IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER and DEMOCRACY 21,	)	
	)	Case No. 1:20-cv-00730
Plaintiffs,	)	
	)	Hon. Christopher R. Cooper
v.	)	
FEDERAL ELECTION COMMISSION,	)	
Defendant,	)	
RIGHT TO RISE SUPER PAC, INC.	)	
Proposed Intervenor-Defendant.	)	

RIGHT TO RISE SUPER PAC, INC.'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR DEFAULT JUDGMENT AGAINST DEFENDANT FEDERAL ELECTION COMMISSION

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I. INTRODUCTION

Plaintiffs challenge as contrary to law the Federal Election Commission's decision to not take public action on the administrative complaints that Plaintiffs filed against Intervenor-Defendant Right to Rise Super Pac, Inc., among others. Seemingly unable to garner the four Commissioner votes required to authorize its general counsel to defend this suit, the FEC has not appeared in this action. As an intervening-defendant, however, Right to Rise has effectively taken the FEC's place and presented meritorious defenses to Plaintiffs' allegations. Indeed, less than two months ago, the Court dismissed the majority of Plaintiffs' complaint and significantly narrowed Plaintiffs' only remaining claim by granting in part Right to Rise's motion to dismiss. ECF No. 17. All that remains now of Plaintiffs' suit is a limited claim for an alleged violation of the Federal Election Campaign Act ("FECA"). Importantly, Right to Rise submitted a motion seeking reconsideration of the February 19th Order, or to certify the Order for interlocutory appeal, which, if granted, would either dismiss the case in its entirety or set the stage for appeal of an issue that, if decided in favor of Right to Rise, would also result in the dismissal of this suit due to Plaintiffs' lack of standing.

While Right to Rise's potentially dispositive motion for reconsideration remains pending, Plaintiffs filed the instant motion for default judgment against the FEC seeking an order that the FEC's decision to not take public action on the administrative complaints is contrary to law. Plaintiffs' motion, however, is but a thinly veiled attempt to obtain an order setting the stage for a citizen-suit under 52 U.S.C. § 30109(a)(8)(A) despite the fact they lack standing in this suit, which is a precursor to any citizen-suit under FECA.

As explained below, Plaintiffs have not satisfied the burden for a default judgment against a United States agency. Plaintiffs cannot establish by a preponderance of evidence that the Court has subject matter jurisdiction over the remaining FECA claim—their alleged informational injury

fails as a matter of fact and law—and therefore cannot demonstrate a claim or right to relief as required to obtain a default judgment against the FEC under Rule 55(d). Further, what remains of Plaintiffs' FECA claim is time-barred because the alleged violations occurred more than five years ago. Plaintiffs' request for a default judgment conveniently ignores Right to Rise's presence in this case as an intervening defendant and the irreconcilability that would result from a default judgment against the FEC. The Commission's decision to not take public action amounts to a functional dismissal of Plaintiffs' administrative complaints against Right to Rise, and Right to Rise must be afforded an opportunity to defend the FEC's decision on its merits. The Court should deny Plaintiffs' motion accordingly.

II. BACKGROUND

A. The Remainder of Plaintiffs' FECA Claim is Currently Subject to a Pending Motion for Reconsideration and/or Interlocutory Appeal

In March and May of 2015, Plaintiffs filed two FEC complaints alleging FECA violations by Right to Rise Super PAC, Inc. ("Right to Rise"), Right to Rise PAC, and Governor John Ellis "Jeb" Bush. Compl. Ex. B. Mar. Admin. Compl., ECF No. 1-2; Compl. Ex. A., May Admin. Compl. ECF No. 1-1. The FEC designated Plaintiffs' complaints as Matter Under Review ("MUR") 6927. Many years later, Plaintiffs filed the present action seeking injunctive and declaratory relief to compel the FEC to take up their complaints under 52 U.S.C. § 30109(a)(8)(A). Compl. ¶ 2. After the Court granted Right to Rise's motion to intervene in June 2020, Right to Rise moved to dismiss Plaintiffs' complaint under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

On February 19, 2021, this Court issued a Memorandum Opinion and Order granting most of Right to Rise's Motion to dismiss. ECF No. 17 ("February 19th Order"). Specifically, the Court held Plaintiffs failed to state a claim under the Administrative Procedure Act, and also that

Plaintiffs lacked standing to pursue their FECA claim as it relates to any alleged coordinated spending between Governor Bush and Right to Rise. *Id*. 12-15; 18-19. The Court, however, also found that Plaintiffs sufficiently alleged an informational injury relating to the five-month period from January 2015 to June 2015, when Governor Bush was testing-the-waters as to a bid for the presidency. *Id.* at 10-12. As a result, the Court held that Plaintiffs had Article III standing to pursue that limited portion of their FECA claim. *Id*.

