

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION**

JIMMY BELUE, ET AL.	§	
	§	
VS.	§	CASE NO. 2:07CV1004-KS-MTP
	§	
WAYNE FARMS LLC	§	DEFENDANT
	§	
<u>CONSOLIDATED WITH</u>	§	
	§	
ROBERT THOMAS DUNN, ET AL.	§	PLAINTIFFS
	§	
VS.	§	CASE NO. 2:07CV1005-MTP
	§	
WAYNE FARMS LLC	§	DEFENDANT

DEFENDANT’S MOTION FOR PARTIAL SUMMARY JUDGMENT (BANKRUPTCY)

COMES NOW Wayne Farms LLC, moving the Court to enter partial summary judgment dismissing with prejudice 2 (2.1%) of our 93 Plaintiffs because the Plaintiffs are judicially estopped from asserting this FLSA claim because they failed to list it as an asset in their bankruptcy petitions, and because the Plaintiffs are not the real parties in interest. In support of this Motion, Wayne Farms would show:

1. The Bankruptcy Code imposes upon bankruptcy debtors an express affirmative duty to disclose all assets, including contingent and unliquidated claims.
2. The duty of disclosure is a continuing one, and the debtor must disclose all potential causes of action, even contingent, dependent, or conditional causes.
3. If a debtor fails to disclose a pending or potential claim in his or her bankruptcy petition, he or she is judicially estopped from bringing that claim later.
4. Each of the Plaintiffs listed below has filed a bankruptcy petition under Chapter 7.

5. Their petitions were filed at some point in the relevant time during which their claims accrued in this lawsuit.¹

6. Each Plaintiff failed to list this FLSA claim as a contingent or unliquidated claim in his or her bankruptcy petition.

7. The Bankruptcy Court accepted their representation that they had no contingent or unliquidated claims and discharged their debts under Chapter 7.

8. The Plaintiffs did not act inadvertently; they had a clear motive to minimize assets, and they had knowledge of the factual basis for the FLSA claim at the time.

9. Thus, the Plaintiffs listed below are judicially estopped from asserting FLSA claims not listed in their bankruptcy petitions.

10. An action must be prosecuted in the name of the real party in interest. Fed. R. Civ. P. 17(a).

11. Any claim that arises prior to filing for bankruptcy or accrues prior to the ultimate discharge is property of the bankruptcy estate, and the trustee is the real party in interest with exclusive standing to pursue the claim.

12. These FLSA claims arose prior to or during the Plaintiffs' bankruptcy proceedings. Thus, the trustee is the real party in interest, and the Plaintiffs lack standing to pursue these claims.

13. The lack of substitution was not due to an understandable mistake, because Plaintiffs were placed on affirmative notice that the bankruptcy trustee was the proper party.

¹ For purposes of argument only, it is assumed that the limitations period would begin three years prior to the date on which each Plaintiff filed her written consent to sue. 29 U.S.C. § 255.

14. Plaintiffs have not acted within a reasonable time to substitute the trustee as the proper party.

15. Thus, the Plaintiffs listed below lack standing to pursue this claim for failure to prosecute in the name of the real party in interest, the bankruptcy trustee.

16. Therefore, these Plaintiffs should be dismissed based on judicial estoppel for failure to list this FLSA claim on their bankruptcy petition, or based on Rule 17(a) for failure to prosecute in the name of the real party in interest, or both:

	<u>Name</u>	<u>Ch. 7 Bankruptcy Petition Filed²</u>	<u>Discharge</u>	<u>Consent Filed³</u>
1	Hogeland, Carolyn S.	10/5/05 (Ex. 1)	2/6/06 (Ex. 2)	10/18/06 (Doc. 1-2, p. 13 filed in N.D. Ala. 4:06cv2095)
2	Peppers, Dorothy Mae	7/17/07 (Ex. 3)	10/19/07 (Ex. 4)	9/13/07 (Doc. 75-2, p. 25 filed in N.D. Ala. 4:06cv2095)

17. On June 9, 2008, in accordance with Pretrial Order No. 2, paragraph 7, defense counsel sent Plaintiffs' counsel a list of Plaintiffs whose claims defense counsel believed should be dismissed in the form of a dismissal spreadsheet. Each of the Plaintiffs listed in this Motion was designated as a requested dismissal, for the reason underlying this Motion – bankruptcy estoppel / lack of standing.

18. Plaintiffs were required to respond, in writing, by August 1, 2008; the Court granted them a final extension until October 1, 2008. See Doc. 35 in 2:07md1872.

² Because bankruptcy petitions are on average over thirty pages long, only the pertinent pages of the bankruptcy petitions are attached. The specific pages include: the Voluntary Petition (2-3 pages); the page where the Plaintiff answered "None" to the question under Schedule B – Personal Property which asks whether the debtor has "Other contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and right to setoff claims;" and the Plaintiff's declaration under penalty of perjury.

³ The Court may take judicial notice of its own records.

19. Plaintiffs did not respond to the dismissal requests in writing. They disclosed no reason for rejecting dismissal. They identified no documents supporting their position. In short, they ignored these commands of Pretrial Order No. 2, paragraph 7.

20. Federal Rule of Civil Procedure Rule 16(f)(1)(C) states that the Court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney fails to obey a scheduling order or other pretrial order. Wayne Farms asks the Court to prohibit these disobedient Plaintiffs from opposing the factual assertions of this Motion as authorized by Rule 37(b)(2)(A)(ii).

WHEREFORE, Wayne Farms LLC moves the Court to enter partial summary judgment dismissing these 2 Plaintiffs from these actions, with prejudice, taxing to them all related costs.

Respectfully submitted this the 15th day of October, 2008.

WAYNE FARMS LLC

BY: BALCH & BINGHAM LLP

s/Anne Harlan Latino

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