

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

The Patriots Foundation,

Plaintiff,

v.

The Federal Election Commission,

Defendant,

and

Correct the Record, *et al.*,

Intervenor-Defendants.

Case No. 20-cv-02229-EGS

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

Plaintiff, The Patriots Foundation (hereinafter “Plaintiff” or “TPF”), 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”). Plaintiff brought this action against the FEC for failure to act on a pending administrative complaint that alleges violations of the Federal Election Campaign Act (“FECA”). For over 300 days, the FEC failed to appear, answer, plead, or otherwise defend this action as required by the Federal Rules of Civil Procedure, and, on July 16, 2021, Plaintiff filed an Affidavit in Support of Entry of Default, requesting that the Clerk of Court enter default against the FEC. (ECF No. 18). The Clerk of Court subsequently entered default against the FEC on July 20, 2021 (ECF No. 19). As required by Rule 55(d), Plaintiff puts forth this submission containing evidence sufficient to establish that the FEC has failed to act, which is contrary to law, and establishes Plaintiff’s right to relief against the FEC. Accordingly, Plaintiff requests that the Court enter judgment against the FEC and in favor of

Plaintiff; declare that the FEC's failure to act is contrary to law in violation of 52 U.S.C. § 30109(a)(8)(C); and direct the Commission to conform with such declaration within 30 days.

In support of this motion, Plaintiff submits the attached Declaration of Attorney Jason Torchinsky (Torchinsky Decl.) (Exhibit 1) and a number of exhibits as more fully incorporated herein.

STATEMENT OF FACTS

I. The Administrative Complaint

1. Plaintiff filed an administrative complaint with the FEC on April 8, 2020, alleging that Media Matters for America, American Bridge 21st Century Foundation, American Bridge 21st Century PAC, Correct the Record PAC, and David Brock (together, the "Administrative Respondents") violated various FECA provisions establishing contribution limits, contribution source prohibitions, and public disclosure and reporting requirements by making or receiving excessive or prohibited and unreported in-kind contributions to one another by coordinating their activities with one another. Admin. Compl. at 11-15 (ECF No. 1-1)

2. Publicly available information established, as fully explained in the Administrative Complaint, that there are multiple ongoing instances of uncompensated in-kind contributions being made from one Administrative Respondent to another—as well as to other political committees. *See* Admin. Compl. at 12 (ECF No. 1-1).

3. Plaintiff's Administrative Complaint asked the FEC to find that the Administrative Respondents violated 2 U.S.C. § 30104 when: (1) American Bridge 21st Century PAC and Correct the Record PAC failed to report uncompensated services received from Media Matters For America; and (2) American Bridge 21st Century Foundation made unreported in-kind contributions to American Bridge 21st Century PAC. Plaintiff's Administrative Complaint further

asked the FEC to find that the Administrative Respondents violated 2 U.S.C. § 30116 when Correct the Record PAC and American Bridge 21st Century PAC made prohibited contributions to Hillary Clinton's 2016 presidential campaign and when American Bridge 21st Century PAC made prohibited in-kind contributions to a variety of Democratic campaigns. Finally, Plaintiff's complaint asked the FEC to conduct an investigation to determine whether a violation had occurred. Admin. Compl. at 12-16 (ECF No. 1-1).

4. Plaintiff's administrative complaint, therefore, demonstrates that the Administrative Respondents violated FECA.

5. The FEC acknowledged receipt of Plaintiff's Administrative Complaint on April 8, 2020, by letter dated April 13, 2020, and informed Plaintiff that the FEC had "numbered this matter MUR 7726." April 13, 2020 Letter from FEC (ECF No. 1-2).

6. TPF has not received any further communications from the FEC regarding MUR 7726. Torchinsky Dec. at ¶ 2 (Ex. 1).

7. The Act provides administrative complainants with a cause of action against the FEC if the agency fails to act on an administrative complaint within 120 days. 52 U.S.C. § 30109(a)(8)(A).

8. At the time the complaint was filed in this case, 127 days had elapsed since the filing of the administrative complaint. *See* (ECF No. 1-1, 1-2). Since more than 120 days had passed since Plaintiff filed its administrative complaint, and the FEC had taken no action on that complaint, Plaintiff filed the instant matter on August 13, 2020, seeking that the Court declare that the FEC's failure to act is contrary to law in violation of 52 U.S.C. § 30109(a)(8)(C) and direct the Commission to conform with such declaration within 30 days.