Right to Rise then filed a motion for reconsideration and/or certification for interlocutory appeal regarding that portion of the February 19th Order holding that Plaintiffs have standing to pursue a limited aspect of their FECA claim. ECF No. 19. In that motion, Right to Rise asserts that the February 19th Order's conclusion that Plaintiffs had sufficiently alleged an informational injury relied on the wrong legal standard and was otherwise based on a misconception of the facts. Right to Rise's motion is fully briefed and currently pending before the Court.

B. The FEC Cannot Proceed with an Enforcement Action or Appear in this Litigation Without the Affirmative Vote of Four Commissioners

To date, the Commission has not publicly acted on MUR 6927 and has not appeared in this litigation. Under FECA, the Commission consists of six voting members "appointed by the President, by and with the advice and consent of the Senate," no more than three of which "may be affiliated with the same political party." 52 U.S.C. § 30106(a)(1). FECA requires that "[a]ll decisions of the Commission with respect to the exercise of its duties and powers under the provisions of [FECA] shall be made by a majority vote of the members of the Commission," with the exception that certain actions, such as enforcement decisions, may only be made with "the affirmative vote of 4 members of the Commission." *Id*. § 30106(c). As for administrative complaints such as those at issue in this case, if the Commission does not find reason to believe that a respondent violated FECA through an affirmative vote of at least four Commissioners within

five years of the date of the alleged violation, the Commission may *not* proceed with investigation of, or enforcement against, that respondent. *Id.* U.S.C. § 30145.

Similarly, the FEC cannot authorize its general counsel to defend a civil suit unless four Commissioners vote to authorize such a defense. *Id.* § 30106(c). Here, the FEC consisted of only three Commissioners from September 2019 through May 20, 2020. Although the Senate subsequently approved a fourth, fifth, and sixth Commissioner, the FEC has not appeared in this suit, as one of the Commissioners at the time "took the unprecedented step of refusing to allow the [Commission] to defend itself in court." Caroline Hunter, *How My FEC Colleague is Damaging the Agency and Misleading the Public* (Oct. 22, 2019), https://politi.co/2zRfIJY. Regardless of the reason, the FEC has not authorized its general counsel to appear in this action. And while the Clerk of Court entered a default against the FEC on March 5, 2021, ECF No. 20, Right to Rise remains in the case as an intervening defendant and is committed to defending the suit on the merits.

III. ARGUMENT

A. The Court Should Deny Plaintiffs' Request for a Default Judgment Because Plaintiffs Have Not Established a Claim or Right to Relief as Required Under Rule 55(d).

In the D.C. Circuit, "there is a strong policy favoring the adjudication of a case on its merits." *Baade v. Price*, 175 F.R.D. 403, 405 (D.D.C. 1997). Accordingly, "[d]efault judgments are not favored" and "must normally be viewed as available only when the adversary process has been halted because of an essentially unresponsive party." *Jackson v. Beech*, 636 F.2d 831, 835-26 (D.C. Cir. 1980). In other words, because of the "drastic nature of a default judgment," it "must be a sanction of last resort." *Webb v. D.C.*, 146 F.3d 964, 971 (D.C. Cir. 1998).

"The disfavor in which [default] judgments are held is especially strong in situations where the defendant is the government." *Payne v. Barnhart*, 725 F. Supp. 2d 113, 116 (D.D.C. 2010). In

those situations, like here, Rule 55(d) expressly provides that a default judgment against the United States, its officers, or its agencies, may only be entered "if the claimant establishes a claim or right to relief by evidence that satisfies the court." Fed. R. Civ. P. 55(d). *See also Carvajal v. Drug Enf't Agency*, 246 F.R.D. 374, 375 (D.D.C. 2007) (A "default judgment may not be entered against the United States absent an independent factual showing of a meritorious claim."). Plaintiffs have not met this burden, and their motion should be denied.

