UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE PATRIOTS FOUNDATION
4020 121st Street
Urbandale, Iowa 50323,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION
1050 First St., NE
Washington, D.C. 20463,

Defendant,

and

HILLARY FOR AMERICA
P.O. Box 5256
New York, NY 10185-5256,

CORRECT THE RECORD
800 Maine Avenue SW, Suite 400
Washington, DC 20024,

MEDIA MATTERS FOR AMERICA
800 Maine Avenue SW, Suite 400
Washington, DC 20024,

AMERICAN BRIDGE 21ST CENTURY FOUNDATION
800 Maine Avenue SW, Suite 400
Washington, DC 20024,

AMERICAN BRIDGE 21ST CENTURY PAC
800 Maine Avenue SW, Suite 400
Washington, DC 20024,

DAVID BROCK
800 Maine Avenue SW, Suite 400
Washington, DC 20024,

Defendant-Intervenors.

Civil Action No. 1:20-cv-02229

DEFENDANT-INTERVENORS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR DEFAULT JUDGMENT AGAINST DEFENDANT FEDERAL ELECTION COMMISSION

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TABLE OF ABBREVIATIONS

American Bridge 21st Century Foundation	**AB Foundation**
American Bridge 21st Century PAC	**AB PAC**
Correct the Record	**CTR (or CTR PAC)**
Federal Election Commission	**FEC (or the Commission)**
Hillary for America	**HFA**
Matter Under Review	**MUR**
Media Matters for America	**MMFA**
Political Action Committee	**PAC**
Telecommunications Research & Action Center	**TRAC**
The Federal Election Campaign Act of 1971, as amended	**FECA (or the Act)**
The Federal Election's Office of General Counsel	**OGC**

INTRODUCTION

Defendant-Intervenors Correct the Record ("CTR"), Media Matters for America ("MMFA"), American Bridge 21st Century Foundation ("AB Foundation), American Bridge 21st Century PAC ("AB PAC"), Hillary for America ("HFA"), and David Brock submit this brief in opposition to Plaintiff The Patriot's Foundation's motion for default judgment against the Federal Election Commission ("FEC" or the "Commission"). Plaintiff is not entitled to a default judgment against the FEC because it has not shown that it has a claim of right under the Federal Election Campaign Act ("FECA"), as required by Federal Rule of Civil Procedure 55(d). To the contrary, and as discussed at length in Defendant-Intervenors' motion for judgment on the pleadings, Plaintiff lacks standing to bring this action; its claim is barred by the equitable doctrine of laches; and Plaintiff has failed to provide this Court with sufficient evidence to demonstrate that the FEC's delay in taking public action thus far is contrary to law.

Moreover, at this early point in this litigation, and given Plaintiff's own dilatory conduct, it is simply implausible that Plaintiff has been prejudiced by the FEC's delay, which can be reasonably explained by the fact that the FEC lacked a quorum of four Commissioners for seven of the fifteen months that Plaintiff's complaint has been pending with the agency. The FEC's lack of quorum rendered it unable to investigate Plaintiff's administrative complaint and left it with a significant backlog of cases to work through. By contrast, if this Court grants a default judgment against the FEC, then Defendant-Intervenors will be severely prejudiced. A default judgment would effectively deprive Defendant-Intervenors of the right to protect their interests—in particular, to engage in conciliation with the FEC or avoid a private lawsuit against them—which is the entire reason they were permitted to participate in this litigation in the first place. Minute Order Granting Motion to Intervene (Oct. 28, 2020) (recognizing that if Defendant-Intervenors were not allowed to participate, they "would lose the benefit of the administrative process and

therefore impairing their interests"). Default judgments are properly awarded when a litigation is effectively ***halted*** because of an unresponsive party. *See H. F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe*, 432 F.2d 689, 691 (D.C. Cir. 1970). That is not the case here; Defendant-Intervenors were granted intervention to litigate this case precisely because of the FEC's absence, and they are prepared to continue the case through the Court's decision on their motion for judgment on the pleadings, discovery, and summary judgment proceedings. *See* ECF No.16. This Court has tools available to it should it need information from the FEC to decide the merits of this case. *See, e.g.*, *Stockman v. FEC*, 944 F. Supp. 518, 520 (E.D. Tex. 1996), *aff'd as modified*, 138 F.3d 144 (5th Cir. 1998) (noting that the court ordered the FEC to answer interrogatories from the court).

For the reasons above and as set forth in more detail herein, Plaintiff's motion for default judgment should be denied.

BACKGROUND

On April 8, 2020—nearly *four years* after the conclusion of the 2016 general election—Plaintiff filed an administrative complaint under FECA, alleging that HFA, former Secretary of State Hillary Clinton's principal campaign committee for the 2016 presidential election, illegally coordinated with various organizations and political committees during the 2016 election cycle. *See* ECF No. 1-1. In particular, Plaintiff's administrative complaint makes the following hodgepodge of vague and unsupported allegations: (1) MMFA coordinated with HFA on media services that constituted prohibited and unreported in-kind contributions from MMFA to HFA; (2) AB Foundation shared staff, office space, and equipment with AB PAC, and although AB Foundation paid AB PAC for those costs and publicly reported those payments, those payments were inaccurate insofar as they were based on estimates rather than actual costs; (3) AB PAC and CTR PAC coordinated with HFA such that their purported independent expenditures should have

been reported as in-kind contributions to HFA; and (4) AB PAC made prohibited in-kind contributions to other unnamed Democratic campaigns. *See* ECF No. 1, ¶ 4.

On July 6, 2020, MMFA, AB Foundation, CTR PAC, AB PAC, and HFA filed a consolidated response to Plaintiff's administrative complaint. *See* ECF No. 10-2. In their response, the administrative respondents argued that each of Plaintiff's allegations were rooted in speculation and a misreading of the law rather than in evidentiary support. Specifically, they argued that the administrative complaint did not present any facts or evidence indicating that: (1) MMFA made in-kind contributions to HFA, CTR PAC, or AB PAC; (2) AB Foundation made in-kind contributions to AB PAC or that AB PAC misreported its activity; or (3) CTR PAC and AB PAC made in-kind contributions to HFA. Finally, the response noted that the administrative complaint provided no evidence that AB PAC ever provided research services to a campaign committee for free, let alone any evidence of *which* campaign committee may have received such services. *Id*.