9. The FEC has lacked a quorum for a portion of the time Plaintiff's Administrative Complaint has been pending. However, the lack of a quorum does not toll the 120-day time period under 52 U.S.C. § 30109(a)(8)(A), and the FEC has nonetheless had ample time to act in this matter.

10. While not required to do so, Plaintiff, on two separate occasions, has voluntarily requested that the Court hold the matter in abeyance, first once for 120-days, (ECF No. 14), and again for 90-days, (ECF No. 16), to allow time for the FEC to appear, and the Court granted such requests. *See* Minute Orders, ECF Entries Nov. 30, 2020 and Mar. 30, 2020.¹ However, notwithstanding the additional five months to appear, the FEC failed to appear or communicate with Plaintiff in any way. Torchinsky Decl. ¶¶ 8-10. It has now been 468 days since TPF filed its administrative complaint.²

II. The FEC's Failure to Act.

11. "Obviously . . . all is not well at the FEC." Weintraub, E., *The State of the Federal Election Commission 2019 End of Year Report*, December 20, 2019 (Exhibit 2). While the FEC was without a quorum from Sept. 1, 2019 to June 5, 2020, and from July 3, 2020 to December 18, 2020, the agency has had a quorum for approximately eight of the fifteen months since the Administrative Complaint was filed. *See* Press Release, FEC, FEC remains open for business, despite lack of quorum (Sept. 11, 2019) (Exhibit 3); Press Release, FEC, James E. Trainor III

¹ Defendant-Intervenors, who are the subjects of the Administrative Complaint, contacted staff at the FEC on June 28, 2021, with Counsel for Plaintiff copied, asking "whether the FEC intends to make an appearance in the matter and defend the FEC against the complaint." Email from Stephanie Command to Lisa Stevenson (acting general counsel), Kevin Deeley (assistant general counsel), *et al.* (Ex. 7). To Plaintiff's knowledge, the FEC has not responded to that correspondence. Torchinsky Decl. at ¶ 9 (Ex. 1).

² At the time the complaint was filed in this case, 127 days had elapsed since the filing of the administrative complaint. *See* (ECF No. 1).

sworn in as Commissioner (June 5, 2020) (Exhibit 4); Press Release, FEC, Caroline C. Hunter to depart Federal Election Commission (June 26, 2020) (Exhibit 5); Press Release, FEC, Shana Broussard, Sean Cooksey, Allen Dickerson sworn in as Commissioners (Dec. 18, 2020), Exhibit 6). According to the former chair of the commission, “[e]nforcement actions pending before the Commission languished for months or years” Ex. 2 at 2. Such is the case here.

12. Therefore, the FEC has had more than sufficient time act on MUR 7726. Even with a quorum, however, the FEC has failed to take any known action on Plaintiff’s Administrative Complaint. Torchinsky Dec. at ¶ 11 (Ex. 1).

13. To date, the FEC has not appeared, filed an answer, or otherwise defended in this action. Torchinsky Dec. at ¶¶ 8, 11 (Ex. 1); *see generally Patriots Foundation v. FEC*, No. 20-cv-2229 (D.D.C.) (the docket lists no appearance by the FEC and no filings by the FEC).

ARGUMENT

I. Default Judgment

Rule 55(b) of the Federal Rules of Civil Procedure permits default judgment to be entered if the party against whom judgment is sought has failed to plead or otherwise defend the action. When unresponsive parties threaten to halt the progress of litigation, judgment by default is available to protect the responsive party “lest he be faced with interminable delay and continued uncertainty as to his rights.” *Gilmore v. Palestinian Interim Self-Gov’t Authority*, 843 F.3d 958, 965 (D.C. Cir. 2016) (internal citation omitted).

Where the party in default is the United States, default judgment may be entered “if the claimant establishes a claim or right to relief by evidence that satisfies the court.” Fed. R. Civ. P. 55(d). This rule, however, “does not relieve the government from the duty to defend cases or obey the court’s orders. Indeed this privilege against default judgment . . . heightens the government’s

duty to defend cases” *Payne v. Barnhart*, 725 F. Supp. 2d 113, 119 (D.D.C. 2010) (internal citation omitted). Nor is this evidentiary burden an especially high one. After entry of default against the government, “the quantum and quality of evidence that might satisfy a court can be less than that normally required.” *Alameda v. Sec’y of Health, Educ. & Welfare*, 622 F.2d 1044, 1048 (1st Cir. 1980) (discussing Rule 55(e), which is now Rule 55(d)).

