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 REPLY IN SUPPORT OF MOTION FOR DEFAULT JUDGMENT**

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PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR DEFAULT JUDGMENT

Plaintiff, The Patriots Foundation (hereinafter "Plaintiff" or "TPF") submit this reply in support of its Motion for Default Judgment against the Federal Election Commission ("FEC" or the "Commission"). Plaintiff filed an Affidavit in Support of Entry of Default (ECF No. 18) on July 16, 2021, and the Clerk of Court entered default against the FEC on July 20, 2021 (ECF No. 19). Plaintiff then filed, pursuant to Rule 55(d), a Motion for Default Judgment (ECF No. 20) on July 20, 2021, and Defendant-Intervenors responded on August 3, 2021, with a Memorandum in Opposition to Plaintiff's Motion for Default Judgment (ECF No. 23). Plaintiff addresses Defendant-Intervenors' arguments here.[1]

ARGUMENT

Rule 55(d) of the Federal Rules of Civil Procedure permits a default judgment to be entered if the party against whom such judgment is sought has failed to plead or otherwise defend the action. When unresponsive parties threaten to halt the progress of litigation, default judgments are available to protect the responsive party from an "interminable delay and continued uncertainty as to his rights." *Gilmore v. Palestinian Interim Self-Gov't Auth.*, 843 F.3d 958, 965 (D.C. Cir. 2016) (internal citation omitted). Defendant-Intervenors counter that default judgments are only appropriate in "extreme situations where the adversary process has literally been halted because of an essentially unresponsive party," ECF. No. 23 at 5, but that is precisely what has happened here. As of the date of this filing, the Defendant Commission has *still* never appeared in this

[1] Intervenors' arguments in their Response are largely just regurgitated from their Motion for Judgment on the Pleadings. *Compare* ECF No. 21-1 at 11-35 (raising standing, failure to state a claim, and laches) *with* ECF No. 23 at 7-10, 13-24 (raising standing, laches, and failure to state a claim, and prejudice). Therefore, this reply contains some of the same arguments presented by Plaintiff in its Memorandum in Opposition to Defendant-Intervenors' Motion for Judgment on the Pleadings.

lawsuit. Defendant-Intervenors claim to represent the Commission's interests, but they are no substitute for *the* real defendant.

When the party in default is the United States government, as it is here, a default judgment may be entered "only if the claimant establishes a claim or right to relief by evidence that satisfies the court." Fed. R. Civ. P. 55(d). But this standard "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 defendant cases . . . ." *Payne v. Barnhart*, 725 F. Supp. 2d 113, 119 (D.D.C. 2010) (internal citation omitted). Nor is the evidentiary burden required of the claimant a particularly heavy one. After an entry of default against the government, "the quantum and quality of evidence that might satisfy a court can be less than normally required." *Alameda v. Sec'y of Health, Educ. & Welfare*, 622 F.2d 1044, 1048 (1st Cir. 1980) (discussing Rule 55(e), now Rule 55(d)).

I. A Default Judgment Should Be Entered Because the FEC's Delay Violated FECA, it Has Failed to Appear in its Own Defense, and Defendant-Intervenors Are No Substitute.

Plaintiff has already adequately addressed Defendant-Intervenors' regurgitated arguments concerning Plaintiff's alleged failure to state a claim, *see* ECF No. 22 at 10-18, and, to the extent it is necessary, incorporates those points by reference here. Plaintiff further contends that Defendant-Intervenors' arguments in their Memorandum in Opposition concerning the inadvisability of entering default against the FEC are irrelevant for a different reason: Defendant-Intervenors are not actually the Defendant in this case, do not have access to Defendant's internal deliberations concerning Plaintiff's administrative complaint, and therefore cannot mount a defense on the merits or award any of the relief that Plaintiff seeks.

Defendant-Intervenors argue that granting Plaintiff's motion in this case will unfairly prejudice them because "entering default judgment against [the FEC] would frustrate the defense of another party"—namely, Defendant-Intervenors. ECF No. 23 at 10. It is worth asking what "defense" Defendant-Intervenors are talking about. If it is a defense pertaining to the merits of Plaintiff's claim of unreasonable delay, then they should present it; but if it is a defense pertaining to the merits of Plaintiff's Administrative Complaint to the FEC then this is not the appropriate forum, and they are not the appropriate defendant. It is understandable why Defendant-Intervenors would be interested in the content of Plaintiff's administrative complaint, but their attempt to confuse the issues at this stage should not succeed.

