



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Federal Election Commission,

Plaintiff,

-against-

LatPAC et al.,

Defendants.

1:21-cv-06095 (ALC) (SDA)

REPORT AND RECOMMENDATION

STEWART D. AARON, UNITED STATES MAGISTRATE JUDGE.

TO THE HONORABLE ANDREW L. CARTER, JR., UNITED STATES DISTRICT JUDGE:

Pending before the Court is a motion by Plaintiff Federal Election Commission (the “Commission”) for a default judgment. (Comm. Not. of Mot., ECF No. 26.) For the reasons set forth below, I respectfully recommend that the motion be GRANTED.

RELEVANT FACTS¹

This is an action by the Commission against Defendants LatPAC and Chalin A. Askew (“Askew”), in his official capacity as treasurer of LatPAC, alleging violations of the Federal Election Campaign Act (“FECA”). (See Compl., ECF No. 1, ¶ 1.) On June 29, 2016, LatPAC registered with the Commission under the FECA as an unauthorized political action committee that supports/opposes more than one federal candidate,² and designated Askew as its treasurer. (*Id.* ¶¶ 6-7, 23.) On July 20, 2016, Askew filed LatPAC’s 2016 July Quarterly Report with the

¹ The relevant facts are drawn from the well-pled allegations in the Complaint. A default constitutes an admission of all well-pleaded factual allegations in the complaint and the allegations as they pertain to liability are deemed true. See *Gurung v. Malhotra*, 279 F.R.D. 215, 221 (S.D.N.Y. 2011).

² An “unauthorized” committee is one that has not been authorized by a candidate to solicit or receive contributions or make expenditures on the candidate’s behalf. (See Compl. ¶ 11.)

Commission. (*Id.* ¶ 24.) The Report disclosed no receipts, no disbursements, no cash on hand and no debts. (*Id.*)

On October 31, 2016, December 28, 2016, and February 16, 2017, the Commission's Reports Analysis Division notified LatPAC and Askew of their failure to file LatPAC's statutorily-required 2016 October Quarterly Report, 2016 Post-General Election Report, and 2016 Year-End Report, respectively. (Compl. ¶ 25.) On March 16, 2017, LatPAC filed an amended statement of organization, reaffirming that LatPAC was an unauthorized political action committee that supports/opposes more than one federal candidate, with Askew serving as treasurer. (*Id.* ¶ 26.)

Since March 2017, LatPAC and Askew have not filed any of the statutorily-required reports for LatPAC with the Commission. (Compl. ¶ 27.) The Commission's Reports Analysis Division notified LatPAC and Askew of their failure to file each of the required reports. (*Id.*) In particular, LatPAC and Askew were required to, but failed to file, a 2016 October Quarterly Report, 2016 Post-General Election Report, 2016 Year-End Report, 2017 Mid-Year Report, 2017 Year-End Report, 2018 April Quarterly Report, 2018 July Quarterly Report, 2018 October Quarterly Report, 2018 Post-General Election Report, 2018 Year-End Report, 2019 Mid-Year Report, 2019 Year-End Report, 2020 April Quarterly Report, 2020 July Quarterly Report, 2020 October Quarterly Report, and 2020 Post-General Election Report. (*Id.* ¶ 28.) The 2021 Mid-Year Report was due on July 31, 2021. (*Id.*) Between October 31, 2016 and December 18, 2020, the Commission's Reports Analysis Division sent LatPAC and Askew sixteen letters regarding LatPAC and Askew's failure to file LatPAC's statutorily-required disclosure reports. (*Id.* ¶ 29.)

On February 8, 2018, the Commission received an administrative complaint alleging, among other things, that a total of \$28,400 in contributions that the complainant gave to and

raised for LatPAC from March to June 2017 was unaccounted for. (Compl. ¶ 31.) On February 14, 2018, the Commission notified LatPAC and Askew that it had received information indicating that LatPAC and Askew may have violated provisions of the FECA. (*Id.* ¶ 32.) The Commission's letter provided LatPAC and Askew with a copy of the administrative complaint and gave them the opportunity to respond. (*Id.*) LatPAC and Askew did not submit a timely written response. (*Id.*) The Commission's disclosure database shows that LatPAC and Askew, in his official capacity as treasurer, failed to report any receipts or disbursements by LatPAC or Askew, in his official capacity as treasurer, at any time whatsoever, including a failure to report any contributions made or raised by the complainant. (*Id.* ¶ 33.)

After reviewing the available information, on October 24, 2018, the Commission decided by a 4-0 vote to find reason to believe that LatPAC and Askew, in his official capacity as treasurer, had violated 52 U.S.C. § 30104(a) and (b) by failing to file reports disclosing, among other things, receipts, disbursements, cash on hand and debts, and the Commission authorized an investigation. (Compl. ¶ 34.) On October 31, 2018, the Commission notified LatPAC and Askew of its reason-to-believe determination, including the factual and legal analysis supporting this determination. (*Id.* ¶ 35.)

