

**IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
CIVIL DIVISION**

**DEBORAH SPRINGER SUTTLAR, JUDY GREEN, FRED LOVE,
in his individual and official capacity as State Representative, KWAMI ABDUL-BEY,
CLARICE ABDUL-BEY, and PAULA WITHERS,**

PLAINTIFFS

V. NO. 60CV-22-1849

**JOHN THURSTON, in his official capacity
as the Secretary of State of Arkansas and in his official capacity as the Chairman of the
Arkansas State Board of Election Commissioners,
and SHARON BROOKS, BILENDA
HARRIS-RITTER, WILLIAM LUTHER,
CHARLES ROBERTS, WENDY BRANDON, JAMIE CLEMMER and
JAMES HARMON SMITH III, in their official capacities
As members of the Arkansas State Board of
Election Commissioners,**

DEFENDANTS

**PLAINTIFFS' BRIEF IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY JUDGMENT**

I. Introduction

This is an action challenging Arkansas's recently enacted congressional map (the "2021 Map") on the grounds that it violates Plaintiffs' constitutional rights under two separate provisions of the Arkansas Constitution: Article 2, Section 3, which guarantees Free and Equal Elections, and Article 2, Sections 2, 3 and 18, which guarantee Arkansans equal protection under the state's laws. Time is of the essence in this action, and yet Defendants have not answered Plaintiffs' Complaint in over five months. Delay of this action has caused irreparable harm to Plaintiffs and the people of Arkansas. Plaintiffs now move for partial summary judgment to establish the factual allegations

of Plaintiffs' Complaint, which have been admitted by Defendants' failure to deny them. Ark. R. Civ. P. 8(d); *id.* § 56.

II. Factual and Procedural Background

Plaintiffs filed their Complaint on March 21, 2022 seeking injunctive relief and declaratory judgment against Defendants John Thurston, in his official capacity as the Secretary of State of Arkansas and in his official capacity as the Chairman of the Arkansas State Board of Election Commissioners, and Sharon Brooks, Bilenda Harris-Ritter, William Luther, Charles Roberts, Wendy Brandon, Jamie Clemmer, and James Harmon Smith III, in their official capacities as members of the Arkansas State Board of Election Commissioners.

On April 22, 2022, prior to filing an answer, Defendants wrongfully removed this action to the United States District Court for the Eastern District of Arkansas. On April 29, 2022, Defendants filed a motion to dismiss Plaintiffs' Complaint. Plaintiffs then filed a motion for remand, which the district court granted on July 13, 2022. Because the district court stayed the case pending the decision on Plaintiffs' motion for remand, Plaintiffs were not required to respond to Defendants' motion to dismiss in federal court. The district court never considered Defendants' motion because the court remanded this case back to this Court.

The day after this case was remanded, on July 14, 2022, Plaintiffs filed a notice of remand in this Court and served Defendants' counsel with the notice pursuant to Ark. R. Civ. P. 12(a)(3). “[A]fter remand from federal court, a case stands as if it had never been removed from state court, and what happened in federal court has no bearing on the proceeding in state court.” *NCS Healthcare of Ark., Inc. v. W.P. Malone, Inc.*, 350 Ark. 520, 526, 88 S.W.3d 852, 856 (Ark. 2002) (citing *Steve Standridge Ins., Inc. v. Langston*, 321 Ark. 331, 900 S.W.2d 955 (1995) (relying on *Allstate Ins. Co. v. Bourland*, 296 Ark. 488, 758 S.W.2d 700 (1988), *cert. denied*, 490 U.S. 1006

(1989))). *See also B-W Acceptance Corp. v. Colvin*, 252 Ark. 306, 312, 478 S.W.2d 755, 758-59 (1972); *Trinity Universal Ins. Co. v. Robinson*, 227 Ark. 482, 486, 299 S.W.2d 833, 836 (1957).

Because Defendants did not file a response to Plaintiffs' Complaint in this Court before removal, they were required to do so by August 16, 2022 pursuant to Ark. R. Civ. P. 12(a)(3). *See NCS Healthcare*, 350 Ark. at 526, 88 S.W.3d at 856 (long-standing Arkansas law requires Defendants to file a pleading or responsive motion upon remand). Although the time for Defendants to file an answer has elapsed, default is unavailable. *See Ark. R. Civ. P. 55(f)*. On August 18, 2022, Plaintiffs requested that this Court enter an order to compel Defendants to file an answer. On August 25, 2022, the Court issued an order finding that the federal district court's order remanding the case "explicitly and fully disposes of any issues remaining to be heard" by the federal court, but holding that Plaintiffs presented "no authority that would require this Court to order the Defendants to file a responsive pleading." (Order of August 25, 2022, at 2). Instead, the Court held that "[w]hile this Court will not direct Defendants to file an Answer, Defendants fail to plead at their own peril." (*Id.*). The Court scheduled a bench trial to begin on November 7, 2022.

