

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CAMPAIGN LEGAL CENTER,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

Civil Action No. 20-cv-0588-BAH

**PLAINTIFF’S MOTION FOR DEFAULT JUDGMENT AGAINST DEFENDANT
FEDERAL ELECTION COMMISSION**

Plaintiff Campaign Legal Center (“CLC”), pursuant to Rule 55(b) of the Federal Rules of Civil Procedure, respectfully moves for the entry of default judgment against Defendant Federal Election Commission (“FEC” or “Commission”). CLC brought this action on February 27, 2020, challenging Defendant’s unlawful failure to act on Plaintiff’s administrative complaint alleging violations of the Federal Election Campaign Act (“FECA”). Service was effected on March 4, 2020, such that the FEC’s deadline to file a responsive pleading was May 4, 2020. *See* ECF No. 9. The FEC failed to appear, answer, plead, or otherwise defend this action as required by the Federal Rules of Civil Procedure, and the Clerk of Court entered a default against the FEC on May 6, 2020. *See* ECF No. 11.

For the reasons described below, entry of default judgment against the FEC is appropriate because the evidence establishes that the FEC has failed to act and that this failure to act is contrary to law. Plaintiff is therefore entitled to an order declaring that the FEC’s failure to act is contrary to law in violation of 52 U.S.C. § 30109(a)(8)(C), and directing the FEC to conform within 30

days. Plaintiff further requests that the Court assess \$400 in court costs pursuant to 28 U.S.C. § 1920.

STATEMENT OF FACTS

1. On September 12, 2019, Campaign Legal Center (“CLC”) filed with the FEC an administrative complaint showing that, during the 2018 midterm election cycle, John Doe, Jane Doe, and/or other persons who created and operated American Progress Now (“APN”) made unreported expenditures and omitted required ad disclaimers in violation of FECA. *See* FEC Matter Under Review (“MUR”) No. 7643 (“Admin. Complaint”), attached hereto as Exhibit 1.

2. The administrative complaint demonstrates that John Doe, Jane Doe, and/or other persons set up and used a Facebook page entitled America Progress Now to pay for and disseminate on Facebook independent expenditure ads that expressly advocated for the election of certain candidates in U.S. Senate races in Michigan and Missouri, and in U.S. House races in Illinois, Iowa, and Ohio. *Id.* ¶¶ 6-7.

3. The administrative complaint identifies the dates, elections, and amounts spent for a series of express advocacy advertisements paid for and run by APN beginning approximately three weeks before the November 2018 election, and continuing through the election. *Id.* ¶¶ 7-8. These facts are supported by specific documentation, including the FEC’s own records. *Id.* ¶ 9.

4. According to Facebook’s Ad Library, APN spent in excess of the \$250 federal reporting threshold in independent expenditures with respect to at least some of those federal candidates’ elections, but did not report any such expenditures, in violation of FECA. *Id.* ¶ 7

5. The administrative complaint further demonstrates that APN does not appear to be a legal person as it does not appear in corporate records or Commission records, does not appear

to have a website, and the apartment building address shown on its Facebook page has no record of the entity's existence. *Id.* ¶ 13.

6. Because APN is not a person, it could not have paid for said independent expenditures and, consequently, the ads run by APN failed to include the FECA-required disclaimers identifying the actual person(s) paying for the communications. *Id.* ¶ 22.

7. On September 18, 2019, the FEC sent CLC a letter acknowledging receipt of the Complaint and designating it MUR 7643. *See* Sept. 18, 2019 Letter, attached hereto as Exhibit 3.

8. CLC has not received any further communication from the FEC regarding MUR 7643. Gaber Declaration ¶ 2, attached hereto as Exhibit 2.

9. CLC waited more than 160 days for the FEC to take action on its administrative complaint before filing this action on February 27, 2020.

10. To date, more than 240 days after CLC's administrative complaint was filed, the FEC has not taken any public action with respect to MUR 7643. *See* FEC, Enforcement Query System, <https://eqs.fec.gov/eqs/searcheqs> (search for "MUR 7643" yields the response "No Matches Found").

11. The FEC has not had a quorum of commissioners since September 1, 2019. *See* Press Release, *FEC remains open for business, despite lack of quorum*, <https://www.fec.gov/updates/fec-remains-open-business-despite-lack-quorum/> (Sept. 11, 2019), attached hereto as Exhibit 4.

