § 23-362, *et. seq.*;
27 failure to make timely wage payments under the Arizona Wage Act ("AWA"), A.R.S. §
28 23-351; retaliation in violation of the FLSA, 29 U.S.C. § 215(a)(3); retaliation in violation

1 of the AMWA, A.R.S. § 23-364(B); and common law unjust enrichment. (*Id.*) Service was
2 executed upon Defendants El Rio Bakery and Vargas Mendoza on August 28, 2018. (Docs.
3 15, 16.)

4 Neither Defendant filed an Answer to Plaintiff's Amended Complaint. (Doc. 12.)
5 On September 14, 2018, Defendant Vargas Mendoza gave notice via counsel that he had
6 filed a Chapter 13 Bankruptcy Petition. (Doc. 17.) The Court ordered briefing as to whether
7 the automatic stay provision of 11 U.S.C. § 362 applied to Defendants in light of the
8 pending bankruptcy petition. (Doc. 18.) Both parties agreed that the stay provision applied
9 only to Defendant Vargas Mendoza, the debtor in the bankruptcy petition, and not to
10 Defendant El Rio Bakery. (Docs. 19, 20.) On December 17, 2018, the Court provided
11 Defendant El Rio Bakery an extension of time to file its Answer, but no Answer was filed.
12 (Doc. 21.)

13 On January 2, 2019, Plaintiffs requested entry of default against Defendant El Rio
14 Bakery pursuant to Rule 55(a) of the Federal Rules of Civil Procedure. (Doc. 22.) Default
15 was entered as to Defendant El Rio Bakery by the Clerk of Court on that same day. (Doc.
16 23.) On February 19, 2019, the Bankruptcy Court dismissed Defendant Vargas Mendoza's
17 Chapter 13 Petition, thus lifting the automatic stay pursuant to 11 U.S.C. § 362(c)(2)(B).
18 (Doc. 26.) Default was then entered as to Defendant Vargas Mendoza after he failed to
19 timely file an Answer. (Docs. 26, 27.) On April 4, 2019, Plaintiffs moved for entry of
20 default judgments against both Defendant El Rio Bakery and Defendant Vargas Mendoza.
21 (Docs. 29, 30.)

22 On August 20, 2019, the Court ordered that Defendants show cause as to why
23 default judgment should not be entered against them. (Doc. 32.) The Court also provided
24 Plaintiffs an opportunity to submit additional evidence and argument on the issue of
25 damages. (*Id.*) Plaintiffs submitted additional evidence and argument. (Doc. 36.)
26 Defendants did not respond to the Court's Order to Show Cause.

27 **II. Default Judgment Standard**

28 Once a party's default has been entered, the district court may grant default

1 judgment against that party. *See* Fed. R. Civ. P. 55(b)(2); *Aldabe v. Aldabe*, 616 F.2d 1089,
2 1092 (9th Cir. 1980). A defendant’s default does not automatically entitle the plaintiff to a
3 court-ordered judgment. *Aldabe*, 616 F.2d at 1092. Rather, a court has discretion whether
4 to grant or deny relief. *Id.* The Ninth Circuit has identified several factors, discussed below,
5 which a court should consider in adjudicating a motion for default judgment. *Eitel v.*
6 *McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986).

7 **III. Jurisdiction**

8 As Defendants have failed to appear in this action, the Court has an “affirmative
9 duty to look into its jurisdiction over both the subject matter and the parties” before
10 granting entry of default judgment. *In re Tuli*, 172 F.3d 707, 712 (9th Cir. 1999). Both
11 subject matter and personal jurisdiction are proper in this case.

12 This Court has original federal question jurisdiction over Plaintiffs’ FLSA claims.
13 28 U.S.C. § 1331. The Court also has supplemental jurisdiction over Plaintiffs’ claims
14 arising under Arizona law because those claims are so substantially related to Plaintiffs’
15 FLSA claims that they form part of the same “case or controversy.” 28 U.S.C. § 1367(a).

16 This Court also has jurisdiction over the parties. Defendants Vargas Mendoza and
17 El Rio Bakery were residents of Tucson, Arizona when the events complained of occurred
18 and this action was filed. (Doc. 12 ¶¶ 16-20.) Defendants conducted business in Arizona,
19 and this case concerns their alleged failure to comply with various employment statutes as
20 applied to their Arizona employees. (*Id.*) Personal service was properly executed against
21 Defendants on August 28, 2019. (Docs. 15, 16.)