Defendant-Intervenors *do not have a defense* to Plaintiff's claim of unreasonable delay under 52 U.S.C. § 30109(a)(8)(A), because Plaintiff has never alleged an unreasonable delay on the part of Intervenors; rather, it properly alleged an unreasonable delay on the part of the FEC in acting upon Plaintiff's administrative complaint. The FEC might have a defense to this claim, but if it does it has not seen fit to appear in this litigation and present it. Despite Defendant-Intervenors' strenuous efforts to guess at the arguments that the Commission *might* present if it were to appear in its own defense, their interests in this litigation are not synonymous with the FEC's and they could not award the Plaintiff the relief it seeks even if the Court ordered them to do so. The simple fact that the Court granted them leave to intervene to defend *their* interests does not simultaneously give them the right to present defenses on the FEC's behalf that are irrelevant to the matter at hand. Defendant-Intervenors are only a simulacrum of a defendant, not the real thing.[2]

[2] To that end, Intervenors do not have standing in *this* action. The FEC's failure to act is not an injury *traceable* to Intervenors nor *redressable* by them. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). No order of this Court against the Intervenors could possibly give Plaintiff the relief it seeks: action by the FEC.

Defendant-Intervenors occasionally seem so interested in attacking Plaintiff's administrative complaint on the merits, *see* ECF No. 23 at 14-16, that the Court could be forgiven for assuming that the content of the administrative complaint is the core issue here, but it is not. Defendant-Intervenors will have an adequate opportunity to present a defense against the substantive claims in Plaintiff's administrative complaint in the event the FEC fails to act upon an order from this Court and Plaintiff brings a direct civil claim against them, but that time has not yet arrived. Moreover, Defendant-Intervenors do not even know for sure whether their arguments concerning the FEC's resource constraints, *see* ECF No. 23 at 18-19, or the alleged complexity of Plaintiff's complaint, *see id.* at 19-21, are the real reason for the unreasonable delay in this case because it does not have any greater insight into the FEC's inner workings than Plaintiff does. Neither party actually knows why the FEC failed to act upon Plaintiff's complaint, which is all the more reason to enter default against the FEC and proceed with all expediency to ordering the FEC to respond within 30 days as required by law.

Crediting Defendant-Intervenors' arguments in their Memorandum in Opposition would mean countenancing additional rounds of shadowboxing between Plaintiff and Defendant-Intervenors while the real Defendant sits idly on the sidelines refusing to mount a defense. What's more, how does it make any sense to continue a proceeding where the *only* relief is an order against the FEC *without* the FEC as a party? The only credible answer is that it doesn't. Therefore, this Court should put an end to Defendant-Intervenors' attempts at defense by inference and allow this litigation to proceed to a stage where they possess the relevant information to defend themselves.

II. Plaintiff Has Demonstrated an Informational Injury Sufficient to Establish Standing.

Asserting informational injury as a basis for standing is not a novel legal argument, but one whose validity has repeatedly been affirmed in this and other courts. "The law is settled that a

denial of access to information qualifies as an injury in fact where a statute (on the claimants' reading) requires that the information be publicly disclosed and there is no reason to doubt their claim that the information would help them." *Campaign Legal Ctr. & Democracy 21 v. FEC*, 952 F.3d 352, 356 (D.C. Cir. 2020) (quotation omitted). Hence, there are two identifiable elements required to establish an informational injury: (1) the claimant has been denied access to information that a statute requires to be publicly disclosed, and (2) there is no reason to doubt the claimant's argument that the disclosure of the information would be beneficial to them.