The FEC has not yet take public action on Plaintiff's administrative complaint. However, the FEC has not been sitting on Plaintiff's complaint for fifteen straight months, as Plaintiff has portrayed to the Court. *See* ECF No. 20 at 10 (stating that a "delay of 15 months to gather information is unreasonable"). Indeed, for seven months before Plaintiff filed its administrative complaint, and a total of eight months after, the FEC lacked a quorum of members and was thus unable to take action on the complaint. *See* FEC, "Matthew Petersen to depart Federal Election Commission," (Aug. 26, 2019) https://www.fec.gov/updates/matthew-petersen-depart-federal-election-commission/; *see also* 52 U.S.C. § 30109(a)(2)-(4) (requiring the FEC to have a quorum of four members in order to be able to vote to take action to investigate and conciliate a complaint); 52 U.S.C. §§ 30106(c), 30107(a)(6)-(9) (requiring the FEC to have a quorum of four members in

order to vote to defend the agency in legal proceedings). As for administrative complaints such as the one filed by Plaintiff, 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*. § 30145. The FEC understandably has a backlog of cases to resolve given the long period of time it lacked quorum before and after Plaintiff's complaint was filed. *See Common Cause v. FEC*, 842 F.2d 436, 450-51 (D.C. Cir. 1988) ("In 1988, an election year, the Commission has far more pressing matters to address than to formulate an ex post facto statement of reasons explaining a 1980 dismissal."). At this point, the FEC has only been able to maintain a quorum for eight of the fifteen months that Plaintiff's administrative complaint has been pending.

Yet, 127 days after filing its administrative complaint with the FEC—just ***seven days*** after the 120-day jurisdictional minimum threshold for filing a lawsuit under FECA had passed—Plaintiff filed this lawsuit. *See* ECF No. 1. Plaintiff's nine-page complaint alleges a single cause of action: "the FEC's failure to act on its administrative complaint is contrary to law under 52 U.S.C. § 30109(a)(8)(A)." ECF No. 1, ¶ 40. The complaint barely includes any facts to support that assertion. Plaintiff seeks a declaratory judgment and an order from this Court requiring the FEC to act on its complaint within 30 days.

Because this lawsuit was filed when the FEC lacked quorum, the agency could not obtain the votes needed to defend the suit. Defendant-Intervenors thus moved to intervene to defend their interests and were granted intervention by this Court on October 28, 2020. Minute Order Granting Motion to Intervene (Oct. 28, 2020). Apparently in no rush for the FEC to resolve this case, Plaintiff *subsequently moved to stay this matter* for a total of 180 days, a request this Court granted.

See Minute Orders of Nov. 30, 2020 and Mar. 30, 2021. The stay was lifted on June 29, 2021, after which Defendant-Intervenors filed a motion for judgment on the pleadings, ECF No. 21, and Plaintiff filed the instant motion for default judgment against the FEC, ECF No. 20.

Because Plaintiff lacks standing, the relief it seeks is barred by the laches doctrine, and because the FEC's failure to act is not contrary to law, Defendant-Intervenors remain committed to defending the suit on the merits. Plaintiff's motion for default judgment should be denied.

STANDARD OF REVIEW

Default judgment is a drastic remedy of last resort, reserved for extreme situations where the adversary process has literally been halted because of an essentially unresponsive party. *See H. F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe*, 432 F.2d 689, 691 (D.C. Cir. 1970); *cf. Webb v. District of Columbia*, 146 F.3d 964, 971 (D.C. Cir. 1998) (noting because of "drastic nature of a default judgment," it "must be a sanction of last resort"). That is because default judgment counteracts the "strong policy favoring the adjudication of a case on its merits," *Baade v. Price*, 175 F.R.D. 403, 405 (D.D.C. 1997), "depriv[ing] a party completely of its day in court," *Webb*, 147 F.3d at 971. Thus, in all cases, entry of a default judgment is not automatic, nor does "the procedural posture of default . . . relieve a federal court of its typical obligations," including its obligation to determine it has jurisdiction over the matter or parties. *Blank v. Islamic Republic of Iran*, No. 19-3645 (BAH), 2021 WL 3021450, at *6 (D.D.C. July 17, 2021).

Those principles apply with even greater force where, as here, the defendant is the government. *See Means v. Reich*, No. 98-5182, 1998 WL 796417, at *1 (D.C. Cir. Oct. 16, 1998) (citing 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 2702, at 178-80 (4th ed.) ("[W]hen the government's default is due to a failure to plead or otherwise defend, the court typically either will refuse to enter a default or, if a default is entered, it will be set aside.")). In such cases, the moving party must "establish[] a claim or right

to relief by evidence that satisfies the court." Fed. R. Civ. P. 55(e); *see also Carvajal v. Drug Enf't Agency*, 246 F.R.D. 374, 375 (D.D.C. 2007) ("[D]efault judgment may not be entered against the United States absent an independent factual showing of a meritorious claim.").