III. Standard of Review

Ark. R. Civ. P. 56(c)(1) allows a party to obtain summary judgment by motion "supported by *pleadings*, depositions, answers to interrogatories and admissions on file, and affidavits." (emphasis added). Arkansas courts hold that "[i]f a party responding to a summary-judgment motion cannot meet proof with proof on an essential element of his claim, the movant is entitled to judgment as a matter of law." *Dunaway v. Garland Cnty. Fair & Livestock Ass'n, Inc.*, 97 Ark. App. 181, 189, 245 S.W.3d 678, 685 (2006) (citing *Caplener v. Bluebonnet Milling Co.*, 322 Ark. 751, 911 S.W.2d 586 (1995)). The Arkansas Supreme Court no longer views summary judgment

as a drastic remedy. Rather, “it is viewed simply as one of the tools in a trial court’s efficiency arsenal.” *Chavers v. Gen. Motors Corp.*, 349 Ark. 550, 558, 79 S.W.3d 361, 367 (2002).

Ark. R. Civ. P. 8(d) governs the “Effect of Failure to Deny.” Specifically, “[a]verments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied, either generally or specifically, in the responsive pleading.” Ark. R. Civ. P. 8(d). “An allegation of a complaint not specifically denied is taken as admitted.” *Medi-Stat, Inc. v. Kusturin*, 303 Ark. 45, 53, 798 S.W.2d 438, 439 (1990) (citing *Meek v. U.S. Rubber Tire Co.*, 244 Ark. 359, 425 S.W.2d 323 (1968)); *see also Jean-Pierre v. Plantation Homes of Crittenden Cnty., Inc.*, 350 Ark. 569, 575, 89 S.W.3d 337 (2002) (“averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied.”); *Clark v. Michael Motor Co., Inc.*, 322 Ark. 570, 572, 910 S.W.2d 697, 698 (1995) (same).

IV. Argument

A. By failing to file a responsive pleading, Defendants have admitted the facts alleged in the Complaint.

Defendants failed to file a responsive pleading by the applicable deadline. *See* Ark. R. Civ. P. 12(a)(3). Plaintiffs’ Complaint thus contains factual averments which have not been denied. Under Ark. R. Civ. P. 8(d), as confirmed by the Arkansas decisions cited above, Defendants have admitted all allegations of the Plaintiffs’ Complaint by their failure to answer and deny them.

Plaintiffs’ Complaint contains numerous now-uncontested factual averments, including:

- “The Black vote has been systematically diluted since at least 1961, which was the first year in which Arkansas had four congressional districts as it does today” (¶ 24);

- “The 2021 Map removes Black voters from the 2nd Congressional District and disperses them between the 1st and 4th Congressional Districts” (§ 54);
- “Pulaski County was not split at random. The General Assembly intentionally and systematically targeted and further cracked the Black population in the state by surgically removing majority Black precincts—and with them over 21,000 Black residents, including Plaintiffs Love and Withers—within Pulaski County from the 2nd Congressional District” (§ 56);
- “Racial data was considered—at times, exclusively— throughout the map-drawing process” (§ 60); and
- “The 2021 Map builds on the prior racially dilutive congressional maps to achieve even more extreme racial vote dilution by surgically removing Black precincts out of the 2nd Congressional District and subsuming them in the 1st and 4th Congressional Districts” (§ 61).

B. The admitted facts provide the basis for this Court to grant partial summary judgment in favor of Plaintiffs.

Because Defendants have failed to timely plead, the factual averments contained in Plaintiffs’ Complaint are admitted for purposes of this action. Ark. R. Civ. P. 8(d). These admitted factual averments are a basis on which to grant a motion for partial summary judgment. *See generally Petrunich v. Sun Bldg. Systems, Inc.*, No. 3:CV-04-2234, 2006 WL 2788208 (M.D. Pa. Sept. 26, 2006.). “By failing to file an answer to Mr. Petrunich’s complaint, the averments therein are deemed admitted by Defendants.” *Id.*, at *1. In *Petrunich*, the court granted partial summary judgment after deeming the factual averments of the complaint to be admitted for failure to answer. *Id.* Similarly, in *Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, LOCAL 295 v. Knouse Foods Cooperative Inc.*, the trial court granted summary judgment to the

plaintiff after defendant failed to deny any of the allegations contained in the complaint. 259 F.Supp. 592 (M.D. Pa., 1966).

Similar procedural postures have led to the same result. “When the Court was considering the Motion for Summary Judgment, it deemed admitted the allegations in Count III, due to Defendant’s failure to respond [to Count III in its answer], citing Fed. R. Civ. P. 8(d).” *Indus. Risk Insurers v. D.C. Taylor Co.*, No. C06-0171, 2008 WL 11509788, at *3 (N.D. Iowa, Jan. 4, 2008).