II. FEC’s Failure to Act Is Contrary To Law

Under the FECA, this Court may “declare that the . . . [FEC’s] failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days” 52 U.S.C. § 30109(a)(8)(C). When the issue before a court is “failure to act,” “[c]ourts must determine whether the Commission has acted ‘expeditiously.’” *Common Cause v. FEC*, 489 F. Supp. 738, 744 (D.D.C. 1980). This analysis involves examination of “[1] the credibility of the allegation, [2] the nature of the threat posed, [3] the resources available to the agency and the information available to it, [4] as well as the novelty of the issues involved.” *Id.* Courts also consider the factors outlined in *Telecommunications Research & Action Center v. FCC*, 750 F. 2d 70, 80 (D.C. Cir. 1984) (hereinafter, “*TRAC*”), which include the [1] “rule of reason” regarding the time elapsed as informed by the [2] statutory timetable, [3] the reasonableness of delay given the stakes, [4] the effect expedition would have on agency priorities, and [6] the interests prejudiced by delay. 750 F.2d at 80. While the *TRAC* Court stated that it “need not find” agency impropriety, however, should impropriety exist, that would constitute a factor in favor of finding that the delay was contrary to law. *Id.*

Although the Commission’s decision whether to investigate “is entitled to considerable deference, the failure to act in making such a determination is not.” *Democratic Senatorial Campaign Comm. v. FEC*, Civil Action No. 95-0349 (JHG), 1996 U.S. Dist. LEXIS 22849, at *13

(D.D.C. Apr. 17, 1996) (hereinafter, “*DSCC*”). Here, an application of either the *Common Cause* factors or the *TRAC* factors demonstrates that the FEC has failed to act expeditiously, rendering its failure contrary to law.

A. Plaintiff’s Administrative Complaints States Credible, Well-Supported Allegations.

First, Plaintiff’s Administrative Complaint states credible and amply-supported allegations. *See Common Cause*, 489 F. Supp. at 744. In *Citizens for Percy ’84 v. FEC*, No. 84-cv-2653, 1984 U.S. Dist. LEXIS 21881, at *8 (D.D.C. Nov. 19, 1984), the court found the allegations credible where the plaintiff waited to file the complaint until after it had “amassed a considerable amount of evidence” and the complaint contained documentation of the amounts spent and the purposes of the spending. *Id.* Given this, the *Percy* Court found that the “evidence provided by the plaintiffs in the complaint was more than sufficient to guide the FEC’s investigations as well as underscore the credibility of the allegations.” *Id.*

Likewise, here, TPF’s administrative complaint provides extensive, reliable evidence to guide the FEC’s investigation and establish the credibility of the allegations. TPF’s Administrative Complaint cites extensively from various credible sources and includes over 450 pages of supporting exhibits.³ By submitting a detailed and specific compilation of relevant evidence in its administrative complaint, TPF both provided the FEC with guidance to conduct its investigation and left no doubt that its claims deserve to be regarded as credible. Nor has the FEC appeared in this action to dispute the credibility of TPF’s claims.

B. The Threat to the Electoral System Posed by the FEC’s Delay in Investigating the Scheme is Significant and Ongoing.

³ Due to the extensive size and number of exhibits, the Complaint includes as an attachment only the Administrative Complaint without the corresponding exhibits. *See* (ECF No. 1-1). The exhibits but will be included in the normal course should this Court order the FEC to act but the FEC subsequently fails to act.

Second, the nature of the threat posed by the FEC's failure to act on TPF's claims is significant. *Common Cause*, 489 F. Supp. at 744; *TRAC*, 750 F.2d at 80. In analyzing this factor, courts look at both the significance of the threat and the likelihood that illegal activity will continue. *See Percy*, 1984 U.S. Dist. LEXIS 21881, at *9; *DSCC*, 1996 U.S. Dist. LEXIS 22849, at *15-16 (“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.”).