Plaintiff incorrectly characterizes its evidentiary burden as not "an especially high one." ECF No. 20 at 6. In reality, the inquiry requires a "thorough review of the plaintiff's allegations and the factual evidence presented," *Stansell v. Republic of Cuba*, 217 F. Supp. 3d 320, 336 (D.D.C. 2016) (cleaned up), and courts must draw their "findings of fact and conclusions of law from admissible testimony in accordance with the Federal Rules of Evidence," *Thuneibat v. Syrian Arab Republic*, 167 F. Supp. 3d 22, 33 (D.D.C. 2016). Additionally, all doubts should be resolved in the favor of the party against whom default is sought. *See Cap. Yacht Club v. Vessel AVIVA*, 228 F.R.D. 389, 393 (D.D.C. 2005). To establish a claim or right to relief, the moving party must do more than point to unsupported factual allegations. *See Stansell*, 217 F. Supp. 3d at 336 (noting courts should not "unquestioningly accept a complaint's unsupported allegations as true"). That is particularly true where, as here, the moving party's allegations are not "[un]controverted" because an opposing party is actively challenging the merits of those allegations. *Thuneibat*, 167 F. Supp. 3d at 33; *see also* ECF No. 21.[1] Additionally, the moving party must establish that the court has jurisdiction over the claims and the parties, otherwise the moving party "has failed to carry her

[1] Case law regarding default judgment motions against other countries is relevant here because the standard used to determine whether a party moving for default judgment has established a claim or right to relief under the statute permitting a court to enter a default judgment against a foreign state is identical to the standard for entry of default judgments against the United States. *See Hill v. Republic of Iraq*, 328 F.3d 680, 684 (D.C. Cir. 2003); *Est. of Botvin ex rel. Ellis v. Islamic Republic of Iran*, 772 F. Supp. 2d 218, 227 (D.D.C. 2011) ("This 'satisfactory to the court' standard is identical to the standard for entry of default judgments against the United States under Federal Rule of Civil Procedure 55(d).").

burden" 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).

In sum, because the Court lacks jurisdiction to consider Plaintiff's action to begin with; because Plaintiff has not presented evidence that establishes a claim or right to relief;, because the relief requested is itself barred by equity; because Defendant-Intervenors stand ready to litigate the case even without the action of the FEC; and because entering default judgment would serve only to prejudice Defendant-Intervenors, Plaintiff's motion should be denied.

ARGUMENT

Plaintiff lacks standing and has not provided sufficient evidence that the FEC's failure to take public action on its complaint is contrary to law. Further, the relief sought by Plaintiff is barred by the equitable doctrine of laches. Plaintiff has thus not satisfied its burden for default judgment against the FEC because the Plaintiff has failed to establish a claim or right to relief under FECA. This Court should deny Plaintiff's motion for default judgment.

I. Plaintiff lacks standing.

As a threshold matter, Plaintiff is not entitled to default judgment until it has demonstrated that the Court has jurisdiction over its claims. *See 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). When a party moving for default judgment "has not established, and cannot establish, that the court has subject matter jurisdiction over her claims," the party "has failed to carry her burden" and "the motion for default judgment must be denied." *Strong-Fisher*, 611 F. Supp. 2d at 52 n.2; *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).

Plaintiff's complaint fails to allege facts sufficient to establish Article III standing. As discussed in detail in Defendant-Intervenors' motion for judgment on the pleadings, ECF No. 21 at 11-26, Plaintiff has not suffered a legally cognizable informational injury nor has Plaintiff sufficiently articulated the information it would obtain if it were successful on the merits in this case. *See* ECF No. 21 at 11-20. Plaintiff's administrative complaint seeks legal determinations, not new factual information; *see id.* at 14-18; Plaintiff fails to allege sufficient facts to support its claims to informational injury, *see id.* at 18; and some of the information Plaintiff seeks is already publicly available, *see id.* at 18-20. Plaintiff has also failed to show how the alleged lack of information has caused it any concrete harm. *See id.* at 20-22. Nor was Plaintiff's alleged injury caused by the FEC's delay. *See id.* at 22-23. Finally, Plaintiff lacks organizational standing because no discrete programmatic activity will be imminently and adversely affected by the FEC's delay. *See id.* at 23-26. Plaintiff's motion for default judgment, ECF No. 20, does nothing to remedy its inadequate pleadings. Because Plaintiff lacks standing, this Court lacks jurisdiction and Plaintiff is not entitled to a default judgment against the FEC.

II. The equitable doctrine of laches bars Plaintiff's claim for relief.

The equitable doctrine of laches provides an independent reason to deny Plaintiff's motion for default judgment. As Defendant-Intervenors explained in their motion for judgment on the pleadings, ECF No. 21, because Plaintiff delayed in filing its administrative complaint, Plaintiff's right to relief is barred by the doctrine of laches, and Plaintiff's motion for default judgment, ECF No. 20, provides no counter to that defense.

To invoke the defense of laches to bar a claim, a defendant "must show that the plaintiff has unreasonably delayed in asserting a claim and that there was 'undue prejudice' to the defendant as a result of the delay." *Jeanblanc v. Oliver Carr Co.,* No. 94–7118, 1995 WL 418667, at *4 (D.C. Cir. June 21, 1995); *see also Pro–Football, Inc. v. Harjo,* 415 F.3d 44, 47 (D.C. Cir.

2005) (stating that laches "requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense") (quoting *Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 121-22 (2002)).

Here, Plaintiff delayed in filing its administrative complaint, which necessarily resulted in significant delay in filing this lawsuit because Plaintiff could not file this lawsuit before their administrative complaint had been pending at the FEC for at least 120 days. *See* 52 U.S.C. § 30109(a)(8)(A), (C). The allegations in Plaintiff's administrative complaint revolve around Secretary Clinton's 2016 presidential campaign and the alleged interconnectedness of the Defendant-Intervenor organizations that Plaintiff contends supported her campaign. *See* ECF No. 1-1. Because the administrative complaint centers on activity surrounding the 2016 election, Plaintiff could have filed it in 2016 or 2017, just as was done by other complainants alleging similar wrongdoing. *See, e.g.*, *Campaign Legal Ctr.*, 507 F. Supp. 3d 79, 82 (D.D.C. 2020) (alleging impermissible coordination between HFA and CTR PAC).