The Commission's ensuing investigation revealed, among other things, that LatPAC and Askew had accepted, but failed to disclose, more than \$92,000 in receipts by LatPAC, including more than 225 separate contributions; that LatPAC and Askew had made, but failed to disclose, more than \$92,000 in disbursements by LatPAC; and that LatPAC and Askew had failed to disclose any of LatPAC's debts or obligations at any time, including a debt of \$4,000 incurred in late 2017 which was still outstanding as of September 2020. (Compl. ¶ 36.) After numerous attempts by

the Commission's Office of the General Counsel to contact Askew, he contacted the Commission in November 2019 and stated that he was going to take corrective action, including filing the missing reports by January 1, 2020. (*Id.* ¶ 37.) However, Askew failed to take these steps. (*Id.*)

Following the Commission's investigation, on September 30, 2020, the Commission's Office of the General Counsel notified LatPAC and Askew that the General Counsel was prepared to recommend that the Commission find probable cause to believe that they had violated 52 U.S.C. § 30104(a) and (b). (Compl. ¶ 38.) The notice included a brief stating the General Counsel's position on the legal and factual issues of the matter, and informed LatPAC and Askew of their right to file their own brief stating their position on the issues and replying to the General Counsel's brief. (*Id.*) LatPAC and Askew did not submit a written response. (*Id.*)

On March 11, 2021, the Commission decided by a 6-0 vote to find probable cause to believe that LatPAC and Askew, in his official capacity as treasurer, had violated 52 U.S.C. § 30104(a) and (b) by failing to file LatPAC's statutorily-required reports and to disclose LatPAC's receipts, disbursements, cash on hand, and debts. (Compl. ¶ 39.) On April 6, 2021, the Commission notified LatPAC and Askew of its probable-cause determination, including the factual and legal analysis supporting this determination. (*Id.* ¶ 40.)

Also starting on April 6, 2021, the Commission endeavored for a period of not less than 30 days to correct the violations through informal methods of conference, conciliation, and persuasion, including by providing a proposed conciliation agreement to LatPAC and Askew. (Compl. ¶ 41.) However, despite multiple attempts to reach LatPAC and Askew, they did not respond to these contacts, and the Commission was unable to reach a conciliation agreement with Defendants. (*Id.*)

On June 23, 2021, the Commission decided by a 6-0 vote to authorize the filing of this civil lawsuit against LatPAC and Askew, in his official capacity as treasurer, for violating 52 U.S.C. § 30104(a) and (b) by failing to file LatPAC's statutorily-required reports and to disclose LatPAC's receipts, disbursements, cash on hand and debts. (Compl. ¶ 42.)

PROCEDURAL HISTORY

On July 15, 2021, the Commission filed its Complaint in this action. (See Compl.) After LatPAC failed to appear by counsel, and Askew failed to abide by Orders of the Court, in an Opinion and Order, dated January 7, 2022, the Court requested that the Clerk of Court enter a default against LatPAC and Askew, pursuant to Federal Rule of Civil Procedure 55(a). See *Fed. Election Comm'n v. LatPAC*, No. 21-CV-06095 (ALC) (SDA), 2022 WL 72304, at *3 (S.D.N.Y. Jan. 7, 2022).³ On January 12, 2022, the Clerk of Court entered a default against LatPAC and Askew. (See Default, ECF No. 24.)

On January 13, 2022, the Court directed that the Commission file its motion for a default judgment against Defendants no later than February 3, 2022 and that Defendants file any response no later than February 25, 2022. (See 1/13/22 Order, ECF No. 25.) On February 3, 2022, the Commission timely filed its motion for a default judgment, and related papers.⁴ (See Comm. Not. of Mot.; Comm. Mem., ECF No. 27; Dillenseger Decl., ECF No. 28; Roser Decl., ECF No. 29;

³ Since familiarity with the January 7, 2022 Opinion and Order is presumed, the Court does not recount in full the bases for the entry of defaults against LatPAC and Askew.

⁴ On February 3, 2022, the Commission filed an Affirmation of Service of these papers and, on February 15, 2022, it filed a Supplemental Affirmation. (See Aff. of Service, ECF No. 33; Supp. Aff. of Service, ECF No. 34.)

Ward Decl., ECF No. 30; Proposed Findings, ECF No. 32.) The Commission seeks a \$56,400 civil penalty, plus declaratory and injunctive relief. (See Comm. Mem. at 8-16.)

