

NATALIE K. WIGHT, OSB #035576
United States Attorney
DIANNE SCHWEINER, CSB #188013
Assistant United States Attorney
United States Attorney's Office
1000 SW Third Ave., Suite 600
Portland, Oregon 97204-2936
Telephone: (503) 727-1102
dianne.schweiner@usdoj.gov

Attorneys for Defendants,
in their official capacities only

THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

DR. HENRY EALY III; SENATOR DENNIS
LINTHICUM; SENATOR KIM THATCHER,

Plaintiffs,

v.

ROBERT REDFIELD, former Director of the
US Center for Disease Control, in his individual
capacity; ROCHELLE WALENSKY, in her
individual capacity and in her official capacity
as Director for the US Center for Disease
Control, ALEX AZAR, former Secretary of the
US Department of Health and Human Services,
in his individual capacity; XAVIER BECERRA,
in his individual capacity and in his official
capacity as Director of the US Department of
Health and Human Services; BRIAN MOYER,
in his individual capacity and in his official
capacity as Director of the National Center for
Health Statistics; and DOES 1-25,

Defendants.

Case No.: 3:22-cv-356-HZ

DEFENDANTS' OPPOSITION
TO PLAINTIFFS' APPLICATION
FOR ENTRY OF DEFAULT

I.

INTRODUCTION

Plaintiffs are three Oregon State Senators who ask this Court to force the U.S. Attorney’s Office to impanel a federal grand jury and prosecute “crimes that have been committed against the citizens of the United States” relating to the government’s handling of the Covid-19 pandemic. (ECF 5). Defendants have filed a motion to dismiss Plaintiffs’ action in its entirety. (ECF 21). Although the motion was due on Friday, August 26, 2022, defense counsel had an emergency arise on Friday which delayed the filing of the motion until the weekend. (*See* Schweiner Decl.). In the meantime, Plaintiffs’ counsel, on Saturday, August 27th at 2:23 p.m., filed an application for entry of Clerk’s default against all Defendants. At no time did Plaintiffs’ counsel reach out to defense counsel, inquire about the status of Defendants’ responsive pleading, or give notice of the application for default. Plaintiffs’ application for default is defective for several reasons and should be denied.

II.

ARGUMENT

Plaintiffs’ application requests only entry of default by the Clerk under subsection (b)(1) of Rule 55, not entry by the Court under subsection (b)(2).¹ Entry of a Clerk’s default fails because Plaintiffs’ claim must be for “a sum certain” or a “sum that can be made certain by computation.” Fed.R.Civ.P. 55(b)(1). In this case, Plaintiffs do not seek monetary damages *at all* in their Corrected Petition, let alone a sum certain. (ECF 5). Rather, Plaintiffs’ Petition seeks unintelligible and unallowable relief by asking this Court to require the U.S. Attorney’s Office (a third party, non-defendant) to impanel a grand jury and prosecute certain crimes, something neither the Clerk nor the Court cannot accomplish on a request for entry of default.

¹ Although Plaintiffs do not request entry of default by the Court, any such request would be defective because Plaintiffs have not served “written notice of the application at least 7 days before the hearing” as required by subsection (b)(2) of Rule 55.

Plaintiffs application must also be denied due to Plaintiffs' counsel's failure to comply with Local Rule 55-1 which requires him to "make a good faith effort to confer [with opposing counsel] before a motion or request for default is filed." LR 55-1; *see also* LR 83-8 (Cooperation Among Counsel). At no time did Plaintiffs' counsel attempt to confer regarding his application for default filed just hours after Defendants' responsive pleading was due. (Schweiner Decl.).

Additionally, Plaintiffs will never be able to satisfy subsection (d) of Rule 55 which states "a default judgment may be entered against the United States, its officers, or its agencies *only if* the claimant establishes a claim or right to relief by evidence that satisfies the court." Fed.R.Civ.P. 55(d) (emphasis added). Here, in addition to the fact Plaintiffs have failed to mention any right to relief in their application for entry of default at all, they have likewise failed to articulate any valid cause of action or right to relief in their Corrected Petition. (*See* ECF 5, ECF 21).

Moreover, Defendants have good cause for filing their response to Plaintiffs' Corrected Petition on the weekend following its Friday due date and Plaintiffs have suffered no prejudice by this short delay in filing. (*See* Schweiner Decl.) Case law is clear that short delays in filing motions to dismiss do not warrant entry of default. *See Sewell v. Fid. Nat'l Fin.*, 2016 U.S. Dist. LEXIS 22203 (D. Md. Feb. 24, 2016), *aff'd*, 668 Fed. Appx. 510 (4th Cir. 2016) (Plaintiff's default judgment motions failed because court dismissed cases, and defendants were responsive, even if their filings were late); *Barros v. Gov't Empl. Ins. Co.*, 79 F. Supp. 3d 32 (D.D.C. 2015) (Although response to amended complaint was filed late, court had no need to determine whether insurer's failure to timely respond to amended complaint was willful because other two factors weighed so heavily in favor of declining to order entry of default that court would deny plaintiffs' motion for entry of default even if willfulness was shown; insurer more than demonstrated meritorious defense—motion to dismiss was successful—and there was no prejudice to plaintiffs because litigation was in such early stage of proceedings); *Savage v. Scales*, 310 F. Supp.

2d 122 (D.D.C. 2004) (Plaintiff's motion for entry of default judgment against defendants was denied where defendants presented reasonable, good faith explanation for slight delay in replying to plaintiff's motion and where plaintiff, whose his ability to adjudicate claim on merits was not diminished by delay, sustained no prejudice as result of late filing); *Dow v. Jones*, 232 F. Supp. 2d 491 (D. Md. 2002) (Plaintiff was not entitled to default judgment for defendants' failure to timely file their motion to dismiss since motion was untimely by only three days and plaintiff suffered no substantial prejudice by brief delay); *Allen v. Gooden*, 521 Fed. Appx. 754 (11th Cir. 2013) (unpublished decision) (holding although defendant's motion to dismiss was untimely, plaintiff's motion for default judgment pursuant to Fed. R. Civ. P. 55(a) was properly denied because by the time plaintiff filed proper motion for default judgment, defendant had defended action by filing his motion to dismiss; there was not extreme situation warranting drastic remedy of default judgment); *Dyer v. Wal-Mart Stores, Inc.*, 535 Fed. Appx. 839 (11th Cir. 2013) (unpublished decision) (Because employer had filed motion to dismiss for failure to state claim, and that motion was granted, it was not error to deny employee's motion for default judgment, and even if motion to dismiss was filed short time after deadline for responsive pleadings, it was not "extreme situation" that warranted drastic remedy of default judgment).

Lastly, no default can be entered against Defendant ROBERT REDFIELD because, as explained in Defendants' motion to dismiss, Plaintiffs have failed to properly serve that individual with process in this case and instead served another individual at another address. (ECF 21, page 11). Federal Rule of Civil Procedure 4(i)(3) provides that "[t]o serve a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf . . . a party must serve the United States and also serve the officer or employee under Rule 4(e), (f) or (g)." Since Defendant REDFIELD was not properly served, Plaintiffs have no grounds for entry of default against him.

III.

CONCLUSION

For these reasons, Plaintiffs' application for entry of Clerk's default should be denied, and the Court should rule on the merits of Defendants' pending motion to dismiss.

Dated this 29th day of August, 2022.

Respectfully Submitted,

NATALIE K. WIGHT
United States Attorney
District of Oregon

/s/ Dianne Schweiner
DIANNE SCHWEINER
Assistant United States Attorney
Attorneys for Defendants