TPF's allegations that the Administrative Respondents engaged in a deliberate scheme to circumvent various campaign finance and coordination rules presents an ongoing threat to the integrity of the electoral process. Deliberately hiding the true source of campaign funds is conduct contrary “to the principal purpose of FECA,” *DSCC*, 1996 U.S. Dist. LEXIS 22849, at *15, to ensure voters know “who is speaking about a candidate . . . before an election,” *Citizens United v. FEC*, 558 U.S. 310, 369 (2010). Disclosure is crucial to allow “citizens [to] see whether elected officials are ‘in the pocket’ of so-called moneyed interests,” *id.* at 370, and to prevent “corruption and avoid the appearance of corruption,” *Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976). The Commission's failure to take action against the clear violations outlined in Plaintiff's Administrative Complaint “not only makes it eminently possible” that Administrative Respondents and other similar entities will continue to violate campaign finance and coordination rules to elude FECA's requirements, “but also provides a clear roadmap for doing so.” *Shays v. FEC*, 528 F.3d 914, 925 (D.C. Cir. 2008) (citing *McConnell v. FEC*, 540 U.S. 93, 177 n.69 (2003)).

The purpose of the FEC disclosure regime is not simply to punish the bad actors, but also to serve the interests of the voters through ensuring disclosure. Here, the FEC's failure to take timely action in this case will likely embolden others to engage in similarly illegal and deceptive actions. Absent FEC action, there is no reason to believe the Administrative Respondents, and

others, will be deterred from continuing to violate the various campaign finance and coordination rules at issue in the Administrative Complaint. Allowing Administrative Respondents' violations to continue uncorrected creates "an immense loophole that would facilitate the circumvention of the Act's" framework and lead to "the potential for gross abuse." *See Shays v. FEC*, 414 F.3d 76, 98 (D.C. Cir. 2005) (quoting *Orloski v. FEC*, 795 F.2d 156, 165 (D.C. Cir. 1986)). Therefore, allowing such an obvious evasion of FECA's requirements is clearly "inconsistent with the statutory mandate," *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981), and the FEC's ongoing delay in acting on TPF's Administrative Complaint poses a substantial and ongoing threat to the electoral system.

C. The FEC's Failure to Act Cannot Be Excused by Lack of Information, Resource Constraints, or Competing Priorities.

There is no evidence to suggest that the FEC lacks the resources or information to complete its investigation of Administrative Respondents in a timely manner or has competing priorities that would be harmed by moving forward with this matter. *See Common Cause*, 489 F. Supp. at 744; TRAC, 750 F.2d at 80. As an initial matter, the FEC has not appeared in this case, so it has not pointed to resource constraints or competing priorities as a potential excuse for its ongoing failure. *Cf. id.* The FEC has thus failed to justify delay based on lack of resources, which lies on the agency because "[k]nowledge as to the limits of [agency] resources is exclusively within the control of the Commission." *Citizens for Percy '84*, 1984 U.S. Dist. LEXIS 21881, at *11. But, even if the FEC pleaded poverty, "whatever 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 U.S. Dist. LEXIS 22849, at *18

Further, the FEC has more than enough information available to move forward expeditiously on Plaintiff's Administrative Complaint. Plaintiff's Administrative Complaint sets

forth the allegations in exhaustive detail and provides extensive citation to evidence in support of the factual allegations. *See* (ECF No. 1-1). Even if the FEC required additional information, it has now had over 15 months to investigate. Given that the FECA contemplates that “some cases can be dealt with in the 120 day period,” a delay of 15 months to gather information is unreasonable. *See Citizens for Percy ’84*, 1984 U.S. Dist. LEXIS 21881, at *12 (“If not, we fail to understand why Congress created jurisdiction in this court upon the passage of 120 days from filing of the administrative complaint.”). By comparison, this Court recently entered a default judgment against the FEC in a matter involving an eight-month delay—holding that the one-month stretch in Summer 2020, during which the Commission had a quorum, indicated it “was statutorily capable of acting on the complaint during that period.” *See* Order at 1 n.1, *Campaign Legal Ctr. v. FEC*, No. 1:20-cv-01778-RCL (D.D.C. Oct. 14, 2020) (ECF No. 14); *see also* Order at 1, *CREW v. FEC*, (D.D.C. Apr. 4, 2020) (ECF No. 9) (entered a default judgement in a matter involving an approximately fourteen-month delay).

Additionally, the FEC’s inaction is likely not just a matter of competing priorities or scarce resources. The Commission can only appear in federal court to defend against a lawsuit when four Commissioners affirmatively vote to do so. *See* 52 U.S.C. §§ 30106(c); 30107(a)(6). 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.

