

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

JIMMY BELUE, ET AL.	§		PLAINTIFFS
	§		
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

**BRIEF SUPPORTING DEFENDANT’S MOTION
FOR PARTIAL SUMMARY JUDGMENT (TIME BAR)**

Even if Plaintiffs were able to prove FLSA violations, and that those violations were willful, so that the applicable statute of limitations would be three years rather than two,¹ these seven Plaintiffs should be dismissed, based on these genuinely undisputed facts:

	<u>Name</u>	<u>Terminated</u>	<u>Consent Filed</u>
1	Burse, Traci S. Watkins	8/16/2004 (Ex. 2, p. 1)	9/30/07 (Doc. 76-2, p. 9 filed in N.D. Ala. 4:06cv2095)
2	Jackson, McKinley T.	7/29/1996 ² (Ex. 2, p. 2)	3/5/07 (Doc. 34, p. 4 filed in N.D. Ala. 4:06cv2095)
3	Payne, Alethea	No employment record (Ex. 2, p. 3)	3/5/07 (Doc. 34, p. 5 filed in N.D. Ala. 4:06cv2095) ³

¹ This point is assumed here only for purposes of argument, in recognition that the record is not yet ripe for a ruling on Wayne Farms’ argument that the two year bar applies.

² As noted in Exhibit 1, it is possible that Wayne Farms has no record because the Plaintiff worked for Wayne Farms so long ago that the relevant employment record is no longer available. This motion assumes this explanation for the lack of an employment record, rather than mis-representation of prior employment.

³ Her consent indicates that she worked for Tyson Foods in Albertville, AL, and not Wayne Farms.

	<u>Name</u>	<u>Terminated</u>	<u>Consent Filed</u>
4	Richey, Tammy Renee	No employment record (Ex. 2, p. 4)	10/18/06 (Doc. 1-2, p. 18 filed in N.D. Ala. 4:06cv2095)
5	Robinson, Mashika R.	7/19/2004 (Ex. 2, p. 5)	9/13/07 (Doc. 75-2, p. 35 filed in N.D. Ala. 4:06cv2095)
6	Vinson, Constance	3/25/2003 (Ex. 2, p. 6)	10/18/06 (Doc. 1-2, p. 20 filed in N.D. Ala. 4:06cv2095)
7	Zamarripa, Baltazar C.	4/6/2004 (Ex. 2, p. 7)	11/20/07 (Doc. 5, p. 21 filed in S.D. Miss. 2:07cv1004)

Wayne Farms submits that the relevant dates are not genuinely disputed and that the applicable law is clear. If Plaintiffs were able to prove willful FLSA violations, the applicable statute of limitations would be three years. 29 U.S.C. § 255. The FLSA limitation period extends backwards from the filing of a written consent to sue. A consent filed after commencement of an action does not relate back to the complaint's filing date. *See LaChapelle v. Owens Illinois, Inc.*, 513 F.2d 286, 288-89 (5th Cir. 1975); *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1106 (11th Cir. 1996). The table set forth in the motion and reproduced above provides employment termination dates drawn from Wayne Farms payroll data. Wayne Farms has produced these employment records to Plaintiffs, and they are stipulated to be authentic. See Business Records Stipulation, Doc. 25, 2:07md1872. The consent filing dates set forth in the table above are drawn from the Court's records, as shown by the document citations. The Court may take judicial notice of its own records. Thus, these Plaintiffs' claims were time-barred when their consents were filed. Consequently, they should be dismissed, with prejudice.⁴

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

⁴ Plaintiffs' counsel has indicated several times in the last two years that they are willing to consider dismissing time-barred claimants. Following up on such statements, Wayne Farms has tendered several proposed orders. None has been accepted.

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 – time-bar. 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. 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. Due to Plaintiffs’ failure to adequately respond and their resulting failure to obey the Court’s Order, Wayne Farms requests that the Court exclude all facts and documentation suggesting that these Plaintiffs should not be dismissed.

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.” Because Plaintiffs have clearly failed to obey the Court’s Pretrial Order No. 2, any just sanctions or those allowed by Rule 37(b)(2)(A) are appropriate at this time. Rule 37(b)(2)(A) provides sanctions for a party’s failure to obey a discovery order, including “(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence.” In accordance with this Rule, Plaintiffs should be prohibited from opposing this Motion for Partial Summary and also prohibited from introducing any facts or documents regarding such matters into evidence.⁵

⁵ See e.g. *Fleming & Assoc. v. Newby & Tittle*, 529 F.3d 631 (5th Cir. 2008) (Federal Rule 16 permits exclusion of expert report submitted after scheduling order deadline); *Edmonds v. Beneficial Miss., Inc.*, 212 Fed.Appx. 334 (5th Cir. 2007) (Federal Rules 26 and 37 permitted court to exclude credit report which plaintiff failed to disclose prior to discovery deadline); *Barrett v. Atlantic Richfield Co.*, 95 F.3d 375, 380 (5th Cir. 1996) (Federal Rules 16 and 37 authorize court to impose sanctions on disobedient party by refusing to allow that party to introduce designated matters into evidence, such as expert opinions provided subsequent to the deadline required by the court’s scheduling order); *Jones v. Flowserve FCD Corp.*, 73 Fed.Appx. 706 (5th Cir. 2003) (court did not abuse its discretion in striking summary judgment affidavit

In conclusion, because their claims were time-barred when their consents were filed and because they should be prohibited from opposing this Motion or offering any evidence as a result of their failure to obey Pretrial Order No. 2, these 7 Plaintiffs should be dismissed, with prejudice.

Respectfully submitted this the 9th day of October, 2008.

WAYNE FARMS LLC

BY: BALCH & BINGHAM LLP

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which contained three expert opinions not previously disclosed during discovery); *Velez v. Awning Windows, Inc.*, 375 F.3d 35, 42-43 (1st Cir. 2004) (defendants prohibited from opposing plaintiff's claims because defendants failed to comply with scheduling order); *Ware v. Rodale Press, Inc.*, 322 F.3d 218 (3rd Cir. 2003) (plaintiff precluded from introducing evidence of damages at trial after repeated non-compliance with discovery requests and scheduling orders which required such disclosure); *Rabb v. Amatex Corp.*, 769 F.2d 996 (4th Cir. 1985) (appellate court affirmed trial court's decision to preclude plaintiff's evidence for failure to comply with discovery orders).

CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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