First, the information that Plaintiff identifies is information that the FECA requires to be disclosed. The Supreme Court has recognized that FECA's disclosure provisions "constitute the Act's primary weapons against the reality or appearance of improper influence," and without adequate enforcement FECA is a dead letter. *Buckley v. Valeo*, 424 U.S. 1, 58 (1976). Moreover, FECA is a statute that expressly protects an informational right. "The Supreme Court has long recognized that FECA creates an informational right," and that right has been characterized as a "right to know who is spending money to influence elections, how much they are spending, and when they are spending it." *CREW v. Am. Action Network*, 410 F. Supp. 3d 1, 12. Moreover, the pool of potential informational claimants under FECA has not been narrowly circumscribed by statute or by precedent; rather, the very language of the statute "demonstrates a congressional intent to cast the standing net broadly." *FEC v. Akins*, 524 U.S. 11, 19 (1998); *see, e.g.*, 52 U.S.C. § 30109(a)(8)(A) ("*Any party aggrieved* . . . may file a petition with" this Court) (emphasis added). As a nonprofit, nonpartisan government watchdog that regularly monitors FEC reports in order to broadcast significant findings to the public, ECF No. 1 ¶ 11-14, Plaintiff fits squarely within the class of claimants whose right to information FECA protects.

Second, there is no reason to doubt Plaintiff's claim that the information it requested in its Administrative Complaint and that it continues to seek in this action would be helpful to achieving its mission. Plaintiff "uses public disclosure reports that are required to be filed with the FEC to educate the public about campaign spending and the true sources and scope of candidates' financial support so that the public may fully evaluate candidates for public office." *Id.* 1 ¶ 12; *see Nader v. FEC*, 725 F.3d 226, 230 (D.C. Cir. 2013) ("The Supreme Court's ruling in *Akins* and our ruling in *Shays* establish that litigants who claim a right to information allege the type of concrete injury needed for standing to bring a FECA claim if the disclosure they seek is related to their informed participation in the political process."). There can be no question that the disclosures sought by Plaintiff are related to its informed participation in the political process and its efforts to inform others.

Defendant-Intervenors argue that Plaintiff lacks standing for several reasons, none of which withstand scrutiny. First, Defendant-Intervenors claim that TPF lacks standing because it seeks "legal determinations, not new factual information." ECF No. 23 at 8. Courts have held that "a plaintiff's inability to procure from [an] agency a 'legal determination' or 'legal conclusion that carries certain law enforcement consequences' does not amount to informational injury." *Campaign Legal Ctr. v. FEC*, 507 F. Supp. 3d 79, 83-84 (D.D.C. 2020). But while a plaintiff might not have a "legally cognizable interest in labeling spending 'coordinated' if that spending has already been disclosed in some format," a plaintiff *does* have a right to the disclosure of information that has never been disclosed in *any* format when that information was legally required to be reported. *Campaign Legal Ctr. v. FEC*, 2021 U.S. Dist. LEXIS 31169, at *12 n.1 (D.D.C. Feb. 19, 2021) (citing *Wertheimer v. FEC*, 268 F.3d 1070, 1075 (D.C. Cir. 2001).

That is the kind of information Plaintiff requests here. TPF's standing in this matter is based upon its right to specific information that Defendant-Intervenors have *never* disclosed to the FEC, or to any other agency or person, despite their legal obligation under FECA to do so. This information consists of two categories of allegedly unreported in-kind contributions first identified in TPF's administrative complaint: (1) the uncompensated services provided by Media Matters for America to American Bridge 21st Century PAC and Correct the Record PAC, which Plaintiff alleges constitute unreported in-kind contributions; and (2) the unreported in-kind contributions made by American Bridge 21st Century Foundation to American Bridge 21st Century PAC. *See* ECF No. 1, ¶¶ 4, 7. TPF's claims are not limited to seeking a legal determination that the actions of Defendant-Intervenors during the 2016 campaign violated the FECA. Rather, TPF seeks additional facts. Plaintiff has identified information required to be disclosed by FECA and which has not been disclosed in previous filings. *See, e.g*, Pl.'s Admin. Compl. at 4 (ECF No. 1-1) (alleging that Media Matters for America's "partisan work supplements the work of AB PAC," another Defendant-Intervenor); *id.* at 5 (ECF No. 1-1) (alleging that the "formal cost-sharing arrangement" between AB PAC and AB Foundation is "especially a concern because the two organizations share space"). TPF seeks the disclosure of that information, concerning unreported in-kind contributions, that, as of the filing of this reply, has *still* never seen the light of day. Plaintiff asserts standing based upon its statutory right to the disclosure of the information itself, without regard to any law enforcement consequences that might flow from that release.