12. Without a quorum, the FEC cannot "launch any new investigations, issue any advisory opinions, promulgate any rules, or render any decisions in pending enforcement actions. *See* FEC Chair Ellen L. Weintraub, *The State of the Federal Election Commission*,

<https://www.fec.gov/resources/cms-content/documents/2019-11-01-State-of-the-Commission-ELW.pdf>, (Nov. 1, 2019), attached hereto as Exhibit 5.

13. As such, the Commission has not acted on Plaintiff's administrative complaint and will not be able to act until a quorum is re-established. *See id.*

14. At this time, the FEC remains in default with respect to this lawsuit, and has not appeared, filed an answer, or otherwise defended the action.

15. Plaintiffs have incurred \$400 in court costs as defined under 28 U.S.C. § 1920 in seeking this default judgment. *See* ECF No. 1 (docket text showing receipt of payment for filing fee).

LEGAL STANDARD

I. Default by the Government under Rule 55

A plaintiff may seek a default judgment in a lawsuit where the defendant fails "to plead or otherwise defend." Fed. R. Civ. P. 55(a)-(b). But, "[a] default judgment may be entered against the United States, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court." Fed. R. Civ. P. 55(d). Although default against the government is disfavored, Rule 55(d) does not "relieve[] the sovereign from the duty to defend cases." *Doe v. Democratic People's Republic of Korea Ministry of Foreign Affairs Jungsong-Dong*, 414 F. Supp. 3d 109, 120 (D.D.C. 2019) (citing *Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238, 242 (2d. Cir. 1994)). "In determining whether the default judgment against the government is proper, the court may accept as true the plaintiff's uncontroverted evidence," *Payne v. Barnhart*, 725 F. Supp. 2d 113, 116 (D.D.C. 2010), including evidence submitted by affidavit, *see Estate v. Botvin ex rel. Ellis v. Islamic Republic of Iran*, 684 F. Supp. 2d 34, 37 (D.D.C. 2010), and public record evidence, *see Doe*, 414 F. Supp. 3d at 120.

II. Contrary to Law Standard

A Plaintiff is entitled to relief where the undisputed facts show that the FEC has acted “contrary to law” by unreasonably delaying action on the underlying complaints. 52 U.S.C. § 30109(a)(8)(c). While FECA “does not require that an [enforcement action] be completed within a specific time period,” *DSCC v. FEC*, No. Civ.A. 95-0349-JHG, 1996 WL 34301203, at *1 (D.D.C. Apr. 17, 1996), it does impose “an obligation to investigate complaints expeditiously,” *id.* at *4; *see also Common Cause v. FEC*, 489 F. Supp. 738, 744 (D.D.C. 1980) (“Where the issue before the Court is whether the agency’s failure to act is contrary to law, the Court must determine whether the Commission has acted ‘expeditiously.’”).

In determining whether the Commission has acted “expeditiously,” the court may look to “the credibility of the allegation, the nature of the threat posed, the resources available to the agency and the information available to it, as well as the novelty of the issues involved.” *Common Cause*, 489 F. Supp. at 744. In addition, the court may consider the factors outlined in *Telecomm. Research & Action Ctr. v. F.C.C.*:

(1) the time agencies take to make decisions must be governed by a “rule of reason[;]” (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not “find any impropriety lurking behind agency lassitude in order to hold that agency action is ‘unreasonably delayed.’”

750 F.2d 70, 80 (D.C. Cir. 1984) (“*TRAC*”).

Although the Commission’s decision whether or not to investigate “is entitled to considerable deference, the failure to act in making such a determination is not.” *DSCC*, 1996 WL 34301203, at *4.

ARGUMENT

Under the *Common Cause* and *TRAC* factors, the undisputed evidence demonstrates that the Commission acted contrary to law by failing to act on Plaintiff's administrative complaint. As such, Plaintiff is entitled to a default judgment against the Commission pursuant to Rule 55.

I. Plaintiff's Administrative Complaint States Credible Allegations that APN Violated FECA.

Plaintiff's administrative complaint provides substantial evidence both that the person or persons behind APN violated FECA's mandatory reporting requirements for independent expenditures in excess of \$250 in aggregate during a calendar year, *see* 52 U.S.C. § 30104(c), and that person or persons who paid for the advertisements violated of 52 U.S.C. § 30120(a), by listing the name "America Progress Now" on the Facebook page's ad disclaimers rather than the identity of whoever paid for the communications. *See* Ex. 1.

