

IN THE UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

STEPHANIE G. KLINGER,

Plaintiff,

vs.

CASE No. 8:11-CV-1586T-27TGW

PHIL MOOK ENTERPRISES, INC., *et al.*,

Defendants.

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**DEFENDANTS' REVISED TENDER OF FULL PAYMENT AND  
MOTION TO DISMISS COMPLAINT WITH PREJUDICE**

Defendants Phil Mook Enterprises, Inc., d/b/a KFC, and Christopher Mook, an individual, by and through their undersigned counsel and pursuant to Fed.R.Civ.P. 12(h)(3), hereby file and serve upon plaintiff their *Revised Tender of Full Payment and Motion to Dismiss Complaint with Prejudice* in the above-referenced matter. In the further support thereof, Defendants state:

**TENDER OF PAYMENT IN FULL**

1. Plaintiff filed a one-count Complaint against defendants in this matter on July 2011, asserting an alleged claim for recovery of overtime compensation.
2. Although defendants vigorously deny all of plaintiff's allegations, plaintiff's claim, and that defendants owe plaintiff any amount of money for unpaid wages, in the interest of expeditious resolution of plaintiff's claim and the efficient use of this Court's time and resources, defendants hereby tender to plaintiff payment in full for her overtime claim, liquidated damages and interest, in the total amount of \$3,415.66. A copy of the check tendered to plaintiff and plaintiff's counsel is attached as Exhibit "A" hereto.

3. This payment is based upon plaintiff's representation, made in Plaintiff's Response to Defendants' Tender of Full Payment and Motion to Dismiss Complaint with Prejudice [Doc. 9] that, at most, plaintiff's overtime damages total \$1,638.24. This tender also includes liquidated damages in the same amount, as well as prejudgment interest in the amount of \$138.98, which represents interest accruing on the overtime damages and liquidated damages for the period running from the beginning of plaintiff's employment through August 25, 2011, assessed at the statutory rate of .000164% per day in accordance with Section 55.03(1), *Florida Statutes*.

#### **MOTION TO DISMISS**

4. Rule 12(h)(3) states in relevant part: "If the court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the action."

5. Having tendered payment in full for all amounts that possibly could be owed to plaintiff, defendants have eliminated any controversy or cause of action available to be pursued by plaintiff in this Court, and dismissal with prejudice, pursuant to Fed.R.Civ.P. 12(h)(3), of plaintiff's claims is appropriate and necessary.

#### **SUPPORTING MEMORANDUM OF LAW**

Pursuant to § 3-311(a) and (b) of the Uniform Commercial Code, payment in full of a disputed claim, in which payment is accompanied by explicit and conspicuous communication to the effect that the payment was tendered as full satisfaction of the claim, constitutes an Accord and Satisfaction of the claim. *See, e.g. Uniform Commercial Code, § 3-311(a) and (b) (2008).*

Since defendants have tendered payment in full to plaintiff, plaintiff's claim is moot and this action should be dismissed. "A case becomes moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Cameron-Grant v. Maxim Healthcare Services, Inc.*, 347 F.3d 1240, 1245 (11<sup>th</sup> Cir. 2003) (internal citations omitted); *Troiano v. Supervisor of Elections in Palm Beach County, Fla.*, 382 F.3d 1276, 1281-82 (11<sup>th</sup> Cir. 2004) ("[A] case is moot when it no longer presents a live controversy. . . If events that occur subsequent to the filing of the lawsuit . . . deprive the court of the ability to give the plaintiff . . . meaningful relief, then the case is moot and must be dismissed.")<sup>1</sup>

**CONCLUSION**

For the foregoing reasons, defendants respectfully request that this Court dismiss plaintiff's Complaint with prejudice.

Respectfully submitted,

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<sup>1</sup> See also *MacKenzie v. Kindred Hospital East, LLC*, 276 F.Supp. 2d 1211, 1219 (M.D. Fla. 2003) (defendant's offer of full relief rendered the case moot, even though the plaintiff did not accept the offer).

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on August 24<sup>th</sup>, 2011, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following:

Gregg I. Shavitz, Esquire  
Camar Jones, Esquire  
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/s/ Richard C. McCrea, Jr.  
Attorney