22 Accordingly, the Court finds that it has jurisdiction over the subject matter and the
23 parties.

24 **IV. The *Eitel* Factors Counsel in Favor of the Entry of Default**

25 In *Eitel*, the Ninth Circuit laid out seven factors that may be considered by courts
26 exercising discretion as to the entry of a default judgment:

- 27 (1) the possibility of prejudice to the plaintiff;
28 (2) the merits of plaintiff’s substantive claim;

- 1 (3) the sufficiency of the complaint;
- 2 (4) the sum of money at stake in the action;
- 3 (5) the possibility of a dispute concerning material facts;
- 4 (6) whether the default was due to excusable neglect; and
- 5 (7) the strong policy underlying the Federal Rules of Civil
6 Procedure favoring decisions on the merits

7 782 F.2d at 1471-72. In applying the *Eitel* factors, “the factual allegations of the complaint,
8 except those relating to the amount of damages, will be taken as true.” *Geddes v. United*
9 *Fin. Grp.*, 559 F.2d 557, 560 (9th Cir. 1977). The Court will discuss each factor in turn.

10 A. Possibility of Prejudice to the Plaintiff

11 Plaintiffs served Defendants with their Amended Complaint in August 2018. (Docs.
12 15, 16.) Defendants have failed to answer. In the absence of a default judgment, Plaintiffs
13 will “likely be without other recourse for recovery.” *Young Poong USA Corporation v.*
14 *Young Poong Paper Mfg Co.*, No. CV-17-02434-PHX-DMF, 2018 WL 4177942, at *4 (D.
15 Ariz. July 3, 2018) (quoting *PepsiCo, Inc. v. Cal. Sec. Cans.*, 238 F. Supp. 2d 1172, 1177
16 (C.D. Cal. 2002). The possibility of prejudice to plaintiffs therefore weighs in favor of the
17 entry of default judgment.

18 B. Merits and Sufficiency of Complaint

19 Plaintiffs seek damages on their claims for overtime violations under the FLSA,
20 failure to pay the minimum wage in compliance with the AMWA, and retaliation in
21 violation of the FLSA and AMWA. The Court addresses each claim below.¹

22 i. *Overtime Violations Under the Fair Labor Standards Act*

23 The overtime provisions of the FLSA provide that employers must pay one and one-
24 half the regular hourly rate of compensation for hours worked beyond a regular forty-hour
25 workweek. 29 U.S.C. § 207(a)(1). To state a plausible claim of an overtime violation under
26 FLSA, a plaintiff must do more than “present[] generalized allegations asserting

27 ¹ Although Plaintiffs’ Amended Complaint asserts claims for failure to make timely wage
28 payments under the AWA and common law unjust enrichment, Plaintiffs do not seek
damages with respect to those claims, and thus the Court need not consider those claims
further.

1 violations” of the overtime provisions. *Landers v. Quality Commc 'ns, Inc.* 771, F.3d 638,
2 646 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 1845 (2015). Rather, under the post-*Twombly*
3 and *Iqbal* standard, a plaintiff must plead specific factual allegations “that there was at least
4 one workweek in which they worked in excess of forty hours and were not paid overtime
5 wages.” *Id.* Here, Plaintiffs’ complaint meets this burden because each Plaintiff specifies
6 at least one week in which he or she worked a specific number of overtime hours but was
7 not paid the overtime rate mandated by FLSA. (Doc. 12 ¶¶ 27, 30, 33, 38.) The Court is
8 therefore satisfied that Plaintiffs’ complaint states a claim for violations of the overtime
9 provisions of FLSA.