FEC complaints are credible where they contain "specific documentation of the amounts spent and the purposes of the spending," along with specific evidence as to the violations alleged. *Citizens for Percy '84 v. FEC*, Civ. A No. 84-2653, 1984 WL 6601, at *4 (D.D.C. Nov. 19, 1984). Plaintiff's complaint specifically documents the dates each advertisement was displayed; the purpose of each ad, including the candidates the advertisements advocated for or against; and the range of amounts spent on each ad.¹ *See* Ex. 1 ¶ 7. This evidence demonstrates that APN likely spent over the \$250 limit to trigger mandatory reporting in each race just on payments to Facebook ad alone, *id.*, not including any time and money required to design and develop the ads and target their placement that could potentially count as well.

¹ The Facebook Ad Library is an archive of political advertising run on Facebook. It provides information about who funded an ad, a range of how much was spent on the ad, and when it was active. *See What is the Facebook Ad Library and how do I search it?*, Facebook, <https://www.facebook.com/help/259468828226154>, last visited May 9, 2020.

Plaintiff's administrative complaint also provided specific evidence that neither APN nor any other filer reported the independent expenditures run under APN's name, according to the FEC's own files. *Id.* ¶ 8. Finally, Plaintiff provided substantial evidence that APN was merely a front for the true source of the expenditures, including that it was active only for a short period of time before and after the November 2018 election; and that it does not appear as a corporate entity in the LexisNexis corporate filings database, nor in the state corporate records databases in New York, Delaware, Washington D.C., or Maryland. *Id.* ¶ 11-13. This evidence demonstrates reason to believe APN did not pay for the expenditures run from the APN Facebook page, and thus the disclaimers on the APN Facebook page did not identify the person or persons who paid for the advertisements.

Plaintiff's administrative complaint states credible allegations, supported by substantial evidence, demonstrating that John Doe, Jane Doe, and/or other persons who created and operated APN violated FECA by failing to report expenditures and omitting the required ad disclosures.

II. The FEC's Delay in Acting on Plaintiff's Allegations Poses a Substantial and Ongoing Threat to the Electoral System.

The conduct alleged in Plaintiff's administrative complaint constitutes a substantial and ongoing threat to the integrity of the election system, because there is a substantial likelihood that this type of illegal activity will continue, or even grow, absent any threat of enforcement. *See Percy*, 1984 WL 6601, at *3 (finding that "the significance of the threat to the integrity of [an] . . . election" is "obvious" where there is a "likelihood" that the illegal activity will continue); *see also DSCC*, 1996 WL 34301203, at *5 ("The threat to the electoral system is highlighted not only by the amounts of money involved and the impact upon close elections, but by the serious threat of recurrence."). Unreported online expenditures by undisclosed persons threaten the fundamental fairness of American elections by denying the electorate necessary information about precisely

who is advocating for and against candidates for federal office. Digital political spending is on the rise, with nearly \$2.8 billion projected in 2020.² Without clear application and enforcement of disclosure and disclaimer requirements to digital advertising, any individual or entity, foreign or domestic, could meddle in U.S. elections at any scale, without fear of disclosure or enforcement. The risk of large-scale noncompliance with federal disclaimer and disclosure laws, and thus interference by unknown actors in federal elections, will only continue to grow as digital ad spending increases and the Commission's inability to enforce FECA persists. Thus, even illegal ad purchases that are relatively small signal danger to the transparency and openness of federal elections, particularly when the source of the communications is unknown.

Disclosure requirements not only ensure that voters and candidates are able to evaluate messages and understand the agenda behind them, *see Citizens United v. FEC*, 558 U.S. 310, 369-70 (2010), but also are critical to enforcement of other aspects of FECA, including prohibitions on foreign spending, excess contributions, and coordination, *see Buckley v. Valeo*, 424 U.S. 1, 56-58 (1976). Without effective oversight and prompt enforcement of campaign finance laws, unreported and undisclosed pseudo-entities like APN can pop into existence just prior to an election, exploit lax registration and reporting requirements on digital platforms, make unlimited expenditures on behalf of or in opposition to candidates, and then disappear, having engaged in little to no activity beyond the unlawful advertisements themselves.