On February 25, 2022, Askew filed an unsworn page-and-a-half opposition to the Commission's motion. (See Askew Opp., ECF No. 35.) In his opposition, Askew conceded liability for the violations at issue; agreed to the injunctive report-filing relief the Commission sought, except as to the deadline for compliance; and agreed that a civil penalty "may be proper to impose," but objected to the requested amount. (See *id.* at 1-2) Askew argued that LatPAC is unable to pay the \$56,400 civil penalty sought by the Commission. (See *id.* at 1.) LatPAC did not appear through counsel to make any submission in opposition to the Commission's motion.

On March 30, 2022, the Commission filed its reply. (Comm. Reply, ECF No. 39.)

DISCUSSION

The Commission is the independent agency of the United States government with exclusive jurisdiction over the administration, interpretation and civil enforcement of FECA. See 52 U.S.C. §§ 30106(b)(1), 30107(a), 30109. The Commission is authorized to promulgate regulations implementing the Act, *id.* § 30107(a)(8); to institute investigations of possible violations of the FECA, *id.* § 30109(a)(1)-(2); and to initiate civil actions in the United States district courts to obtain judicial enforcement of the Act. *Id.* §§ 30107(e), 30109(a)(6).

Based upon the well-pled allegations of the Complaint, LatPAC and Askew, in his official capacity as LatPAC's treasurer, violated 52 U.S.C. § 30104(a) and (b) by failing to file LatPAC's statutorily-required disclosure reports and failing to disclose LatPAC's receipts, disbursements, cash on hand and debts. Indeed, Askew himself admits that the violations occurred. (See Askew Opp. at 1 ("it is established and undisputed that the defendant violated 52 U.S.C. § 30104(a) and

(b”).) Thus, the Court must determine the appropriate remedies. The Commission seeks a civil penalty, as well as declaratory and injunctive relief, which are addressed below.

I. Civil Penalty

The FECA authorizes the Court to order a defendant who has violated FECA to pay a civil penalty and provides a statutory basis for calculating the amount of such a penalty. *See* 52 U.S.C. § 30109(a)(6)(B). For each of LatPAC and Askew’s FECA violations, the Court may impose a civil penalty up to the greater of \$20,528 or the amount of any contribution or expenditure involved in the violation. *See id.*; 11 C.F.R. § 111.24(a)(1) (Jan. 2021); FEC, Civil Monetary Penalties Ann. Inflation Adjustments, 86 Fed. Reg. 1737-02 (Jan. 11, 2021). Under the first method, the civil penalty for Defendants’ failure to file sixteen statutorily-required disclosure reports in violation of 52 U.S.C. § 30104(a) and (b) may be up to \$328,448, *i.e.*, 16 times \$20,528. (*See* Roser Decl. ¶¶ 5-6.) Under the latter method, the civil penalty may be up to \$188,000, since Defendants failed to disclose more than \$92,000 in receipts, more than \$92,000 in disbursements and \$4,000 in debt, for a total amount in violation of at least \$188,000. (*See* Dillenseger Decl. ¶¶ 14-15.)

The Commission, however, seeks a more modest civil penalty based upon Defendants’ default in this case. The Commission requests that the Court impose a civil penalty of \$56,400 (*i.e.*, 30% of \$188,000). (*See* Comm. Mem. at 10.) Askew states that LatPAC would be unable to pay a civil penalty in this amount and argues that the penalty “should be within the defendant’s means.”⁵ (*See* Askew Opp. at 2.)

⁵ Askew states that “LATPAC’s current account has an available balance of \$6,162 and a monthly average balance of \$5,052.” (Askew Opp. at 1.) Askew provides no information regarding prior account balances.

In reply, the Commission asserts that Askew's claims regarding LatPAC's finances are unsubstantiated by evidence. (See Comm. Reply at 5.) The Court agrees. As the sanctioned parties, Askew and LatPAC have the "the burden to produce evidence of inability to pay." *Fed. Election Comm'n. v. Toledano*, 317 F.3d 939, 948-49 (9th Cir. 2002), *as amended on denial of reh'g* (Jan. 30, 2003) (citation omitted). Askew and LatPAC have not met this burden. Askew's unsworn statement of the current balance in LatPAC's account does not suffice, especially in circumstances where he and LatPAC have been aware of their FECA reporting failures since 2016 and no accounting has been provided of expenditures made from its accounts since then. See *Fed. Election Comm'n v. O'Donnell*, No. 15-CV-00017 (LPS), 2017 WL 1404387, at *3 (D. Del. Apr. 19, 2017) (refusing to reduce civil penalty despite political committee's current low funds where it transferred funds "after Defendants were on notice of their potential liability").

Based upon the Court's consideration of the relevant factors,⁶ the Court finds that a civil penalty in the amount of \$56,400 achieves the purposes of punishment and deterrence. See *New York v. United Parcel Serv., Inc.*, 942 F.3d 554, 599 (2d Cir. 2019) ("In general, civil penalties are designed to punish culpable individuals, deter future violations, and prevent the conduct's recurrence.").