10 *ii. Minimum Wage Violations Under Arizona Law*

11 The AMWA requires that employers pay employees a certain hourly wage. A.R.S. §
12 23-363. As penalty for failing to pay at least the appropriate minimum wage, the AMWA
13 provides for recovery of not only the unpaid wage but also “an additional amount equal to
14 twice the underpaid wages.” *Id.* at 364. Plaintiffs allege with specificity that Defendants
15 consistently failed to pay the minimum wage as to each Plaintiff. (Doc. 12 ¶¶ 22-25 as to
16 Plaintiff Bernal, ¶ 28 as to Plaintiff Mendoza, ¶ 31 as to Plaintiff Herrera, ¶¶ 35-36 as to
17 Plaintiff Tolano). Plaintiffs allege the amount per hour required to be paid by the minimum
18 wage statute, the amount per hour actually paid, and the time periods in which the
19 violations occurred. *Id.*

20 Taking the factual allegations in the complaint as true, *TeleVideo Sys. v. Heidenthal,*
21 *Inc.*, 826 F.2d 915, 917-918 (9th Cir. 1987) (per curiam), the Court finds that Plaintiffs’
22 Amended Complaint (Doc. 12) contains sufficient factual information to make out a
23 plausible claim for relief under the AMWA.

24 *iii. Retaliation Under State and Federal Law*

25 Both FLSA and AMWA provide causes of action for retaliation for employees who
26 suffer adverse employment action because they assert statutory rights. 29 U.S.C. §
27 215(a)(3); A.R.S. § 23-364. The FLSA makes it unlawful “to discharge or in any other
28 manner discriminate against any employee because such employee has filed any complaint

1 or instituted or caused to be instituted any proceeding under or related to this chapter, or
2 has testified or is about to testify in any such proceeding[.]” *Id.* The AMWA provides that
3 it is unlawful for anyone to “discriminate or subject any person to retaliation for asserting
4 any claim or right under this article, for assisting any other person in doing so, or for
5 informing any person about their rights.” A.R.S. § 23-364(B). Adverse action within ninety
6 days of participation in protected activities raises a rebuttable presumption that the adverse
7 action was retaliatory in nature. *Id.*

8 The same factual allegations are relevant to Plaintiffs’ retaliation claims under both
9 FLSA and AMWA. With regard to Plaintiff Herrera, the Amended Complaint alleges that
10 Plaintiff Herrera invited other employees to attend an upcoming meeting at the Workers’
11 Rights Clinic to take place on September 22, 2017. (Doc. 12 ¶ 42.) The Amended
12 Complaint further alleges that immediately after that meeting Defendants refused to
13 schedule Plaintiff Herrera for work and soon after replaced her with a new employee. (*Id.*
14 ¶¶ 43-45.) With regard to Plaintiff Tolano, Plaintiffs allege that Federal Express delivered
15 a letter from the Workers’ Rights Clinic on or about February 16, 2018, demanding that
16 Defendants remedy their wage and hour violations with respect to all four Plaintiffs, who
17 were named in the letter. (*Id.* at ¶ 49.) Two days later, Plaintiff Tolano was fired, despite
18 having not received any negative feedback about her work over the past five years. (*Id.* ¶¶
19 50-51.)

20 Finally, with regard to Plaintiffs Bernal and Mendoza, Plaintiff’s Amended
21 Complaint alleges that within days of the delivery of the demand letter via Federal Express,
22 Defendants instructed Plaintiffs Bernal and Mendoza to fill out employment applications
23 even though they had each been working for Defendants for at least two years. (*Id.* ¶¶ 52,
24 58.) Afterwards, Defendants cut Plaintiffs Bernal and Mendoza’s hours drastically,
25 assigning Plaintiff Bernal only two days of work per week and Plaintiff Mendoza only 18-
26 20 hours per week. (*Id.* ¶¶ 54, 60.)

27 Retaliation claims under FLSA are governed by the three-step burden shifting
28 framework established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See*

1 *Forsyth v. City of Buena Park*, 691 Fed. App'x 363 (9th Cir. 2017). Thus, “a plaintiff
2 alleging retaliation under FLSA must first establish a prima facie case of retaliation by
3 showing (1) participation in protected activity known to the defendant, like the filing of a
4 FLSA lawsuit; (2) an employment action disadvantaging the plaintiff; and (3) a causal
5 connection between the protected activity and the adverse employment action.” *Mullins v.*
6 *City of New York*, 626 F.3d 47, 53 (2d Cir. 2010) (summarizing *McDonnell Douglas*
7 framework).