But Plaintiff waited to file until spring 2020, less than two years before the statute of limitations on its claims would expire, despite knowing that the FEC could not act on Plaintiff's administrative complaint as a result of its lack of quorum, *see* 52 U.S.C. § 30109(a)(2)–(4), and the FEC could not vote to defend the agency in legal proceedings without regaining quorum, *see* 52 U.S.C. §§ 30106(c), 30107(a)(6)–(9). Now, Plaintiff is rushing the FEC to take public action. If Plaintiff obtains the relief it seeks—ordering the FEC to act on Plaintiff's complaint within 30 days—the FEC will be prejudiced by being forced to reorder its administrative priorities, upending the deference traditionally afforded administrative agencies. Moreover, as discussed in the section immediately below, Defendant-Intervenors will be prejudiced if the FEC is unable to act in 30

days because that would allow Plaintiff to bring a civil suit directly against them. Plaintiff's claim is barred by the equitable doctrine of laches.

III. Entry of default judgment against the FEC would severely prejudice Defendant-Intervenors.

Plaintiff's motion for default judgment against the FEC should also be denied because it will severely prejudice Defendant-Intervenors. Rule 55 "is designed to empower courts to consider the equities that specially arise in a given case." *Gilmore v. Palestinian Interim Self-Gov't Auth.*, 843 F.3d 958, 966 (D.C. Cir. 2016). One such equitable factor is whether entering default judgment will prejudice other parties. *Cf. Candido v. District of Columbia*, 242 F.R.D. 151, 156, 164 (D.D.C. 2007) (weighing the potential prejudices suffered by the parties). When entering default judgment against one party would frustrate the defense of another party, courts refuse to enter default judgment, even when it might otherwise be appropriate, which is not this case. *See, e.g.*, *Scimed Life Sys., Inc. v. Medtronic Ave Inc.*, 297 F. Supp. 2d 4, 10 (D.D.C. 2003) ("The Court cannot see how it is possible to enter default judgment against Martin without also simultaneously, and inadvertently, entering judgment against Scimed on the underlying issues of Medtronic's counterclaim.").

Defendant-Intervenors are full participants in this case and are entitled to mount a vigorous defense regardless of whether the FEC has entered an appearance. *See Schneider v. Dumbarton Devs., Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985) ("When a party intervenes, it becomes a full participant in the lawsuit and is treated just as if it were an original party" and therefore the intervenor has both the duty and the right to "complete adjudication by the federal court of the issues in litigation between the intervenor and the adverse party"); *cf. District of Columbia v. Merit Sys. Prot. Bd.*, 762 F.2d 129, 132 (D.C. Cir. 1985) (stating that intervenors "assume the status of full participants in a lawsuit," even when the original defendant is dismissed). Indeed, one of the

primary reasons this Court granted Defendant-Intervenors' motion to intervene in this case is that if Defendant-Intervenors could *not* participate, then they "would lose the benefit of the administrative process and therefore impairing their interests." Minute Order Granting Motion to Intervene (entered Oct. 28, 2020). If this Court grants a default judgment against the FEC, then that could effectively deprive Defendant-Intervenors of the right to protect their interests—in particular, to engage in conciliation with the FEC or avoid a private lawsuit against them—which is the entire reason they were permitted to participate in this litigation in the first place.

To date, the FEC has not taken public action on Plaintiff's administrative complaint, which will effectively amount to a dismissal of an administrative complaint five years from the date of the alleged violation, *see* 52 U.S.C. § 30145, a time limit which is quickly approaching in this case, *see* ECF No. 1-1 (alleging violations based on campaign finance reports that were filed in 2016). Plaintiff challenges that functional dismissal in this suit, and the default judgment sought by Plaintiff would apparently result in an order holding that the FEC's treatment of the administrative complaint is contrary to law and, presumably, would attempt to require the FEC to conform to such a judgment within 30 days. As a result, the default judgment may deprive Defendant-Intervenors of the FEC's effective dismissal of the administrative complaint before Defendant-Intervenors have had an opportunity to defend the case on the merits. Plaintiff is not entitled to a default judgment at Defendant-Intervenors' expense when Defendant-Intervenors stand ready to litigate this case in the absence of the FEC. *Cf. Campaign Legal Ctr. V. FEC*, 334 F.R.D. 1, 5 (D.D.C. 2019) (permitting administrative respondents to intervene and defend the FEC's dismissal of the plaintiff's administrative complaint in the absence of the FEC because the FEC's dismissal of the administrative complaint provides administrative respondents "with a significant benefit, similar to a favorable civil judgment"). Notably, neither of the cases Plaintiff cites, in which default

judgment was granted against the FEC, involved the appearance of any other party defending the action on the merits. *See Campaign Legal Ctr. v. FEC*, No. 20-cv-01778 (D.D.C. Oct. 14, 2020) (ECF No. 14); *CREW v. FEC*, No. 19-cv-02753 (D.D.C. Apr. 4, 2020).

What is more, separate and apart from the resulting prejudice to Defendant-Intervenors, the possibility of inconsistent results itself counsels against entry of default judgment. When a case involves multiple defendants, the need to guard against the entry of incompatible judgments providing conflicting relief independently precludes entry of 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 (4th ed.). 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. In *Frow v. De La Vega*, 82 U.S. 552, 552-53 (1872), for example, the plaintiff alleged that multiple defendants had conspired to defraud him of a single tract of land. The district court entered default judgment against one unresponsive defendant, which vested title to the land in the plaintiff; later, however, it found for the remaining defendants on the merits, which vested title to the land in the defendants. *Id.* Because the two judgments provided irreconcilable relief, the Supreme Court vacated the default judgment. *Id.* at 554. The Court explained that "[i]t would be unreasonable to hold, that because one defendant had made default, the plaintiff should have a decree even against him, where the court is satisfied from the proofs offered by the other, that in fact the plaintiff is not entitled to a decree." *Id.* Similarly, the court in *Hudson v. Ashley*, 411 A.2d 963, 969-70 (D.C. 1980), vacated default judgment against one defendant because the defenses of another party "were closely related" and therefore "[t]he distinct possibility existed" that an appearing party's proof would have exonerated the defaulting party "and required setting aside his default at the end of trial." The same risk of conflicting results

is present here. Entering default judgment against the FEC and awarding Plaintiff declaratory and injunctive relief while Defendant-Intervenors continue to litigate this matter could result in the very irreconcilable conflicts that *Frow* counsels against.