Applying the analogous Federal Rule of Civil Procedure, numerous Circuit Courts of Appeal have held that where a factual allegation was not denied in an answer, it was properly admitted as a fact in evidence by the trial court, even in instances where default was unavailable. *See Legal Aid Soc. of Alameda Cnty. v. Brennan*, 608 F.2d 1319, 1334 (9th Cir. 1979) (rejecting arguments from intervenor-appellants challenging factual basis of appellees’ standing where factual contentions of appellees’ complaint were not specifically denied in pleadings before trial court); *Hodgson v. Humphries*, 454 F.2d 1279, 1281 (10th Cir. 1972); *U. S. for Use of Automatic Sprinkler Corp. of Am. v. Merritt-Chapman & Scott Corp.*, 305 F.2d 121, 123 (3d. Cir. 1962) (“Since the Answer fails to deny the quoted allegations of the Complaint, they are deemed admitted.”); *see also McComb v. Blue Star Auto Stores*, 164 F.2d 329, 331 (7th Cir. 1947); *Sun-Maid Raisin Growers Ass’n v. Neustadter Bros.*, 115 F.2d 126, 127 (9th Cir. 1940) (holding failure to deny averments of a complaint in an answer “admits these allegations.”); *S. Fla. Secs. v. Seward*, 103 F.2d 872, 873 (5th Cir. 1939) (“[t]he averments of the pleas, not having been denied, stood as admitted”).

More recently, the Seventh Circuit held that a party resisting summary judgment could have “conclusively established most of the material facts alleged in his complaint simply by highlighting the defendants’ failure to file a timely answer to his first amended complaint.”

Modrowski v. Pigatto, 712 F.3d 1166, 1170 (7th Cir. 2013). “Generally, a defendant must serve an answer within 21 days of receipt of service of a complaint (or within 60 days if she has waived service); *failure to deny an allegation constitutes an admission.*” *Id.* (citing Fed. R. Civ. P. 12(a)(2); Fed. R. Civ. P. 8(b)(6)) (emphasis added).

Plaintiffs acknowledge that “no judgment by default shall be entered” under these circumstances. Ark. R. Civ. P. 55(f). However, Plaintiffs do not seek default judgment pursuant to Ark. R. Civ. P. 55. Instead, Plaintiffs request only partial summary judgment confined solely to the admission of the factual averments contained in Plaintiffs’ Complaint against Defendants. *Id.* § 56(c)(1).

C. Remaining Proceedings.

Although the factual averments in the Complaint must be deemed admitted because Defendants failed to file an answer, further proceedings remain necessary for Plaintiffs to establish their legal right to the equitable remedies they seek. Ark. R. Civ. P. 56(d). Plaintiffs will continue to conduct discovery and develop evidence concerning the issues in this case for the trial on November 7, 2022. Plaintiffs expect the Defendants to do likewise. The admitted facts in the Complaint will be a part of the evidence before the Court at trial.

Plaintiffs understand and anticipate that the Court will exercise discretion in determining whether to grant and how to fashion the equitable relief they seek in this action. Because the trial will involve additional evidence and a determination of whether to grant injunctive relief, this motion for partial summary judgment is not a request for a default judgment and, if granted, would not be a final judgment.

V. Conclusion

Because Defendants have not filed any pleading in this action, “the pleadings, depositions, answers to interrogatories and admissions on file” show that “there is no genuine issue as to any material fact” as to the factual averments of Plaintiffs’ Complaint, and Plaintiffs are therefore entitled to partial summary judgment that those facts are admitted and established for purposes of this action. Ark. R. Civ. P. 8(d), 56(c)(2).

Respectfully submitted,

Jess Askew III, Ark. Bar No. 86005
McKenzie L. Raub, Ark. Bar No. 2019142
KUTAK ROCK LLP
124 West Capitol Avenue, Suite 2000
Little Rock, Arkansas 72201-3740
Tel: (501) 975-3141
Fax: (501) 975-3001
jess.askew@kutakrock.com
mckenzie.raub@kutakrock.com

Aria Branch*
Aaron M. Mukerjee*
Marilyn Gabriela Robb*
Elias Law Group LLP
10 G. Street NE
Suite 600
Washington, DC 20002
Tel: (202) 968-4654
Fax: (202) 968-4498
amukerjee@elias.law
mrobb@elias.law
**Admitted pro hac vice*

/s/ Alexander T. Jones

Alexander T. Jones, Ark. Bar No. 2015246
200 West Capitol Avenue, Suite 2300
Little Rock, Arkansas 72201-3699
Tel: (501) 212-1241
Fax: (501) 376-9442
alexandertaylorjones@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2022, I electronically filed the foregoing with the Clerk of the Court using the Arkansas Judiciary Electronic Filing System, which shall send notification of such filing to the following counsel-of-record:

Dylan L. Jacobs
Deputy Solicitor General
Office of the Arkansas Attorney General
323 Center Street, Suite 200
Little Rock, AR 72201
dylan.jacobs@arkansasag.gov

/s/ Alexander T. Jones

Alexander T. Jones