8 All four plaintiffs were engaged in “protected activity known to the defendant.”
9 *Mullins*, 626 F.3d at 53. Such activity is not limited to the filing of a formal complaint.
10 *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 14 (2011). Rather, a
11 complaint falls within the scope of the antiretaliation provision if it is “sufficiently clear
12 and detailed for a reasonable employer to understand it, in light of both content and context,
13 as an assertion of rights protected by the statute and a call for their protection.” *Id.* Here,
14 the Amended Complaint alleges that Plaintiff Herrera complained to Defendant Vargas
15 Mendoza on May 15, 2017, “and on several occasions thereafter,” that he was not paying
16 her the minimum wage. (Doc. 12 ¶ 39.) She then organized a meeting with the Workers’
17 Rights Clinic and encouraged her fellow employees to attend. (*Id.* ¶¶ 41-43.) Either her
18 oral complaints or the organizing of a meeting with a Workers Rights organization would,
19 standing alone, be understood by a reasonable employer as “an assertion of rights and a
20 call for their protection.” *Kasten*, 563 U.S. at 14.

21 Plaintiffs Tolano, Bernal, and Mendoza were each allegedly subjected to adverse
22 action immediately after being named in a letter authored by the Workers’ Rights Clinic
23 addressing Defendants’ violations of wage and hour statutes. (Doc. 12 ¶¶ 50, 52, 58.) A
24 formal letter sent by a legal representative is clearly sufficient to manifest the required
25 “assertion of rights and [] call for their protection.” *Kasten*, 563 U.S. at 14. Therefore, all
26 plaintiffs can demonstrate they were engaged in the “protected activity known to the
27 defendant” required to prevail on a FLSA retaliation claim. *Mullins*, 626 F.3d at 53.

28 Plaintiffs also each suffered “an employment action disadvantaging [them].” *Id.*

1 According to the Amended Complaint, Defendants refused to schedule Plaintiff Herrera
2 for work, discharged Plaintiff Tolano, and forced Plaintiffs Bernal and Mendoza to fill out
3 employment applications and drastically cut their hours. (Doc. 12 ¶¶ 45, 50, 52-54, 58-60.)
4 This caused Plaintiffs Bernal and Mendoza’s “working conditions [to] become so
5 intolerable that a reasonable person in the employee’s position would have felt compelled
6 to resign.” See *Pennsylvania State Police v. Suders*, 542 U.S. 129, 141 (2004).

7 Finally, the Court is persuaded that Plaintiffs have alleged sufficient factual
8 allegations to make out a plausible case for the requisite “causal connection” between the
9 protected activity and adverse action. *Mullins*, 626 F.3d at 53. Plaintiffs may prove
10 causation by showing that retaliation was a substantial or motivating factor for a
11 defendant’s adverse employment actions. *Ostad v. Or. Health Scis. Univ.* 372 F.3d 876,
12 884 (9th Cir. 2003). Plaintiffs can satisfy this standard in a variety of ways, including by
13 showing temporal proximity between the protected activity and the adverse action, through
14 statements by the employer showing its disapproval of the protected activity, or by showing
15 that the employer’s proffered reasons for the adverse action were pretextual. *Coszalter v.*
16 *City of Salem*, 320 F.3d 968, 977 (9th Cir. 2003).

17 Here, Plaintiffs allege that adverse action occurred almost immediately following
18 protected activity. In the case of Plaintiff Herrera, she was taken off the schedule
19 “[i]mmediately after the September 22 meeting” that she organized. (Doc. 12 ¶45.) In the
20 case of the other Plaintiffs, they suffered adverse action within days of the delivery by
21 Federal Express of the demand letter from the Workers’ Rights Clinic. (*Id.* ¶¶ 50, 52, 58.)
22 The Court is persuaded that the temporal proximity alleged between Plaintiffs’ protected
23 activity and the apparently adverse action is sufficient to state a prima facie claim. See
24 *Thomas v. City of Beaverton*, 379 F.3d 802, 812 (9th Cir. 2004) (“The Causal link between
25 a protected activity and the alleged retaliatory action can be inferred from timing alone
26 when there is a close proximity between the two.”) (internal quotation marks and citation
27 omitted).

28 Like FLSA, AMWA’s retaliation provision prohibits employers from taking

1 retaliatory actions against employees. A.R.S. § 23-364(G). Adverse action taken within 90
2 days of a person's assertion of their rights raises a rebuttable presumption that such action
3 was retaliatory. A.R.S. § 23-364(B). An employer can rebut that presumption by presenting
4 clear and convincing evidence that the adverse action was taken for permissible reasons.
5 *Id.* Here, the presumption has been raised as to each Plaintiff and has not been rebutted.
6 Accordingly, the Court finds that Plaintiffs have adequately stated a claim for retaliation
7 under both statutes.