IV. Plaintiff is not entitled to a default judgment because it has failed to establish a claim or right to relief under FECA.

Plaintiff has also failed to provide sufficient evidence demonstrating that the FEC's delay in publicly acting on its administrative complaint is contrary to law. To establish a claim or right to relief for unreasonable delay, Plaintiff must *present evidence* sufficient to satisfy the Court that the failure to take public action is "arbitrary and capricious," which is a standard that is highly deferential to administrative agencies like the FEC and necessarily tied to the specific facts of each case. *See Common Cause v. FEC*, 489 F. Supp. 738, 744 (D.D.C. 1980). When determining whether agency inaction is contrary to law, courts may consider the following factors: (1) the resources and information available to the agency; (2) the credibility of the allegations made in the administrative complaint, (3) the nature of the threat posed, and (4) the novelty of the issues involved. *See, e.g.*, *id.*; *see also In re Nat'l Cong. Club*, No. 84-5701, 1984 WL 148396, at *1 (D.C. Cir. Oct. 24, 1984) (approving the factors considered in *Common Cause*). District courts in the District of Columbia also consider the six principles enumerated by the D.C. Circuit in *Telecommunications Research & Action Center ("TRAC") v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984), which are: (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. *Id*.

As Defendant-Intervenors argue in their motion for judgment on the pleadings, ECF No. 21 at 26-34, Plaintiff's allegations fail to demonstrate that the *Common Cause* factors and the *TRAC* principles support Plaintiff's allegation of arbitrary and capricious delay by the FEC. And Plaintiff's motion for default judgment, ECF No. 20, including the complete dearth of evidence it has marshalled in support of the motion, fairs no better.

A. Plaintiff's claims are not credible because they are speculative and unsupported by evidence.

As described in detail in Defendant-Intervenors' motion for judgment on the pleadings, the allegations underlying Plaintiff's administrative complaint remain entirely speculative and completely unsupported by factual evidence. *See* ECF No. 10-2, Admin. Response; ECF No. 21 at 32-33. Plaintiff's allegations in this matter do not even meet the standard required for the FEC to take action, much less for a court to credit them. When analyzing an administrative complaint, the FEC considers whether there is "reason to believe" a violation of the Act has occurred. *Id*. § 30109(a)(2). In interpreting this provision, the Commission has held that it "may find 'reason to believe' only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the [Act]."[2] Moreover, "unwarranted legal conclusions from asserted facts" and mere speculation will not be accepted as true." *Id*. If at least four of the FEC's

[2] MUR 4960 (Hillary Rodham Clinton for U.S. Senate Exploratory Committee, et al.), Statement of Reasons, Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas at 1 (Dec. 21, 2000).

Commissioners vote to find such reason to believe,[3] the FEC may investigate the alleged violation or engage in pre-probable cause conciliation; otherwise, the FEC dismisses the administrative complaint. *Id.* §§ 30106(c), 30109(a)(2).

As stated in Defendant-Intervenors' response to the administrative complaint, Plaintiff's allegations fall woefully short of the standard necessary to prompt investigation by the FEC. ECF No. 10-2. For example, as discussed above, Plaintiff complains that publicly-reported reimbursement payments made by AB Foundation to AB PAC for shared costs may be inaccurate without any reason to believe that is the case. ECF No. 1-1 at 5. The fact that the payments were made based on estimates of costs is consistent with industry practice and is not reason to believe they were false. Similarly, the administrative complaint alleges that AB PAC made prohibited in-kind contributions to unnamed Democratic campaigns. But the complaint never so much as names which campaigns were the supposed recipients. *Id.* at 4.

Plaintiff's motion for default judgment does not even attempt to bolster its speculative claims with factual evidence. *See* ECF No. 20. The exhibits attached to Plaintiff's motion largely center on when the FEC lacked quorum, a fact which is not helpful to Plaintiff's case. The exhibits do nothing to support Plaintiff's argument that their underlying claims are credible. *Compare* ECF No. 1-1 (alleging Defendant-Intervenors illegally coordinated and made prohibited in-kind contributions) *with* ECF No. 20-1 (announcing the FEC's 2019 end of year report); ECF No. 20-3 (describing the FEC's activities while it lacked quorum); ECF No. 20-4 (announcing the confirmation of Commissioner James E. Trainor III); ECF No. 20-5 (announcing Commissioner Caroline C. Hunter's departure from the FEC); ECF No. 20-6 (announcing the confirmations of

[3] Prior to the Commission's vote, the FEC's Office of General Counsel ("OGC") recommends to the Commission in a report whether there is "reason to believe" a violation has occurred. *Id.* § 30109(a)(2).

Commissioners Shana Broussard, Sean Cooksey, and Allen Dickerson); ECF No. 20-7 (illustrating Defendant-Intervenors' attempt to contact the FEC about this case). Plaintiff claims that "[t]he exhibits [to its administrative complaint], which it says supports its claims, will be included in the normal course should this Court order the FEC to act but the FEC subsequently fails to act." *Id.* But Plaintiff cannot ask for relief now and promise to prove its right to relief later. Plaintiff must provide evidence that satisfies the court that it is entitled to relief *before* it is entitled to default judgment. *Carvajal*, 246 F.R.D. at 375 ("[D]efault judgment may not be entered against the United States absent an independent factual showing of a meritorious claim.").[4] Plaintiff's barebones allegations, unsupported by evidence, are not sufficient to show that its claims are credible.

B. Plaintiff has failed to demonstrate that the conduct challenged in Plaintiff's administrative complaint poses an urgent and ongoing threat, or has prejudiced Plaintiff's interests.