⁶ The relevant factors are "(1) the good or bad faith of the defendants; (2) the injury to the public; (3) the defendant's ability to pay; and (4) the necessity of vindicating the authority of the responsible federal agency." See *Fed. Election Comm'n v. Odzer*, No. 05-CV-03101 (NG) (RML), 2006 WL 898049, at *4 (E.D.N.Y. Apr. 3, 2006) (citing *Fed. Election Comm'n v. Furgatch*, 869 F.2d 1256, 1258 (9th Cir. 1989)). As to the first factor, Defendants have not acted in good faith given their continued statutory violations and default in this case. As to the second factor, the public is harmed if a party fails to publicly disclose election-related information. Due to Defendants default, the third factor cannot be fully evaluated. As to the fourth factor, the Commission's statutory authority will be vindicated by awarding the civil penalty the Commission seeks.

II. Declaratory And Injunctive Relief

The FECA authorizes the Court to grant a permanent injunction and “other orders” to remedy violations of the Act. *See* 52 U.S.C. § 30109(a)(6)(B). The Commission seeks a declaration that Defendants LatPAC and Askew violated the FECA’s disclosure requirements; an order requiring Defendants to file all statutorily-required disclosure reports that are past due; and a permanent injunction precluding Defendants from committing future FECA disclosure violations. (*See* Comm. Mem. at 14-15.) Based upon Defendants’ default, the Court finds that the Commission is entitled to all the relief it seeks.

First, since the Court already has determined that Defendants violated the FECA, the Commission is entitled to the declaration it seeks. *See Fed. Election Comm’n v. Craig for U.S. Senate*, 70 F. Supp. 3d 82, 101 (D.D.C. 2014), *aff’d*, 816 F.3d 829 (D.C. Cir. 2016) (“As the Court has already determined that defendants did, indeed, violate section 30114(b) by converting campaign funds to the personal use of Senator Craig, the Court will issue the declaration that the [Commission] seeks.”); *see also Odzer*, 2006 WL 898049, at *1 (granting requested declaratory relief to Commission).

Second, due to their violations of law, Defendants should be directed to file all overdue reports and disclose all information to the Commission as required by the FECA and Commission regulations. *See Fed. Election Comm’n v. Comm. of 100 Democrats*, 844 F. Supp. 1, 8 (D.D.C. 1993) (ordering defendants to file required disclosure reports within 10 days).

Third, the Court finds that injunctive relief is warranted. “An injunction prohibiting a party from violating statutory provisions is appropriate where there is a likelihood that, unless enjoined, the violations will continue.” *SEC v. Suman*, 684 F. Supp. 2d 378, 391 (S.D.N.Y. 2010),

aff'd, 421 F. App'x 86 (2d Cir. 2011) (quoting *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1477 (2d Cir. 1996)). LatPAC and Askew declined to participate in the administrative proceedings before the Commission and defaulted in this case. Moreover, their statutory violations continue unabated. Thus, unless enjoined, the violations will continue.

CONCLUSION

For the foregoing reasons, I respectfully recommend that the Court award a civil penalty against Defendants LatPAC and Askew in the amount of \$56,400. In addition, I recommend that the Court enter an Order (1) declaring that LatPAC and Askew, in his official capacity as LatPAC's treasurer, violated 52 U.S.C. § 30104(a) and (b) by failing to file LatPAC's statutorily-required disclosure reports and failing to disclose LatPAC's receipts, disbursements and debts; and (2) directing LatPAC and Askew to file all overdue reports and disclose all information to the Commission as required by the FECA and Commission regulations. Finally, I recommend that a permanent injunction be issued prohibiting LatPAC and Askew from failing to file any of LatPAC's statutorily-required disclosure reports in the future.

Dated: March 31, 2022
New York, New York



STEWART D. AARON
United States Magistrate Judge

*

*

*

NOTICE OF PROCEDURE FOR FILING OBJECTIONS TO THIS REPORT AND RECOMMENDATION

The parties shall have fourteen (14) days (including weekends and holidays) from service of this Report and Recommendation to file written objections (to those portions other than with respect to the motion to strike), pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal

Rules of Civil Procedure. *See also* Fed. R. Civ. P. 6(a), (d) (adding three additional days when service is made under Fed. R. Civ. P. 5(b)(2)(C), (D) or (F)). A party may respond to another party's objections within fourteen days after being served with a copy. Fed. R. Civ. P. 72(b)(2). Such objections, and any response to objections, shall be filed with the Clerk of the Court. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72(b). Any requests for an extension of time for filing objections must be addressed to Judge Carter.

FAILURE TO OBJECT WITHIN FOURTEEN (14) DAYS WILL RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72(b); *Thomas v. Arn*, 474 U.S. 140 (1985).