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**
	§	
CONSOLIDATED WITH	§	
	§	
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 (BANKRUPTCY)

I. Introduction

These two Plaintiffs should be dismissed, based on judicial estoppel for failure to list their FLSA claims on their bankruptcy petitions, or based on Rule 17(a) for failure to prosecute in the name of the real party in interest, or both:

	Name	Ch. 7 Bankruptcy Petition Filed[1]	Discharge	Consent Filed[2]
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)

[1] 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.

[2] The Court may take judicial notice of its own records.

II. Judicial Estoppel

Wayne Farms submits that the relevant dates are not genuinely disputed and that the applicable law is clear. "Judicial estoppel is a common law doctrine by which a party who has assumed one position in his pleadings may be estopped from assuming an inconsistent position." *In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 1999). The Bankruptcy Code imposes "upon bankruptcy debtors an express affirmative duty to disclose all assets, *including contingent and unliquidated claims*." *Id.* at 207-8 (emphasis in original). "The duty of disclosure in a bankruptcy proceeding is a continuing one, and a debtor is required to disclose all potential causes of action." *Id.* at 208.

> The debtor need not know all the facts or even the legal basis for the cause of action; rather, if the debtor has enough information . . . prior to confirmation to suggest that it may have a possible cause of action, then that is a "known" cause of action such that it must be disclosed.

Id. (citations omitted) (omission in original). The Fifth Circuit stated that "*[a]ny claim with potential must be disclosed*, even if it is contingent, dependent, or conditional." *Id.* (emphasis in original) (citations omitted).

"When a debtor fails to disclose a pending or potential claim in her bankruptcy petition, she is judicially estopped from bringing that claim later." *Kamont v. West*, 83 Fed.Appx. 1, 3 (5th Cir. 2003) (unpublished) (citing *In re Coastal Plains*, 179 F.3d at 210). A court should apply judicial estoppel if:

(1) the position of the party against which estoppel is sought is plainly inconsistent with its prior legal position;

(2) the party against which estoppel is sought convinced a court to accept the prior position; and

(3) the party did not act inadvertently.

Jethroe v. Omnova Solutions, Inc., 412 F.3d 598, 600 (5th Cir. 2005).

a. The Plaintiffs have represented an inconsistent position to the Court.

The omission of a claim from mandatory bankruptcy filings is tantamount to a representation that no such claim existed. *In re Superior Crewboats*, 374 F.3d 330, 335 (5th Cir. 2004). Each Plaintiff above filed a bankruptcy petition under Chapter 7. These petitions were filed at some point in the relevant time during which their claims in this lawsuit accrued.[3] Each Plaintiff failed to list this FLSA claim as a contingent or unliquidated claim in his or her petition. Therefore, the Plaintiffs have asserted a position in this FLSA lawsuit that is plainly inconsistent with their prior legal positions, namely that they had no contingent or unliquidated claims.

b. The Plaintiffs convinced the bankruptcy court to accept their first position.

Adoption of a prior position does not require a formal judgment; it only requires that the first court adopted the position urged by the party, either as a preliminary matter or as a part of a final disposition. *In re Superior Crewboats*, 374 F.3d at 335. Under Chapter 7, when a Court accepts an individual's bankruptcy petition disclosing all of his or her assets and ultimately grants the debtor a discharge of his indebtedness, the Court has adopted any representations made in or omitted from the bankruptcy petition. *Burnes v. Pemco Aeroplex Inc.*, 291 F.3d 1282, 1288 (11th Cir. 2002). This rule applies equally under Chapter 13 cases, when a Court confirms the debtor's plan. *De Leon v. Comcar Industries Inc.*, 321 F.3d 1289, 1291 (11th Cir. 2003).

[3] Causes of action accruing prior to the filing of a bankruptcy petition are property of the bankruptcy estate and may only be prosecuted by the bankruptcy trustee. *Ratliff v. Bay Inc. of Texas*, 2007 WL 1455969, at *1 (W.D. La. May 15, 2007). For purposes of argument only, it is assumed that the limitations period would begin three years before each Plaintiff filed her written consent to sue. 29 U.S.C. § 255.

Here, each of the Plaintiffs convinced the bankruptcy court to accept his or her prior position – that they had no contingent or unliquidated claims – because each Plaintiff has received a discharge under Chapter 7.

c. The Plaintiffs did not act inadvertently.