Defendant-Intervenors also allege that it is impossible to demonstrate an informational injury without first showing that an organization's "discrete programmatic activity will be imminently and adversely affected by the FEC's delay." ECF No. 23 at 8. This argument conflates the requirements for two separate bases of standing. In *Campaign Legal Ctr v. FEC*, this Court

discussed at length the standard for demonstrating standing based upon *informational* injury, while declining to reach the *CLC* plaintiffs' arguments concerning *organizational* injury. 2021 U.S. Dist. LEXIS 31169, at *12 n.1. These two forms of injury are not mutually exclusive; an organization could conceivably suffer an informational injury based upon a statutory right to disclosure of information that has been unlawfully withheld, and also suffer an organizational injury based upon the impact such withholding has had on the specific programmatic activities of that organization. Nevertheless, it is not required that an organization demonstrate *both* informational and organizational injury in order to successfully plead one of the two.

Here, TPF has demonstrated an informational injury that supports its standing. That showing of informational injury does not simultaneously require the Plaintiff to identify specific programmatic activities that are adversely affected by Defendant-Intervenors' continued withholding of the requested information. Rather, it is sufficient that TPF has identified the undisclosed additional information it seeks and the statute that mandates the disclosure of that information. Furthermore, there is no reason to doubt that disclosure of the information sought would help Plaintiff, and that it directly relates to Plaintiff's informed participation in the political process. In *FEC v. Akins*, the Supreme Court characterized the respondents' injury simply as the "inability to obtain information . . . that, on respondents' view of the law, the statute requires that [entity] make public." 524 U.S. at 20. The Court did not require the respondent to demonstrate specific ways in which that informational deprivation impacted their organizational activities. The Court instead held that a "failure to obtain relevant information"—*i.e.*, the very informational injury that Plaintiff asserts here—"is injury of a kind that FECA seeks to address." *Id.* This Court should not impose any additional pleading requirements beyond those required by the Supreme Court in this context.

Accepting all of the facts pleaded by Plaintiff as true, as is required at this point in the litigation, Plaintiff has credibly alleged that (1) FECA requires the public disclosure of the specific categories of unreported in-kind contributions identified by Plaintiff, and (2) "there is no reason to doubt [TPF's] claim that the information would help them" given the importance of such disclosure reports to TPF's mission as a nonpartisan, nonprofit government watchdog. 952 F.3d at 356; ECF No. 1, ¶¶ 11-14. Therefore, Plaintiff has demonstrated standing upon the basis of informational injury.

III. The Relief Plaintiff Seeks is Not Barred by Laches.

Plaintiff's claims are not barred by laches and Defendant-Intervenors' attempt to argue otherwise is unavailing. First, Intervenors seek to apply laches to a claim *that is not before this Court*. ECF No. 23 at 9. Second, Intervenors completely disregard the applicable five-year statute of limitations for the FEC to review violations of FECA, meaning laches is inapplicable. *Id.* Third, and finally, Intervenors do not, and indeed cannot, prove laches.

First, Intervenors ask the Court to focus on the wrong question. The case before the Court is *not* about the validity of Plaintiff's underlying administrative complaint or the timeliness of that complaint; that was a matter for FEC determination, if indeed the agency had ever arrived at one. The only question before this Court is whether the FEC acted within 120 days in response to that administrative complaint as required by FECA. And, as Intervenors readily concede, *this* action was timely. *Id.* at 9 (conceding that this lawsuit could not have been filed "before [Plaintiff's] administrative complaint had been pending at the FEC for at least 120 days"). That is, and should be, the end of this Court's analysis on this issue.

Second, while the five-year statute of limitations, *see* 28 U.S.C. § 2462, affects the FEC's ability to enforce a civil action against administrative respondents, it does not bar the relief that

Plaintiff seeks in this suit, which is once again an order instructing the FEC to comply with federal law, not to issue any particular "legal determination." Plaintiff alleges that has suffered an informational injury under FECA, and that injury could still be redressed by the disclosure of the requested information even after the expiration of the statute of limitations, per the FEC's admission in another recent case. *See* Br. for the FEC at 26, *Campaign Legal Ctr. v. FEC*, No. 20-5159 (D.C. Cir. Oct. 14, 2020) (arguing that "[t]he expiration of any statute of limitations . . . would not affect Complainant's interest in obtaining the information the Commission releases at the termination of an enforcement matter.").