8 C. Sum of Money at Stake in the Action

9 Plaintiffs seek monetary relief in the total amount of \$197,078 for all four Plaintiffs.
10 Plaintiffs allege that Defendants consistently failed to adhere to federal and state wage and
11 hour laws over a period of years. Defendants then discharged or constructively discharged
12 Plaintiffs when they complained or otherwise sought to vindicate their statutory rights.

13 Defendants' retaliatory actions are probative of intentional misconduct; this is not a
14 case of minor accidental or technical statutory violations made in good faith. *See, e.g.,*
15 *Chao v. A-One Med. Servs., Inc.*, 346 F.3d 908, 920 (9th Cir. 2003), *cert. denied*, 541 U.S.
16 1030 (2004) (finding denial of liquidated damages for overtime violations warranted where
17 the defendant has shown good faith and had an objectively reasonable basis for believing
18 it was complying with the law). Rather, the facts alleged suggest a pattern and practice of
19 purposeful violations of wage and hour laws undertaken for the purpose of financially
20 benefitting Defendants.

21 Moreover, the amount of the damages Plaintiffs seek are set by statute. The FLSA
22 provides for double damages for overtime violations. 29 U.S.C. § 216(b). The AMWA
23 provides for treble damages for minimum wage and wage payment violations. 23 A.R.S. §
24 23-364(G). Accordingly, the Court finds that the sum of money at stake in the action
25 weighs in favor of entry of default judgment.

26 D. Possibility of a Dispute Concerning Material Facts

27 Where a complaint states a cause of action and the defendant, although properly
28 served, fails to raise any issue of fact by responding to the allegations, courts will find that

1 this factor favors granting a default judgment as to liability. *See Stillwater Ins. Co. v.*
2 *Fricker*, No. CV-17-1080-PHX-DGC, 2018 WL 2985255 at *3 (D. Ariz. June 14, 2018).
3 If a genuine dispute over material facts existed, it is likely that Defendants would have
4 raised such a dispute in response to this action. Therefore, this factor weighs in favor of a
5 default judgment.

6 E. Whether Default Was Due to Excusable Neglect

7 It is clear that Defendants were aware of this proceeding because they provided
8 notice through counsel of Defendant Vargas' bankruptcy petition. (Doc. 17.) Defendants'
9 failure to address the substantive issues raised therefore appears willful and deliberate.
10 There is no indication that Defendants' failure to appear and defend this action was
11 anything other than purposeful. Accordingly, this factor weighs in favor of a default
12 judgment.

13 F. Federal Rules' Policy Favoring Decisions on the Merits

14 Cases should be decided upon their merits whenever reasonably possible. *Pena v.*
15 *Seguros La Comercial, S.A.*, 770 F.2d 811, 814 (9th Cir. 1985). This factor cautions
16 hesitation in the granting of a default judgment. However, here the Court has provided
17 multiple opportunities for Defendants to appear and defend themselves, and Defendants
18 have repeatedly declined those opportunities. Accordingly, a decision on the merits will
19 not be possible. While mindful of the Federal Rules' policy favoring decisions on the
20 merits, the Court finds that this factor does not outweigh the other *Eitel* factors discussed
21 above.

22 **V. Damages**

23 In contrast to other allegations in the Complaint, allegations pertaining to damages
24 are not taken as true. *See TeleVideo Sys., Inc. v. Heidenhal*, 826 F.2d 915, 917-18 (9th Cir.
25 1987). As a result, a "[p]laintiff is required to prove all damages sought in the
26 complaint." *Philip Morris USA, Inc. v. Castworld Prods., Inc.*, 219 F.R.D. 494, 498 (C.D.
27 Cal. 2003). "The plaintiff is required to provide evidence of its damages, and the damages
28 sought must not be different in kind or amount from those set forth in the complaint." Fed.

1 R. Civ. P. 54(c); *Amini Innovation Corp. v. KTY Int'l Mktg.*, 768 F. Supp. 2d 1049, 1054
2 (C.D. Cal. 2011). “In determining damages, a court can rely on declarations submitted by
3 the plaintiff[.]” *Philip Morris USA, Inc.*, 219 F.R.D. at 498.