In considering judicial estoppel for bankruptcy cases, the debtor's failure to disclose is "inadvertent" only when the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment. *In re Coastal Plains*, 179 F.3d at 210. "A debtor always has a motive for concealing potential causes of action in order to minimize income and assets." *Gaskins*, 521 F.Supp.2d at 697-98. Plaintiffs would certainly reap a windfall if they are able to recover on their undisclosed FLSA claims without having disclosed them to the creditors. *In re Superior Crewboats*, 374 F.3d at 336. So, to show that the failure to disclose these claims was inadvertent, Plaintiffs must show that they were unaware of the facts giving rise to them. *Jethroe*, 412 F.3d at 601. The Complaint alleges that, for the three years prior to the filing of the Complaint, Plaintiffs were not paid overtime compensation allegedly due for various activities, including donning and doffing personal protective equipment.[4] Thus, it is clear that Plaintiffs had a sufficient factual basis at the time of filing their bankruptcy petitions to disclose their causes of action related to the FLSA. *See Gaskins,* 521 F.Supp.2d at 697.

d. Therefore, the Court should dismiss these Plaintiffs' claims based on judicial estoppel.

In *Jethroe*, the Fifth Circuit affirmed the district court's holding that the plaintiff's Title VII claim was judicially estopped because the plaintiff failed to disclose the claim during the

[4] Again, Plaintiffs do not have to know or understand the legal or statutory basis for filing the lawsuit; they only need to be aware of the facts that ultimately support the claim. *In re Coastal Plains*, Inc., 179 F.3d at 208.

bankruptcy proceedings. *Jethroe*, 412 F.3d at 600. The Fifth Circuit also held that judicial estoppel barred plaintiffs' personal injury suit as a matter of law for failure to disclose the claim in their bankruptcy case. *In re Superior Crewboats*, 374 F.3d 330 (5th Cir. 2004).[5] In *Gaskins v. Thousand Trails*, LP, 521 F.Supp.2d 693 (S.D. Ohio 2007), the court held that judicial estoppel barred the employee's FLSA claim because she did not list her claim as a contingent or unliquidated claim in her Chapter 7 bankruptcy petition.

Allowing Plaintiffs to reap a windfall at the expense of their creditors "would permit debtors to conceal their claims; get rid of [their] creditors on the cheap, and start over with a bundle of rights." *In re Superior Crewboats*, 374 F.3d at 336. Furthermore, "[a]llowing [the debtor] to back-up, re-open the bankruptcy case, and amend his bankruptcy filings, only after his omission has been challenged by an adversary, suggests that a debtor should consider disclosing personal assets only if he is caught concealing them." *Id.* Therefore, the Court should dismiss these Plaintiffs' claims based on judicial estoppel.

III. Lack of Standing

Rule 17(a) requires that "an action must be prosecuted in the name of the real party in interest." Fed. R. Civ. P. 17(a). These FLSA claims arose prior to the Plaintiffs' filing for bankruptcy or accrued prior to their ultimate discharge. Thus, these claims are property of the

[5] The Fifth Circuit recently differentiated this case from their holding in *Kane v. National Union Fire Insurance Co.*, 535 F.3d 380 (5th Cir. 2008). In *Kane*, the Court held that judicial estoppel did not bar the plaintiff's claim because the bankruptcy trustee re-opened the bankruptcy case and moved to substitute himself as the real party in interest. *Id.* at 387. The Court differentiated the *Kane* case from *In re Superior Crewboats* by noting that the trustee in *Crewboats* had formally abandoned pursing the claim and only later attempted to re-open the bankruptcy and move to substitute; so the claim was properly judicially estopped. *Id.* at 386-87. Here, no trustee for any of their Plaintiffs has contacted defense counsel, no trustee has attempted to re-open their Plaintiffs' bankruptcy cases, and no trustee has moved for substitution as the real party in interest.

bankruptcy estate and the Trustee is the real party in interest with exclusive standing to assert them. *Wieburg v. GTE Southwest Inc.*, 272 F.3d 302, 306 (5th Cir. 2001).[6]

Rule 17(a)(3) states that a "court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action." Fed. R. Civ. P. 17(a)(3). To avoid dismissal, a plaintiff who is not the real party in interest must show (1) that he sued in his own name based on an understandable mistake and (2) that he did not have a reasonable time to correct the pleading deficiency. *Wieburg v. GTE Southwest, Inc.*, 2003 WL 21417074, at *2 (5th Cir. June 2, 2003) *aff'g Wieburg v. GTE Southwest, Inc.*, 2002 WL 31156431 (N.D. Tex. Sept. 26, 2002).

a. Plaintiffs' pursuit of the action in their own names was not the result of an understandable mistake.

