

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

CHARLES RAY SIMS and PAMELA SIMS,)
Individually and on behalf of all others)
Similarly situated,)
Plaintiffs)

vs.)

) Case No. CV 07-5053

MENU FOODS INCOME FUND,)
MENU FOODS MIDWEST CORPORATION,)
MENU FOODS SOUTH DAKOTA, INC.,)
MENU FOODS, INC., MENU FOODS)
HOLDINGS, INC.,)
Defendants)

MOTION FOR EXTENSION OF TIME TO RESPOND AND
RESPONSE TO PLAINTIFFS' MOTION FOR DEFAULT

COMES NOW the Defendants, MENU FOODS INCOME FUND, MENU FOODS MIDWEST CORPORATION, MENU FOODS SOUTH DAKOTA, INC., MENU FOODS, INC. and MENU FOODS HOLDINGS, INC., (collectively referred to as "MENU FOODS"), by and through counsel, JONES & HARPER, and for their Motion for Extension of Time to Plead in Response to Plaintiffs' Complaint and for their Response to Plaintiffs' Motion for Default, state as follows:

1. Plaintiffs filed their Complaint on March 21, 2007, on behalf of the named Plaintiffs and "all others similarly situated" and obtained service of process on

the Menu Foods Defendants (with the exception of Separate Defendant Menu Foods Income Fund) on March 23, 2007.

2. On April 12, 2007, the Menu Foods Defendants which had been served filed a Motion to Stay seeking, *inter alia*, a stay of the proceedings pending a transfer decision by the Judicial Panel on Multi District Litigation pursuant to 28 U.S.C. §1407 and pending a determination of class certification by the transferor court, including an explicit request that the Court stay Defendants' "obligation to timely respond to Plaintiffs' Complaint."

3. On April 18, 2007, Plaintiffs responded that Menu Foods' Motion to Stay should be denied and requested that the Court "order Defendants to answer Plaintiffs' Complaint."

4. On April 24, 2007, Defendant Menu Foods Income Fund entered its appearance and Defendants filed their reply, providing the Court notice of the Judicial Panel hearing on May 31, 2007.

5. On April 27, 2007, Judge Dawson stayed the case of *Widen, et al. v. Menu Foods, Wal-Mart Stores, Inc., et al.*, Civil No. 07-5055, and the undersigned counsel proposed Agreed Orders of Stay, including preservation language, to Plaintiffs' counsel in the above-captioned case, *Sims*, as well as to counsel in *Gray, et al. v. Menu Foods, Wal-Mart Stores, Inc., et al.*, Civil No. 07-5065, pending before Judge Dawson in the Fort Smith Division, and counsel in *Cooper, et al. v. Menu Foods, Wal-Mart Stores, Inc., et al.*, Civil No. 07-4036, pending before Judge Barnes in the Texarkana Division.

In addition to *Widen*, thirty-one (31) of the approximately seventy (70) cases nationwide have been stayed pending outcome of the Judicial Panel hearing of the Plaintiffs' Motions for Multi-District Litigation; in many of the remaining cases, Defendants either have not been served, or are in the process of negotiating stays or extensions.

6. On May 2, 2007, the Court entered its Order, denying Menu Foods' Motion to Stay.

7. One day later, on May 3, 2007, Plaintiffs filed their Rule 55 Motion for Default Judgment, stating that the Menu Foods Separate Defendants "failed to file an answer or otherwise defend in the current matter in a timely manner" as required on April 12, 2007 and arguing that they "are entitled to a default against the Separate Defendants." It is unclear whether Plaintiffs are seeking a default judgment on behalf of the named Plaintiffs or if they are seeking default judgment on behalf of themselves as well as the uncertified class which they purportedly represent.

8. Plaintiffs' pleadings offer no legal citation in support of their argument that the Motion to Stay, with its explicit request that the Court stay Defendants' obligation to respond to the Plaintiffs' complaint, was insufficient to toll Defendants' deadline to respond to Plaintiffs' Complaint until such time as the Court ruled on the Motion to Stay. Further, Plaintiffs' bare contention that they have been "severely prejudiced in their attempt to proceed with discovery . . . due to the lack of a responsive pleading" is undermined by Rule 26 of the Federal Rules of Civil

Procedure which sets forth the time-table for first conferring, then making initial disclosures and finally, engaging in discovery. Plaintiffs' Motion for Default Judgment is without merit.

9. The Menu Foods Defendants respectfully request that Plaintiffs' Motion for Default Judgment be denied, and that Defendants' Motion for Extension of Time to Respond to Plaintiffs' Complaint be granted, and that Defendants be granted a minimum of thirty (30) days to respond to Plaintiffs' complaint, during which time Defendants will, *inter alia*, move to consolidate each of the four (4) related Western District of Arkansas cases – *Sims*, *Gray*, *Widen* and *Cooper* – into one proceeding; pursue motions to stay in the remaining Western District of Arkansas cases, *Gray* and *Cooper*, and seek reconsideration of the Court's denial of the stay in this matter.

10. If the Court deems necessary, the undersigned counsel desires to appear before this Honorable Court to be heard on Defendants' Motion for Extension of Time and on Defendants' response to Plaintiffs' Motion for Default Judgment.

WHEREFORE, Defendants, MENU FOODS INCOME FUND, MENU FOODS MIDWEST CORPORATION, MENU FOODS SOUTH DAKOTA, INC., MENU FOODS, INC. and MENU FOODS HOLDINGS, INC., respectfully request this Honorable Court enter an Order denying Plaintiffs' Motion for Default and an Order granting Defendants additional time of no less than thirty (30) days to respond to Plaintiffs' Complaint.

Respectfully submitted,

/s/Christy Comstock

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing instrument was forwarded this 3 day of May 2007, electronically and by first class mail, postage prepaid to:

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/s/Christy Comstock
Christy Comstock