Plaintiff claims that the FEC's failure to take public action on the administrative complaint "not only makes it eminently possible that Defendant-Intervenors and other similar entities will continue to violate campaign finance and coordination rules to elude FECA's requirements, but provides a clear roadmap for doing so." Br. at 8 (cleaned up). Plaintiff is wrong. Some of the Defendant-Intervenor organizations, including HFA, which was supposedly was the impetus for the alleged in-kind contributions in the first place, is no longer active. Thus, there is no threat that

[4] Plaintiff contends that it has not filed exhibits to its administrative complaint because of their size and number. ECF No. 21 at 7 n.3. That does not excuse Plaintiff from its burden of having to show, based on admissible evidence, that its claims are credible in order to obtain a default judgment against the FEC. *Thuneibat*, 167 F. Supp. 3d at 33 ("Courts must draw their findings of fact and conclusions of law from admissible testimony in accordance with the Federal Rules of Evidence."). Indeed, much of the "evidence" cited in Plaintiff's administrative complaint, which is not even before this Court, is inadmissible hearsay. *See, e.g.*, ECF No. 1-1 at 3 n.5 (citing out of court media statements to prove the truth of the matter asserted), 3 n.7 (same), 4 n.9 (same), 4 n.10 (same), 4 n.11 (same), 6 n.25 (same), 7 n.29 (same), 7 n.31 (same), 11 n.34 (same), 11 n.36 (same), 12 n.37 (same), 13 n.41 (same), 13 n.42 (same), 15 n.43 (same), 15 n.46 (same).

they will continue the conduct Plaintiff challenges. With respect to similar entities, the rules prohibiting coordination and setting contribution limits are still on the books and being enforced by the FEC. *See, e.g.*, 52 U.S.C. 30101(17), 30116(a), (d); 11 C.F.R. 110.1. Plaintiff's argument that this case will open the door for political actors in a way that poses an urgent and ongoing threat to the entire electoral system is overblown and entirely speculative. The FEC's failure to take public action on the administrative complaint in this case is limited to this case; it does not set any precedent that political actors can make illegal or excessive in-kind contributions without consequence. The FEC has not introduced or sanctioned any loophole here; it has simply failed to take public action on Plaintiff's administrative complaint during the period of time that Plaintiff demands, which is far from providing a "roadmap" for violating the law in the future. *See* Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50702 (Aug. 2, 2016) (explaining that the FEC does not disclose legal conclusions, factual findings, or vote records before the agency takes public action on an administrative complaint); *see also* 5 U.S.C. § 552(a)(2), (a)(5). This case will not shield other political actors from legal liability for wrongdoing, and other political actors will find no comfort in the FEC's lack of action here, especially because the FEC still has jurisdiction over this matter and now has a quorum of four Commissioners who can authorize the Commission to investigate complaints.

Furthermore, to the extent Plaintiff believes that Defendant-Intervenors' alleged conduct poses an urgent threat, its actions before filing this lawsuit and during the course of this litigation indicate otherwise. Plaintiff waited nearly four years after Defendant-Intervenors' alleged conduct took place—from the 2016 election until spring of 2020—to even file an FEC complaint regarding the conduct challenged in this case. Then, after Plaintiff ironically sued the FEC for not taking public action quickly enough, Plaintiff moved to stay this case for another six months. ECF Nos.

14, 15. If Plaintiff was concerned that Defendant-Intervenors and other political actors would engage in repeated and similar prohibited conduct that would threaten the electoral system, then it would have filed an administrative complaint earlier, and it would have litigated this case on a more swift timeline. Plaintiff's delay is inexcusable and further demonstrates that the FEC's delay is not contrary to law.

C. The FEC has lacked sufficient resources to take public action on Plaintiff's administrative complaint.

Another factor courts consider when weighing whether an agency's delay is arbitrary or capricious is what resources the agency has available to it to adjudicate the complaint at issue. *Common Cause*, 489 F. Supp. at 744. At the same time, courts consider the effect of expediting delayed action on agency activities of a higher or competing priority, and they afford agencies deference when prioritizing their docket. *TRAC*, 750 F.2d at 80. Courts recognize that "[i]t is not for the judiciary to ride roughshod over agency procedures or sit as a board of superintendance[sic] directing where limited agency resources will be devoted." *FEC v. Rose*, 806 F.2d 1081, 1091 (D.C. Cir. 1986) ("We are not here to run the agencies."). Because the FEC is "primarily and substantially responsible for administering and enforcing FECA," it is "precisely the type of agency to which deference should presumptively be afforded." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) (cleaned up).

For a significant part of the time Plaintiff's complaint has been pending, the FEC has lacked the resources necessary to adjudicate it. *See* ECF No. 21 at 29-32. Instead of suggesting otherwise, the exhibits attached to Plaintiff's motion only further demonstrate how the FEC's hands were tied while it lacked a quorum, and that it was unable to investigate cases. *See* ECF No. 20-2 at 4 n.1 (noting that, as of September 1, 2019, the FEC had only three commissioners, and thus "has been unable to launch any new investigations, issue any advisory opinions, promulgate any rules, grant

any matching funds request, or render any decisions on pending enforcement actions") (cleaned up). There is now a backlog of work at the FEC that the agency is working through,[5] and Plaintiff's complaint is almost certainly caught in that backlog.

Further, Plaintiff's claim that the FEC has had over 15 months to investigate its administrative complaint, ECF No. 20 at 10, is patently incorrect. As Plaintiff well knew when it filed its complaint, the FEC lacked a quorum of four Commissioners, and had been without a quorum for nearly a year, since August 2019.[6] Without a quorum, the FEC could not act on Plaintiff's administrative complaint or any other complaints *See* 52 U.S.C. § 30109(a)(2) (requiring an affirmative vote of four of more Commissioners to initiate an investigation).[7] Since Plaintiff filed its administrative complaint, the FEC has only had a quorum that would allow it to investigate Plaintiff's complaint for eight months, not fifteen.