It is not an understandable mistake if actions reveal a clear attempt to actively conceal these claims from the bankruptcy trustees. *Wieburg v. GTE Southwest, Inc.*, 2002 WL 31156431, at * 3 (N.D. Tex. Sept. 26, 2002) *aff'd, Wieburg v. GTE Southwest, Inc.*, 2003 WL 21417074 (5th Cir. June 2, 2003). Furthermore, if a party has been placed on affirmative notice that a bankruptcy trustee and not the individual plaintiff is the proper party, the court will not find an understandable mistake. *Id.*

Here, Plaintiffs have been on notice since April 10, 2007 that the Defendants would seek dismissal of Plaintiffs estopped for failure to list his or her FLSA claim as an asset in his or her

[6] In this case, the Fifth Circuit held that it was an abuse of discretion for the district court to dismiss the action without explaining why less drastic alternative were inappropriate. *Id.* at 303. On remand, the district court again dismissed the case, after addressing each of the Fifth Circuit's concerns. *Wieburg v. GTE Southwest, Inc.*, 2002 WL 31156431 (N.D. Tex. Sept. 26, 2002). In the second appeal, the Fifth Circuit affirmed the dismissal for lack of standing under Rule 17(a). *Wieburg v. GTE Southwest, Inc.*, 2003 WL 21417074 (5th Cir. June 2, 2003).

bankruptcy case. On April 10, 2007, Defendants filed their Response to Plaintiffs Motion for an Order Permitting Court Supervised Notice to Employees of their Opt-in Rights (Doc. 49, filed in N.D. Ala. 4:06cv2095). In that Response, several times Defendants mention the lack of standing of certain Plaintiffs due to bankruptcy and the fact that the claims belong to the bankruptcy trustee and not the Plaintiffs. *See* Doc. 49 at p. 2 & 19.

Furthermore, Pretrial Order No. 2 was filed on May 20, 2008, which stated that the Defendants would seek dismissal of Plaintiffs estopped for failure to list his or her FLSA claim as an asset in his or her bankruptcy case. *See* Pretrial Order No. 2, ¶ 7. Additionally, Plaintiffs have been on notice since June 9, 2008, as to exactly which Plaintiffs would potentially be dismissed for failure to list the claim in their bankruptcy cases because defense counsel provided Plaintiffs' counsel with the dismissal spreadsheet on that date, pursuant to Pretrial Order No. 2, paragraph 7. None of the trustees assigned to the above listed Plaintiffs' bankruptcy cases have contacted defense counsel, re-opened the bankruptcy case, or filed a motion for substitution. Thus, there has been no understandable mistake in this case because Plaintiffs were placed on affirmative notice that their bankruptcy trustees are the real parties in interest.

b. Plaintiffs have not acted within a reasonable time.

What constitutes a reasonable time is a matter of judicial discretion and will depend on the facts of each case. *Wieburg v. GTE Southwest, Inc.*, 2002 WL 31156431, at * 3 (N.D. Tex. Sept. 26, 2002) *aff'd*, *Wieburg v. GTE Southwest, Inc.*, 2003 WL 21417074 (5th Cir. June 2, 2003). The Plaintiffs have been on notice since April 10, 2007 that the Defendants would ask that any Plaintiff, who is estopped by failure to list his or her FLSA claim as an asset in his or her bankruptcy case, be dismissed. *See* Doc. 49. They have also been on notice of exactly which Plaintiffs may be estopped since June 9, 2008 when defense counsel provided the dismissal

spreadsheets. Plaintiffs have either failed to contact their bankruptcy trustees, or the bankruptcy trustees have failed to intervene.[7] Either way, the Plaintiffs lack standing to pursue this claim. Thus, the Plaintiffs' claims should be dismissed based on Rule 17(a) for failure to prosecute in the name of the real party in interest, the bankruptcy trustee.

IV. Plaintiffs Should be Prohibited from Offering any Evidence in Opposition to this Motion

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. 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

[7] Plaintiffs' counsel has contacted the bankruptcy trustee for certain plaintiffs. For example, in April and May 2007, Robert Camp was employed as special counsel in James Glover and Carolyn Gurley's bankruptcy cases to pursue this claim. In 2007, they also amended their Schedule B to list the FLSA claim as a contingent claim. Because Plaintiffs' counsel has had reasonable time to contact the trustees for these Plaintiffs, there is no explanation for why they have not done the same as to the Plaintiffs targeted by this Motion.

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.[8]

V. Conclusion

These Plaintiffs' claims must be dismissed, with prejudice, either based on judicial estoppel for failure to list the 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.

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

WAYNE FARMS LLC

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[8] *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 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).

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CERTIFICATE OF SERVICE

I hereby certify that on October 15, 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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