4 Plaintiffs request double damages for overtime violations as provided by the
5 FLSA, 29 U.S.C. § 216(b). (Doc. 31 at 4.) They also request treble damages for minimum
6 wage violations under the AMWA, A.R.S. § 23-364(G). (*Id.* at 4-5.) They further request
7 \$150 in damages for retaliation under the AMWA, A.R.S. § 23-364(G), to be paid for each
8 day between Plaintiff’s alleged termination or constructive discharge and October 4, 2018,
9 the date El Rio ceased operations. (*Id.* at 5.)

10 Plaintiff Tolano requests damages in the amount of \$52,171, comprised of \$6,190
11 in base wages and liquidated damages for overtime violations under the FLSA, \$11,781 in
12 treble damages for minimum wage violations under the AMWA, and \$34,200 as remedy
13 for retaliation under AMWA. (*Id.* at 7.)

14 Plaintiff Bernal requests damages in the amount of \$51,925, comprised of \$7,780 in
15 base wages and liquidated damages for overtime violations under the FLSA, \$23,295 in
16 treble damages for minimum wage violations under the AMWA, and \$20,850 as remedy
17 for retaliation under AMWA. (*Id.* at 10.)

18 Plaintiff Mendoza requests damages in the amount of \$30,106, comprised of \$6,976
19 in base wages and liquidated damages for overtime violations under the FLSA, \$4,680 in
20 treble damages for minimum wage violations under the AMWA, and \$18,450 as remedy
21 for retaliation under the AMWA. (*Id.* at 11.)

22 Plaintiff Herrera requests damages in the amount of \$62,876, comprised of \$410 in
23 base wages and liquidated damages for overtime violations under the FLSA, \$5,916 in
24 treble damages for minimum wage violations under the AMWA, and \$56,550 as remedy
25 for retaliation under the AMWA. (*Id.* at 12-13.)

26 A. Damages for Overtime Violations under the FLSA

27 Plaintiffs request double damages for overtime violations as provided by the FLSA,
28 29 U.S.C. § 216(b). (Doc. 31 ¶ 10.) The affidavit of Plaintiffs’ counsel contains detailed

1 and specific calculations as to the claimed damages for overtime violations under the
2 FLSA. (Doc. 31 at 25-55.) The affidavit specifies the amount paid for each relevant period
3 and the estimated hours of overtime worked during each week of the relevant period. The
4 affidavit accurately calculates Plaintiffs' damages for the overtime violations. The Court
5 finds that the requested overtime damages are reasonable as to each Plaintiff and are
6 adequately supported by cognizable evidence.

7 B. Damages for Minimum Wage Payments under the AMWA

8 Plaintiffs also seek statutory treble damages under the AMWA for Defendants'
9 failure to pay the minimum wage. (Doc. 31 at 4-5.) The affidavit contains detailed and
10 specific calculations as to these claimed violations. (*Id.* at 25-55) The affidavit shows an
11 estimated number of hours worked for each week during the relevant period, the minimum
12 wage at that time, and the amount actually paid. (*Id.*) The affidavit accurately calculates
13 Plaintiffs' damages for the minimum wage violations. The Court finds that the requested
14 damages are reasonable as to each Plaintiff and are adequately supported by cognizable
15 evidence.

16 C. Damages for Retaliation under the AMWA

17 Plaintiffs also request \$150 in statutory damages for retaliation under the AMWA,
18 A.R.S. § 23-364(G), for each day between their discharge or constructive discharge and
19 when El Rio ceased operations on October 4, 2018. (Doc. 31 at 5.) The AMWA provides
20 for statutory damages for unlawful employment retaliation in an amount "sufficient to
21 compensate the employee and deter future violations, but not less than one hundred fifty
22 dollars for each day that the violation continued until legal judgment is final." A.R.S. 23-
23 364(G).