D. The claims presented in the administrative complaint are novel and complex.

Plaintiff's attempt to oversimplify this case by describing it as one that is just about coordination and contribution limits, two subjects the FEC confronts with regularity, *see, e.g. SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 689 (D.C. Cir. 2010) (regarding contribution limits); *Shays v. Fed. Election Comm'n*, 528 F.3d 914, 919 (D.C. Cir. 2008) (regarding coordination), is misleading. This case is complex. Plaintiff's administrative complaint

[5] *See* FEC, "Statement of Commissioner Ellen L. Weintraub On the Senate's Votes to Restore the Federal Election Commission to Full Strength," available at https://www.fec.gov/resources/cms-content/documents/2020-12-Quorum-Restoration-Statement.pdf (December 9, 2020).

[6] *See* FEC, "Matthew Petersen to depart Federal Election Commission," available at https://www.fec.gov/updates/matthew-petersen-depart-federal-election-commission/ (Aug. 26, 2019) (noting that former Commissioner Matthew Petersen resigned in late August 2019).

[7] *See* FEC, "Statement of Commissioner Ellen L. Weintraub On the Senate's Votes to Restore the Federal Election Commission to Full Strength," available at https://www.fec.gov/resources/cms-content/documents/2020-12-Quorum-Restoration-Statement.pdf (December 9, 2020).

appears to allege that numerous excessive and prohibited in-kind contributions took place between several different respondents. *See* ECF No. 1-1. Those respondents are categorically different entities—some are non-profit organizations while others are political committees—to which different rules apply. *See id.* Before it can take public action on the administrative complaint, the FEC must analyze numerous financial transactions that are called into question by the Plaintiff, as well as the relationships between the Defendant-Intervenors.

This case is also closely related to other administrative complaints that were filed against HFA, CTR PAC, and other Defendant-Intervenors in the wake of the 2016 election. *See* MURs 6940, 7097, 7146, 7160, and 7193. Plaintiff's theory of excessive in-kind contributions made by CTR PAC in support of HFA is closely related to a novel theory pushed by Campaign Legal Center in a complaint that has been rejected by the FEC. On June 4, 2019, by a deadlocked vote of 2-2, the FEC's four commissioners failed to find reason to believe and failed to authorize any investigation into the allegations raised in Campaign Legal Center's administrative complaint.[8] There, the controlling group of Commissioners issued a Statement of Reasons thoroughly explaining that they voted against finding reason to believe that HFA violated the law because (1) the "internet communications in support of HFA were not in-kind contributions even if they were coordinated with Hillary for America" because they were not "public communications"; and (2) "speculative information and materials stolen by Russian intelligence operatives and published by Wikileaks does not provide reason to believe that [the] expenditures for other activities were excessive or prohibited in-kind contributions to [HFA]."[9] Plaintiff in this case relies on similar

[8] Amended Certification, MURs 6940, 7097, 7146, 7160, and 7193, available at https://www.fec.gov/data/legal/matter-under-review/7146/ (signed June 13, 2019).

[9] Statement of reasons, MUR 7146, available at https://www.fec.gov/data/legal/matter-under-review/7146/ (Aug. 21, 2019).

information and materials from foreign adversaries, and their allegations necessarily require the FEC to analyze other related matters in order to determine next steps in this case. Because of the complexity of the allegations underlying Plaintiff's administrative complaint and the fact that Plaintiff's allegations overlap with those made in other similar matters, the FEC's delay in taking public action is not unreasonable. *Stockman v. FEC*, 944 F. Supp. at 524.

E. Plaintiff's complaint has not been pending at the FEC for an unreasonable period of time.

Defendant-Intervenors' motion for judgment on the pleadings also describes why the FEC's delay does not violate the rule of reason. *See* ECF No. 21 at 33-34. Plaintiff's motion for default judgment fails to provide any reason why an FEC complaint that has been pending with the agency for just over 15 months following eight months of agency inaction due to lack of quorum is violative of reason. *See* ECF No. 20 at 11-12. Courts regularly find comparable—and longer—delays reasonable. *See, e.g.*, *Common Cause*, 489 F. Supp. at 745 (finding a two-year delay was not contrary to law); *Stockman v. FEC*, 944 F. Supp. at 523 (noting that "an FEC investigation lasting approximately one year and ten months does not strike the Court as violative of rules of reason" and that resolution of similar matters "take[s] 3.3 to 4.6 years to complete"). And it is not at all unusual for similar matters to take the FEC more than 15 months to resolve. *See, e.g.*, MUR 7878 (resolving administrative complaint regarding contribution limits, opened March 13, 2018, and closed March 10, 2010); MUR 7875 (resolving administrative complaint regarding contributions, opened July 24, 2018, and closed May 6, 2021); MUR 7768 (resolving administrative complaint regarding contribution limits, opened September 6, 2019, and closed January 14, 2021); MUR 7767 (resolving administrative complaint regarding contribution limits, opened September 6, 2019, and closed January 14, 2021).

Although, as Plaintiff claims, "some cases can be dealt with in the 120-day period," ECF No. 20 at 11, Congress did not provide a timetable within which the FEC must act, *see Rose*, 806 F.2d at 1092. To be sure, in cases where human health and welfare are at risk, agency delay is intolerable. *See Rose*, 806 F.2d at 1091-92 n.17. But this is not one of those cases. This case is about activity that occurred several elections ago. And Plaintiff has provided no evidence demonstrating that this FEC investigation requires rapid resolution. *See* ECF No. 20 at 11-12.

V. Plaintiff has otherwise failed to establish that entry of default judgment is warranted against the FEC.

Plaintiff's motion for default judgment against the FEC should be denied for additional, independent reasons: Plaintiff has failed to demonstrate that the FEC's default is willful; that the default prejudices Plaintiff; and that no meritorious defense precludes Plaintiff's claim for relief. In C*ombs v. Nick Garin Trucking*, 825 F.2d 437, 441 (D.C. Cir. 1987), the D.C. Circuit identified willfulness, prejudice, and the absence of a meritorious defense as factors to be considered in deciding whether to set aside an entry of default judgment. Those same factors are relevant in deciding whether default judgment is appropriate in the first place. *See Scimed Life Sys.*, 297 F. Supp. 2d at 9. Plaintiff has entirely failed to address or has—at best—insufficiently satisfied each of those factors. *See Biton v. Palestinian Interim Self Gov't Auth.*, 233 F. Supp. 2d 31, 33 (D.D.C. 2002) (noting that the moving party failed to address a factor in finding the factor weighed against default judgment).[10] Moreover, none of the factors weigh in favor of default judgment against the FEC.