1. Plaintiffs Have Not Established Standing On Their FECA Claim

As a threshold matter, Plaintiffs cannot meet their burden under Rule 55(d) without first establishing Article III standing by a preponderance of the evidence. Indeed, "the procedural posture of a default does not relieve a federal court of its 'affirmative obligation' to determine whether it has subject matter jurisdiction over the action." *Herbin v. Seau*, 317 F. Supp. 3d 568, 571 (D.D.C. 2018) (denying motion for default judgment where plaintiff failed to provide sufficient evidence establishing the court's jurisdiction).

Here, Plaintiffs' purported basis for standing is premised on the February 19th Order's holding regarding the sufficiency of Plaintiffs' alleged informational injury. ECF No. 23 at 8-9. But as demonstrated in Right to Rise's motion for reconsideration, that Order mistakenly relied on the more liberal Rule 12(b)(6) standard, thereby improperly alleviating Plaintiffs of their burden of establishing by a "preponderance of the evidence" that the Court has subject-matter jurisdiction over their claims. ECF No. 19 at 5-8. Instead, the Order merely accepted Plaintiffs' factual allegations as true and, for purposes of determining whether Plaintiffs have standing to sue, "assum[ed] that plaintiffs are correct that Bush was testing the waters as of January 2015." ECF No. 17 at 11; ECF No. 19 at 6-8. By incorrectly assuming that Plaintiffs were deprived of statutorily required disclosures for the period from January to June 2015, and despite the Plaintiffs' burden to show their alleged injury by a preponderance of evidence, the February 19th Order

erroneously determined that Plaintiffs suffered an informational injury even though the public record shows that Governor Bush reported the testing-the-waters spending for the exact period in question. *See* ECF No. 22 at 4. Under the "closer scrutiny" required for a Rule 12(b)(1) analysis, Plaintiffs have failed to establish the requisite standing. *See Biton v. Palestinian Interim Self-Gov't Auth.*, 310 F. Supp. 2d 172, 176 (D.D.C. 2004); *Kareem v. Haspel*, 986 F.3d 859, 869 (D.C. Cir. 2021).

Further, even if the February 19th Order had applied the correct legal standard under Rule 12(b)(1), Plaintiffs still cannot establish an informational injury that would entitle them to a default judgment at this stage. Here, Plaintiffs allege they have "been denied complete, FECA-mandated reporting of Bush's receipts and expenditures prior to June 2015." ECF No. 23 at 10. Faced with the reality that Governor Bush satisfied his obligations under FECA by reporting the testing-the-waters activity, Plaintiffs shift their theory, speculating instead that those disclosures "cannot possibly account for all of Bush's reportable activity over his pre-candidacy period" by relying on "public reports and Bush's own statements revealing his extensive travel, fundraising efforts, meetings and speeches across the country." *Id.* at 9, 11.

But newspaper articles that were published *before* Governor Bush's first FECA report, *see* ECF No. 22 at 4, are far from the "uncontroverted evidence" required to obtain a default judgment against the federal government under Rule 55(d). *Payne*, 725 F. Supp. 2d at 116. Rather, Plaintiffs' allegations are directly contradicted by the public record, which establishes that: (1) Governor Bush reported $386,020.15 of testing-the-waters activity on his campaign's first FEC report in July 2015, after he formally announced his candidacy; and (2) the activities described in Plaintiffs' "public reports" were on behalf of Right to Rise and were paid for and reported by Right to Rise. ECF No. 22 at 4, 7-8. Accordingly, Plaintiffs' alleged informational injury plainly relates to

already disclosed expenditures, which cannot support Article III standing as a matter of law. *E.g.*, *Wertheimer v. Fed. Election Comm'n*, 268 F.3d 1070, 1075 (D.C. Cir. 2001); *Free Speech for People v. FEC*, No. 19-CV-1722 (APM), 2020 WL 999205, at *6 (D.D.C. Mar. 2, 2020).

Simply put, Plaintiffs' conclusory allegations are insufficient to establish a right to relief for purposes of a default judgment against the federal government. Where, as here, a movant "has not established, and cannot establish, that the court has subject matter jurisdiction over her claims," the movant "has failed to carry her burden under Rule 55(d)" and "the motion for default judgment must be denied." *Strong-Fisher v. LaHood*, 611 F. Supp. 2d 49, 52 n.2 (D.D.C. 2009). *See also Auleta v. United States Dep't of Just.*, 80 F. Supp. 3d 198, 199 (D.D.C. 2015) (granting motion to dismiss pursuant to Rule 12(b)(1) and consequently denying plaintiff's motion for default judgment against the Department of Justice under Rule 55(d)).