Furthermore, the nature of the threat is substantial where, as here, the conduct alleged is contrary to one of the principal purposes of FECA. *See, e.g., DSCC*, 1996 WL 34301203, at *5

² Alexandra Bruell, *Political Ad Spending Will Approach \$10 Billion in 2020, New Forecast Predicts*, WALL ST. J. (June 4, 2019), <https://www.wsj.com/articles/political-ad-spending-will-approach-10-billion-in-2020-new-forecast-predicts-11559642400>.

(finding that the underlying matter involved a substantial threat when it “involve[d] allegations” at the core of FECA’s requirements).

III. The Commission’s Failure to Act on Plaintiff’s Administrative Complaint Is Not Excused by Lack of Resources, Competing Priorities, or Lack of Information.

Because the FEC has failed to appear in this case, it has put forward no evidence that its delay is caused by lack of resources, competing priorities, or lack of information. *Cf. Common Cause* 489 F. Supp. at 744; *TRAC*, 750 F.2d at 80. Indeed, the evidence gathered by Plaintiff and provided in its administrative complaint, including evidence of the Commissions’ own records, is more than sufficient to allow the Commission to proceed expeditiously under normal circumstances. Thus, the FEC has failed to carry its burden of showing that its delay is reasonable. *See Percy*, 1984 WL 6601, at *4 (placing the burden of showing lack of resources on the agency because “[k]nowledge as to the limits of [agency] resources is exclusively within the control of the Commission”). And “[w]hatever deference an agency is due in resource allocation decisions, it is entitled to substantially less deference when it fails to take any meaningful action within a reasonable time period.” *DSCC*, 1996 WL 34301203, at *5-*6.

Here, the FEC has lacked a quorum of Commissioners necessary to advance Plaintiff’s administrative complaint through the Commission’s enforcement process. But while the lack of quorum may make the FEC’s delay inevitable,³ it does not make that delay reasonable under the law or leave the Court powerless to ensure the Nation’s campaign finance laws are enforced. Rather, Congress included an alternative enforcement mechanism in FECA, authorizing private

³ Even when the FEC has had a quorum of Commissioners, it has regularly unlawfully delayed action on administrative complaints, *see, e.g.*, Plaintiff’s Redacted Cross-Mot. for Summ. J. at 16-17 n.11, *Giffords v. FEC*, No. 19-1192 (EGS) (Jan. 8, 2020), ECF No. 50 (discussing FEC’s workload statistics), so there is no evidence the agency would have taken meaningful action even if it could.

actions against administrative respondents when FEC does not or cannot act. *See* 52 U.S.C. § 30109(a)(8)(C) (authorizing private right of action in federal court against administrative respondent should the FEC fail to conform to this Court’s judgment within thirty days).

If this Court concludes that the Commission’s failure to act has been unlawful, the Commission will be required to take action within 30 days. If the President and Senate use that opportunity to advance nominations to fill the vacant Commission positions, the Commission will have a quorum to determine whether to conform to this Court’s order. If not, the lack of quorum will remain, the FEC will fail to conform to this Court’s order, and Plaintiff will be authorized to file suit to enforce its administrative complaint. Notably, that outcome would ease the Commission’s enforcement burden, and would avoid any concern about “the effect of expediting delayed action on agency activities of a higher or competing priority.” *TRAC*, 750 F.2d at 80. If Plaintiff brings a civil action against John Doe, Jane Doe, and/or other persons who created and operated APN, the FEC can focus on other matters when and if it regains a quorum.

IV. Plaintiff’s Complaint Does Not Raise Novel Issues.

FECA’s reporting and disclosure requirements date back to the mid-1970s. Plaintiff’s allegations that APN failed to report independent expenditures or to disclose the name or names of the person(s) who paid for them are not remotely a “novel” issue. *See Percy* 1984 WL 6601, at *1 (finding that issues that make up a substantial amount of the Commission’s workload are not “novel”). The Commission routinely deals with matters involving the failure to report independent expenditures, and the failure to disclose the person who paid for such expenditures. *See, e.g., Frank v. Unknown Respondents*, FEC MUR 7416, <https://eqs.fec.gov/eqsdocsMUR/19044471145.pdf> (last visited May 13, 2020); *Pickrel v.*

Indivisible Ky., Inc., FEC MUR 7286, <https://eqs.fec.gov/eqsdocsMUR/19044473175.pdf> (last visited May 13, 2020).