[10] Plaintiff claims that the FEC's failure to appear is not a matter of competing resources, but rather because "[t]he Commission can only appear in federal court to defend against a lawsuit when four Commissioners affirmatively vote to do so. . . . Therefore, the FEC's failure to appear in this action likely indicates that a defense providing a rationale for their inaction has not been authorized by the required four Commissioners." ECF No. 20 at 10. However, when the FEC has failed to garner four votes to defend as a lawsuit in the past, and an intervenor was present to defend against the case, courts have permitted the intervenor to "effectively take the defaulting FEC's place" instead

First, the FEC's default was not willful. Courts judge a defaulting party's willfulness on a spectrum between "an excusable failure to respond," which counsels against entry of default judgment, and "a deliberate decision to default." *Strong-Fisher*, 611 F. Supp. 2d at 51. Uncertainties around the willfulness of default are frequently resolved in the defaulting party's favor, even where that party's explanation had slim or no supporting evidence. *See, e.g.*, *Biton*, 233 F.Supp.2d at 33 (finding default not willful because, even though the defaulting party had "supplied no specifics—by proffer, affidavit, or otherwise" to excuse its delay, the court has a "duty to accord the defendants the benefit of the doubt"). Given the FEC's lack of quorum and backlog of cases, and resolving any uncertainties in favor of the FEC, the FEC's absence in this case is best characterized as "an excusable failure to respond," which counsels against entry of default judgment. *Strong-Fisher*, 611 F. Supp. 2d at 51.

Second, Plaintiff has not demonstrated that the FEC's default has impacted its ability to successfully prosecute its claim. Delay in and of itself does not satisfy the prejudice requirement. *See Keegel v. Key West & Caribbean Trading Co., Inc*., 627 F.2d 372, 374 (D.C. Cir. 1980). To establish prejudice resulting from the default, the party moving for default judgment must show that consequences of the delay "might have an impact upon [their] ability to successfully prosecute [their] claim." *Cap. Yacht Club*, 228 F.R.D. at 394. During the early stages of the proceedings, courts often refuse to find that a moving party has been prejudiced by a default. *See, e.g.*, *Biton*, 233 F. Supp. 2d at 33 (finding "no possible prejudice" was apparent because, since "[n]o discovery has been conducted, and no summary judgment motions have been filed," the case was

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of granting default judgment against the FEC. *See Campaign Legal Ctr. v. FEC*, 334 F.R.D. 1 (D.D.C. 2019); *see also Gilmore v. Palestinian Interim Self-Gov't Auth.*, 675 F. Supp. 2d 104, 108-10 (D.D.C. 2009) (finding defendants' default to be willful and part of a "deliberate litigation strategy," but nevertheless granting vacatur of the entry of default).

"procedurally in its early stages"); *Haskins v. U.S. One Transp., LLC*, 755 F. Supp. 2d 126, 131 (D.D.C. 2010) (same); *Acree v. Republic of Iraq*, 658 F. Supp. 2d 124, 129 (D.D.C. 2009) (same). Here, the litigation is in its early stages, but is actively proceeding. In fact, Plaintiff and Defendant-Intervenors filed a joint status report explicitly noting that they were "prepared to move this litigation forward," despite the FEC's absence. ECF No. 16. Other cases against the FEC have similarly proceeded with an intervening party stepping into the shoes of the FEC. *See, e.g.*, *Campaign Legal Ctr*, 334 F.R.D. at 3 (permitting the intervening defendants to appear, "effectively tak[ing] the defaulting FEC's place in th[e] suit"). The only delays in the progression of the litigation have resulted from Plaintiff's requests to stay the proceedings. *See* ECF Nos. 14, 15.

Finally, meritorious defenses against Plaintiff's claim exist. The measure of a meritorious defense is not "likelihood of success." *Keegel*, 627 F.2d at 374. Rather, a meritorious defense sufficient to undermine entry of default judgment need only contain "even a hint of a suggestion" of a complete defense. *Id.* Accordingly, a meritorious defense "is extremely easy to present." *Shatsky v. Syrian Arab Republic*, 795 F. Supp. 2d 79, 84 (D.D.C. 2011). To wit, the D.C. Circuit has allowed "somewhat broad and conclusory" allegations to suffice. *Keegel*, 627 F.2d at 374. Defendant-Intervenors have not only proffered defenses that meet that standard, *see* ECF No. 13 (denying the merits of Plaintiff's complaint, alleging that Plaintiff's lack standing, and alleging that Plaintiff's requested relief is barred by the equitable doctrine of laches), they have supported those defenses in their motion for judgment on the pleadings, *see* ECF No. 21 (same). Those same arguments preclude judgment against the FEC. *See* ECF No. 20. Accordingly, meritorious defenses weigh against entry of default judgment against the FEC.[11]

[11] The suggestion of a meritorious defense need not be raised by FEC. *See Whelan v. Abell*, 48 F.3d 1247, 1259 (D.C. Cir. 1995) (affirming district court's finding that the absence of a meritorious defense factor weighed against default judgment even though the defaulting party "just

CONCLUSION

For the reasons stated herein, Defendant-Intervenors respectfully request that the Court deny Plaintiff's Motion for Entry of Default Judgment against Defendant FEC.

Dated: August 3, 2021

Respectfully submitted,

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adopted by reference the defenses of its co-defendants"); *cf. Keegel*, 627 F.2d at 374 n.4 (finding the meritorious defense factor weighed against default judgment even though it was raised in an answer that "did not have the verification required by [the local rules]"). The import of the factor is whether the court is "faced with a case in which the court could conclude that the defense is entirely without merit in view of facts as to which there is no genuine issue." *Id.*

CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2021, that 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.

By: */s/ Aria Branch*

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