Right to Rise's motion for reconsideration seeks to redress the deficiencies in the February 19th Order's standing determination and dispose of Plaintiffs' remaining FECA claim. Of course, if the Court reconsiders the standing analysis set forth in the February 19th Order, or if that holding is reversed on appeal, a default judgment against the FEC would be rendered invalid. *Roeder v. Islamic Republic of Iran*, 195 F. Supp. 2d 140, 159 (D.D.C. 2002), *aff'd*, 333 F.3d 228 (D.C. Cir. 2003) (reasoning the "court has 'no alternative' but to vacate a default judgment entered without subject matter jurisdiction.") (cleaned up); *McNeil v. Harvey*, No. CV 17-1720 (RC), 2018 WL 4623571, at *7 n. 6 (D.D.C. Sept. 26, 2018) ("Plaintiffs' motions for default judgment are denied because the Court lacks subject matter jurisdiction over Plaintiffs' claims."). Thus, at a minimum, the Court should refrain from the "drastic remedy" of a default judgment against the FEC because

Plaintiffs have not established Article III standing by a preponderance of the evidence, and therefore cannot establish a claim or right to relief as required under Rule 55(d).[1]

2. Plaintiffs' Remaining FECA Claim is Time-Barred

In addition to lacking an informational injury, Plaintiffs have failed to establish a claim as required under Rule 55(d) because the statute of limitations on Plaintiffs' remaining FECA claim has expired. While Plaintiffs allege the FEC has failed "to take any action on plaintiffs' administrative complaints for over five and a half years" and request the Court enter a default judgment that such failure to act is contrary to law, ECF No. 23 at 17, 19, the express language of FECA precludes the relief sought by Plaintiffs. Under FECA, unless the FEC finds through an affirmative vote of at least four Commissioners reason to believe that a respondent violated FECA *within five years of the date of the alleged violation*, the FEC may not proceed with an investigation of, or enforcement against, that respondent. 52 U.S.C. § 30145.

Consequently, the time in which the FEC could take any authorized action in connection with Plaintiffs' administrative complaints has passed. Right to Rise intends to seek summary judgment on this and other grounds and, for this additional reason, a default judgment against the FEC would be improper. This is simply *not* a case "where the adversary process has been halted because of an essentially unresponsive party," *Jackson*, 636 F.2d at 836, and a default judgment would therefore be inappropriate. Here, Plaintiffs waited years to bring this action, and Right to Rise promptly presented meritorious defenses to Plaintiffs' claims. The Court should permit the parties to resolve this matter on the merits, and Plaintiffs' motion should be denied.

[1] Plaintiffs' reliance on *Citizens for Responsibility and Ethics in Washington v. FEC*, No. 1:19-cv-2753 (D.D.C. Apr. 9, 2020) is inapposite. *See* ECF No. 23 at 7. There, the plaintiff's motion for default judgment against the FEC was *unopposed*. And, unlike here, at the time of the request for the default judgment, there was no challenge to the sufficiency of the evidence presented, no question as to the plaintiff's standing to sue or the Court's jurisdiction over the case, and no argument that the case should be decided on its merits.

B. A Default Judgment Would Be Improper In This Multi-Defendant Case.

Even if the Court were to deny Right to Rise's motion for reconsideration and/or certification for interlocutory appeal, the Court should still wait on entering default judgment against the FEC until Right to Rise has concluded its defense of this case. In a matter involving multiple defendants, a default judgment should not be entered against one defendant for failure to appear or answer when another defendant remains in the case and inconsistent results will arise from the entry of a default judgment. *See Whelan v. Abell*, 953 F.2d 663, 674-75 (D.C. Cir. 1992); 10A C. Wright, A. Miller & M. Kane, Federal Practice & Procedure § 2690 (2010). Inconsistent results may occur between the default judgment and the ultimate resolution of the case where the defendants face joint liability or, like here, have closely related defenses. *See Hudson v. Ashley*, 411 A.2d 963, 969 (D.C. 1980) (vacating default judgment where defendants' defenses "were closely related").