24 The Court previously noted that remedies for employment retaliation generally
25 require an employee to mitigate their damages by attempting to secure comparable
26 employment. (Doc. 32.) At the Court's invitation, Plaintiffs submitted affidavits describing
27 the extent to which they mitigated their damages by seeking comparable employment.
28 (Docs. 36-1, 36-2, 36-3, 36-4.) Each Plaintiff explained that they either found comparable

1 employment or have been diligently attempting to do so. (*Id.*) Plaintiffs also submitted
2 additional argument that A.R.S. § 23-364(G) sets a “floor” on retaliation damages and that
3 mitigation of damages is not required. (Doc. 36 at 6-14.)

4 The Court finds Plaintiffs’ arguments persuasive. In particular, the plain language
5 of A.R.S. § 23-364(G)’s minimum daily retaliation provision differs pointedly from the
6 requirements set up under analogous statutes like the FLSA and Title VII, 42 U.S.C. §
7 2000e-5(g)(1). Whereas AMWA explicitly provides for daily minimum damages of \$150
8 for each day the retaliatory violation continues, the FLSA’s retaliation remedy contains no
9 such provision for minimum damages. Whereas Title VII explicitly requires interim
10 earnings and amounts earnable with reasonable diligence be deducted from back pay, the
11 AMWA contains no such requirement.

12 The AMWA, adopted by ballot initiative in 2006, explicitly incorporates elements
13 of pre-existing employment statutes, for example by defining “small business” by reference
14 to the FLSA and by adopting the FLSA’s test for whether an employment relationship
15 exists. A.R.S. § 23-362(C)-(D). The AMWA’s framers therefore chose to adopt some
16 provisions of analogous law. At the same time, they declined to require that damages be
17 offset by interim earnings and added an unusual requirement of daily minimum damages
18 for retaliation. This strongly suggests an intent to provide for stronger protections and
19 deterrence against retaliation than analogous laws. *Cf. Lorillard v. Pons*, 434 U.S. 575,
20 584-85 (1978) (inferring congressional intent based on Congress’ choice to adopt the
21 FLSA’s remedial framework rather than Title VII’s).

22 Accordingly, the Court holds that the period of violation under A.R.S. § 23-364(G)
23 ran from each Plaintiff’s date of discharge or constructive discharge until El Rio closed
24 down. Plaintiffs are each entitled to \$150 in statutory damages for each day within that
25 period, and no offset from interim earnings is required. Plaintiffs have correctly calculated
26 the damages and the Court finds that the requested damages are reasonable as to each
27 Plaintiff and adequately supported by cognizable evidence.

28 Accordingly,

1 **IT IS ORDERED** that Plaintiffs’ Motion for Default Judgment (Docs. 29, 30) is
2 **granted.**

3 **IT IS FURTHER ORDERED** that Defendants shall be liable to Plaintiffs for
4 damages as set forth below:

5
6 Plaintiff Maria Teresa Tolano

7	Overtime Violations Under the Fair Labor Standards Act:	\$6,1900
8	Minimum Wage Violations Under the Arizona Minimum Wage Act:	\$11,781
9	Retaliation Remedy Under the Arizona Minimum Wage Act:	\$34,200
10	Total for Plaintiff Tolano:	\$52,171

11
12 Plaintiff Francisco Javier Ponce Bernal

13	Overtime Violations Under the Fair Labor Standards Act:	\$7,780
14	Minimum Wage Violations Under the Arizona Minimum Wage Act:	\$23,295
15	Retaliation Remedy Under the Arizona Minimum Wage Act:	\$20,850
16	Total for Plaintiff Bernal:	\$51,925

17
18 Plaintiff Jose Daniel Mendoza

19	Overtime Violations Under the Fair Labor Standards Act:	\$6,976
20	Minimum Wage Violations Under the Arizona Minimum Wage Act:	\$4,680
21	Retaliation Remedy Under the Arizona Minimum Wage Act:	\$18,450
22	Total for Plaintiff Mendoza:	\$30,106

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Plaintiff Raquel Herrera

Overtime Violations Under the Fair Labor Standards Act:	\$410
Minimum Wage Violations Under the Arizona Minimum Wage Act:	\$5,916
Retaliation Remedy Under the Arizona Minimum Wage Act:	\$56,550
Total for Plaintiff Herrera:	\$62,876

Total for All Plaintiffs: \$197,078

IT IS FURTHER ORDERED that the Clerk of Court shall enter judgment in favor of Plaintiffs accordingly and close this case.

Dated this 27th day of November, 2019.



Honorable Rosemary Márquez
United States District Judge