D. The Issues Raised Are Not Novel.

The FEC regularly investigates the very same types of violations that Plaintiff raises here, rendering the issues far from novel. *See Common Cause*, 489 F. Supp. at 744. Plaintiff’s Administrative Complaint raises credible allegations of violations of the statute and regulations by alleging that Administrative Respondents (1) failed to report uncompensated services and other

in-kind contributions, 2 U.S.C. § 30104; and (2) made prohibited contributions, in-kind and otherwise, to various Democratic campaigns, 2 U.S.C. § 30116. None of these are novel provisions and each have been the subject of prior FEC action. The FEC already understands the relevant law and it cannot be said that the current case is so novel as to justify the ongoing delay. The underlying violations at issue here are not novel. The FEC is accustomed to applying relevant law to Section 30104 and 30116 violations like those at issue in TPF's Administrative Complaint.

E. Continued, Unexplained Delay Violates the “Rules of Reason” and Is Out-of-Sync with the FECA’s Statutory Timetable.

Continued delay runs contrary to the “rule of reason” and Congress’s intent as evidenced through the statutory timetable. *TRAC*, 750 F.2d at 80. The “rule of reason . . . assumes that an agency matter “will be finally decided within a reasonable time encompassing months, occasionally a year or two, but not several years or a decade.” *Rose v. Federal Election Comm’n*, 608 F. Supp. 1, 10 (D.D.C. 1984). Here, we are fast approaching the 16-month mark with no evidence from the Commission that it has taken, or plans on taking, any substantive action to advance the investigation requested by Plaintiff.

While Congress “did not impose specific 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 U.S. Dist. LEXIS 22849, at *23. To this end, the language of the FECA, which contains many “short deadlines governing the speed with which such complaints must be handled,” *Rose*, 608 F. Supp. at 11, evidences an expectation of movement within a reasonable time. In fact, “some cases can be dealt with in the 120-day period” proscribed by the FECA, *Citizens for Percy ’84*, 1984 U.S. Dist. LEXIS 21881 at *12, and there is no reason to believe that this should not have been one such case. “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 U.S. Dist. LEXIS 22849, at *25. The FEC's failure to appear in this case deprives this Court and Plaintiff of any further insight into the FEC's process. As such, there is no evidence to suggest that the FEC has taken, or will take, any meaningful action on the administrative complaint. The only way to ensure the allegations found in TPF's Administrative Complaint will be investigated and adjudicated in a reasonable time frame is to allow Plaintiff to avail itself of FECA's private right of action. *See* 52 U.S.C. § 30109(a)(8)(C).

Accordingly, this factor mediates in favor of a finding that the FEC's delay is unreasonable and confirms that the delay is likely to continue.

F. The FEC's Delay Prejudices Plaintiff and Gives Rise to the Appearance of Impropriety.

Plaintiff and voters will be and have been severely prejudiced by the FEC's inability to proceed with its investigation of Administrative Respondents, and this delay, a fair amount of which occurred after the FEC regained a quorum, gives rise to the appearance of agency impropriety. *See TRAC*, 750 F.2d at 80. The fact that the election at issue has passed "does not make the 'nature' or 'extent' of the threat any less significant." *Rose*, 608 F. Supp. at 12. Rather, absent enforcement, there is no reason to believe that the same parties who violated various campaign finance and coordination laws in this instance will not be empowered to do so again, despite the illegality, in future elections.

The lack of enforcement and lack of any consequences for the illegal behavior detailed in the Administrative Complaint will continue to encourage these bad actors to continue to violate campaign finance law.

CONCLUSION

Accordingly, Plaintiff requests that the Court enter judgment against the FEC in favor of Plaintiff declaring that the FEC's failure to act is contrary to law in violation of 52 U.S.C. § 30109(a)(8)(A) and direct the Commission to conform with such declaration within 30 days pursuant to 52 U.S.C. § 30109(a)(8)(C).

Dated: July 20th, 2021

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CERTIFICATE OF SERVICE

I do hereby certify that, on this 20th day of July 2021, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which gives notice of filing to all counsel of record. I further certify that a copy of this motion was sent to the Federal Election Commission, who has yet to enter an appearance, by USPS Certified mail on July 21, 2021.

/s/ Jason Torchinsky
Jason Torchinsky