To grant default judgment against the FEC now would present an irreconcilable conflict if Right to Rise is successful in defending this case on the merits. To date, the FEC has not taken public action on Plaintiffs' complaints, as is its prerogative. The FEC's decision to not take public action serves as the functional equivalent of the dismissal of an administrative complaint five years from the date of the alleged violation. 52 U.S.C. § 30145. It is this functional dismissal that the Plaintiffs are challenging in this suit, and the default judgment sought by Plaintiffs would result in an order holding that the FEC's treatment of MUR 6927 is contrary to law and, presumably, would attempt to require the FEC to conform to such a judgment within 30 days. ECF No. 23 at 19. Plaintiffs further assert that, if the FEC were to fail to conform with such a default judgment, Plaintiffs would avail themselves of FECA's private right of action. *Id.* at 18. As a result, the default judgment may deprive Right to Rise of the FEC's effective dismissal of MUR 6927 before Right to Rise has had an opportunity to defend the case on the merits.

A similar case challenging the FEC's dismissal of an administrative complaint is instructive as to the closely related nature of the FEC's and Right to Rise's positions in this matter. In *Campaign Legal Ctr. v. Fed. Election Comm'n*, 334 F.R.D. 1 (D.D.C. 2019) (hereinafter "*CLC 2019*"), as here, the FEC could not garner the four votes necessary to appear in the case to defend its treatment of an administrative complaint, so the court permitted the intervening defendants to appear, "effectively tak[ing] the defaulting FEC's place in th[e] suit." *Id.* at 3. The court explained that for respondents in an administrative action, the FEC's dismissal "provides them with a significant benefit, similar to a favorable civil judgment, and precludes exposure to civil liability." *Id*. at 5, *citing Crossroads Grassroots Pol'y Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 317 (D.C. Cir. 2015) (cleaned up).

So too here. More than five years ago, Plaintiffs filed with the FEC an administrative complaint against Right to Rise. Years later, the FEC has not taken public action on MUR 6927, presumably because it lacks four affirmative votes to find reason to believe that Right to Rise or the other respondents violated FECA. Plaintiffs now seek a default judgment declaring that the "FEC's failure to act on plaintiffs' administrative complaints is contrary to law under 52 U.S.C. § 30109(a)(8)(A)," and ordering "the FEC to conform to the judgment within 30 days pursuant to 52 U.S.C. § 30109(a)(8)(C)." ECF No. 23, at 19. Simply put, if Plaintiffs' motion were granted, Right to Rise would be forced to defend itself as a respondent in a Commission action against it.

As initially stated in Right to Rise's motion to intervene, ECF No. 9, the FEC appears to lack the four affirmative votes necessary to take public action on the allegations in Plaintiffs' administrative complaints presumably because less than four Commissioners have reason to believe that Right to Rise or the other respondents violated FECA. That being the case, the FEC simply cannot proceed with the investigation of, or enforcement against, Right to Rise or the other

respondents. This is the functional equivalent of the dismissal of the administrative complaints five years from the date of the alleged violation(s)—a deadline that has passed for the alleged violations. 52 U.S.C. § 30145.

That Plaintiffs are disgruntled by the lack of four Commissioner votes in support of their aggressive legal theories and policy stances does not make the FEC's actions contrary to law. If Plaintiffs obtain a default judgment now, the above-described FEC process will be disrupted, thereby depriving Right to Rise of the statutorily afforded protection from investigation and enforcement absent the affirmative probable cause vote of at least four Commissioners. But the aforementioned process—both the "four vote" requirement and the five year statute of limitations—are among the legal defenses the FEC would make had four Commissioners voted in the affirmative to defend this case. Indeed, the FEC has complied and is complying with FECA, and the relief sought by Plaintiffs would do nothing but order the FEC to do something it simply cannot due—take action without four Commissioner votes, and do so more than five years after the alleged violations. Accordingly, Right to Rise has and will pursue some of the same defenses in this case as would the FEC, and therefore it should have the opportunity to defend the case on the merits.

This likely explains why Plaintiffs now seek to avoid a determination on the merits by virtue of a default judgment. Yet, as the court noted in *CLC 2019*, while the FEC has defaulted, "an entry of default does not equate with default judgment." 334 F.R.D. at 7. Right to Rise must be afforded an opportunity to defend the case on the merits because it has effectively taken the FEC's place in this suit, and Plaintiffs cannot obtain judgment merely because the FEC has failed to appear. Plaintiffs' motion should be denied.

IV. CONCLUSION

For these reasons, Right to Rise respectfully requests that the Court deny Plaintiffs' Motion for Default Judgment.

Dated: April 9, 2021

Respectfully Submitted,

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**Pending Admission*

CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2021, I caused a true and correct copy of the foregoing document to be served upon all counsel of record registered with the Court's ECF system by electronic service via the Court's ECF transmission facilities.

/s/ Robert L. Avers
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