Third, even if the diligence pursued by Plaintiff in submitting the Administrative Complaint were an issue in *this proceeding*—which it is not—then laches *still* does not apply because there is a separate applicable statute of limitations for administrative complaints. "[I]n face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief . . . ." *Petrella v. MGM*, 572 U.S. 663, 679 (2014); *id* at 678 (collecting cases). Congress has set a statute of limitations for any "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture" at five years. 28 U.S.C. § 2462. Section 2462 applies to administrative complaints under FECA. *FEC v. Christian Coalition*, 965 F. Supp. 66, 69 (D.D.C. 1997) (noting that "FECA does not contain an internal statute of limitations. The applicable statute of limitations is provided under 28 U.S.C. § 2462."). Accordingly, laches has no applicability here because Plaintiff satisfied the applicable statute of limitations.

Finally, the FEC cannot prove laches, because (1) the FEC is not here to defend itself; (2) it could not do so even if it had appeared given the applicable statute of limitations; and (3) Defendant-Intervenors' contention that they speak on behalf of the FEC is meaningless. "Laches is an equitable defense that applies where there is (1) lack of diligence by the party against whom

the defense is asserted, and (2) prejudice to the party asserting the defense." *Manin v. NTSB*, 627 F.3d 1239, 1242 (D.C. Cir. 2011). Importantly, "the party asserting a laches defense must have relied on the plaintiff's inaction, and must have been harmed on account of that reliance." *Purepac Pharm. Co. v. Thompson,* 283 F. Supp. 191, 203 (D.D.C. 2002).

First, as explained above, Plaintiff was *per se* diligent because it filed its administrative complaint within the applicable five-year statute of limitations. Next, as to the question of prejudice, Defendant-Intervenors argue that "the FEC will be prejudiced" by Plaintiff's alleged delay. ECF No. 23 at 9. There are several problems with this. Initially, while an Intervenor can, in some instances, step into the shoes of a party litigant, it cannot put words in another party's mouth. Defendant-Intervenors here are attempting to assert prejudice on behalf of the FEC. This is something they cannot possibly do. Defendant-Intervenors cannot claim that the FEC will have to adjust its priorities to accommodate Plaintiff's *timely* administrative complaint because Intervenors know just as much about the FEC's "priorities" as do Plaintiffs: that is to say, nothing.

Even *if* Intervenors could assert prejudice on behalf of the FEC—which it cannot—it has not met its burden under relevant case law. There are two kinds of prejudice that support a finding of laches. First, the defendant can show that "Plaintiff's delay in filing suit may have resulted in the loss of evidence or witnesses supporting defendant's position. . . ." *Gull Airborne Instruments, Inc. v. Weinberger,* 694 F.2d 838, 844 (D.C. Cir. 1982). The second type of prejudice requires that the defendant show it "may have changed its position in a manner that would not have occurred but for plaintiff's delay." *Id*. As it pertains to laches, Defendant-Intervenors make no attempt at showing the former or the latter, and the only alleged "prejudice" they point to on their own behalf is the possibility of inconsistent results given the multiple defendants and the prejudice they will suffer "if the FEC is unable to act in 30 days" in response to this Court's order, thereby enabling

Plaintiff to bring a civil suit directly against them. *See* ECF No. 23 at 9-10. But this is just further evidence that the real source of any prejudice on the part of Defendant-Intervenors' would be the FEC's continuing inaction or an order from this Court—not any delay on the part of Plaintiff. *Id.* This is insufficient.

CONCLUSION

Accordingly, for the foregoing reasons, Plaintiff requests that this Court grant Plaintiff's Motion for Default Judgment.

Dated: Aug. 10th, 2021

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CERTIFICATE OF SERVICE

I do hereby certify that, on this 10th day of August 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 response was sent to the Federal Election Commission, who has yet to enter an appearance, by USPS Certified mail on August 11, 2021.

/s/ Jason Torchinsky
Jason Torchinsky