As such, the Commission is clearly familiar with the relevant law and regulations surrounding violations of 54 U.S.C. §§ 30104(c) and 30120(a). These issues are not novel.

V. The Commission’s Delay Violates the “Rule of Reason,” and Runs Contrary to Congress’s Intent that the Commission Act Expeditiously.

The Commission’s delay is unreasonable. Although “Congress did not impose specific time constraints upon the Commission to complete final action, . . . it did expect that the Commission would fulfill its statutory obligations so that [FECA] would not become a dead letter.” *DSCC*, 1996 WL 34301203, at *7. Thus, although courts have declined to find that the Commission *must* act on every complaint within 120 days or within an election cycle, *see FEC v. Rose*, 806 F.2d 1081, 1092 (D.C. Cir. 1986), this “is not the equivalent of unfettered FEC discretion to determine its own timeline.” *DSCC*, 1996 WL 34301203, at *8. Indeed, the multitude of “*short* deadlines governing the speed with which such complaints must be handled,” *Rose*, 608 F. Supp. at 11 (emphasis in original), itself demonstrates that Congress expected enforcement actions to advance expeditiously. This is because “the deterrent value of the Act’s enforcement provisions are substantially undermined, if not completely eviscerated, by the FEC’s failure to process administrative complaints in a meaningful time frame.” *DSCC*, 1996 WL 34301203, at *8; *see also In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004) (finding that an agency’s unreasonable delay “signals the breakdown of regulatory processes”) (internal quotation marks omitted). The Commission’s inability to act given its lack of quorum is just such a regulatory breakdown. Indeed, it seems likely that the only way the allegations raised in Plaintiff’s administrative complaint will be investigated and adjudicated in any reasonable time frame is by

this Court ordering the Commission to conform, failing which Plaintiff may avail itself of FECA's private right of action.

VI. The Commission's Delay Prejudices Plaintiff and the Public.

The Commission's failure to act undermines public confidence in our elections by allowing apparent violations of the law to go uninvestigated and unredressed.⁴ So too, the lack of enforcement and corresponding lack of any consequence for illegal behavior necessarily encourages APN and others who seek to emulate APN's activities to continue to violate campaign finance law. *See DSCC*, 1996 WL 34301203, at *8 (“[T]hreats to the health of our electoral processes . . . require timely attention [and] should not be encouraged by FEC lethargy . . .”). As such, CLC and the voting public will continue to be harmed because they will be denied necessary information about precisely who is advocating for and against candidates for federal office.

CONCLUSION

The uncontested evidence demonstrates that the Commission has acted contrary to law in failing to act on Plaintiff's administrative complaint. Thus, Plaintiff is entitled to entry of a default judgment against the Commission. Accordingly, Plaintiff respectfully requests that the Court enter judgment that the Commission has acted contrary to law; order the Commission to conform to the judgment within 30 days, and assess \$400 in court costs pursuant to 28 U.S.C. § 1920.⁵

⁴ Although evidence of impropriety may buttress a plaintiff's claim that the Commission has acted contrary to law, “the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.” *TRAC*, 750 F.2d at 80. Plaintiffs do not allege, and it is unnecessary for this Court to find, any impropriety in the Commission's failure to act. *See Rose*, 209 F. Supp. at 12 (“the Court need not and does not make such findings.”). Nonetheless, for the reasons stated herein, the Commission's failure to act is contrary to law.

⁵ Plaintiff respectfully requests that the Court retain jurisdiction over this matter until Defendant takes final agency action with respect to Plaintiff's administrative complaints. *Cobell v. Norton*, 240 F.3d 1081, 1109 (D.C. Cir. 2001) (noting district court's discretion to “retain jurisdiction until a federal agency has complied with its legal obligations” and to “compel regular progress reports in the meantime”); *Alegent Health-Immanuel Med. Ctr. v. Sebelius*, 917 F. Supp. 2d 1, 3 (D.D.C.

Dated: May 14, 2020

Respectfully submitted,

/s/ Adav Noti

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2012) (noting that court may retain jurisdiction in “cases alleging unreasonable delay of agency action”).