No. 18-6386

IN THE

Supreme Court of the United States

DORA L. ADKINS,
Petitioner,

v.

WHOLE FOODS MARKET GROUP, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR REHEARING

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Pursuant to Supreme Court Rule 44.2, Dora L. Adkins respectfully petitions for rehearing of the Court's decision issued on December 10, 2018. Ms. Adkins moves this Court to grant this petition for rehearing. Pursuant to Supreme Court Rule 44.2, this petition for rehearing is filed within 25-days of this Court's decision in this case.

REASONS FOR GRANTING THE PETITION

Ms. Adkins will provide grounds limited to "intervening circumstances of a substantial or controlling effect or to other substantial grounds" not previously presented: 'The Federal Rules of Civil Procedure (FRCP) 55(A) and the Circuit Split Regarding its Meaning;" "The Minority's Narrow Approach to Rule 55(a) Is More Logically Sound, Is More Just, and Better Reflects the Intent of Default Judgments," and "Whole Foods Market Group, Inc., Failed to Plead or Otherwise Defend."

I. The Federal Rules of Civil Procedure (FRCP) 55(A) and the Circuit Split Regarding its Meaning

"Without doubt, the majority of federal circuits interpret broadly the "failed to plead or otherwise defend" language in Rule 55(a) and, therefore, permit entry of default unless the party both pleads *and* otherwise defends." *See, e.g., City of N.Y. v. Mickalis Pawn Shop, L.L.C.*, 645 F.3d 114, 129 (2d Cir. 2011) (affirming entry of default against defendants who not only answered plaintiff's complaint, but also

appeared in litigation for several years, "repeatedly moved to dismiss," and "vigorously defended" throughout discovery); *United States v. $23,000 in U.S. Currency*, 356 F.3d 157, 160–63 (1st Cir. 2004) (affirming default judgment in forfeiture action when claimant answered but failed to file verified statement); *Ackra Direct Mktg. Corp. v. Fingerhut Corp.*, 86 F.3d 852, 856 (8th Cir. 1996) (affirming default judgment against defendants who did not participate in litigation); *Home Port Rentals, Inc. v. Ruben*, 957 F.2d 126, 133 (4th Cir. 1992) (affirming default judgment for failure to defend or participate in discovery); *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 917–19 (3d Cir. 1992) (affirming entry of default against a party who answered but failed to appear at trial); *Ringgold Corp. v. Worrall*, 880 F.2d 1138, 1141 (9th Cir. 1989) (affirming default judgment against defendants who repeatedly failed to attend pretrial conferences, did not participate in litigation, and did not attend the first day of trial).

The minority of circuits' reasoning, *See, e.g., Solaroll Shade & Shutter Corp. v. Bio-Energy Sys., Inc.*, 803 F.2d 1130, 1134 (11th Cir. 1986); *Bass v. Hoagland*, 172 F.2d 205, 209–10 (5th Cir. 1949); *Olsen v. Int'l Supply Co.*, 22 F.R.D. 221, 222–23 (D. Alaska 1958). however, which does not allow entry of a Rule 55(a) default if the party *either* pleads or "otherwise defend[s]," is more logically sound, more just, and better reflects the underlying intent of default judgments. *Wright, Miller & Kane, supra* note 12, § 2681, at 9. 432 F.2d 689, 691 (D.C. Cir. 1970).

""That is, "the default judgment must normally be viewed as available only when the adversary process has been halted because of an essentially unresponsive party."" *H. F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe*, 432 F.2d 689, 691 (D.C. Cir. 1970). The minority approach also represents more accurately the change in court construction of defaults. *Wright, Miller & Kane*, *supra* note 12, § 2681, at 9. 21 *H. F. Livermore Corp.*, 432 F.2d at 691. 22 *Id.* 23 *See Wright, Miller & Kane*, *supra* note 12 § 2681, at 9. 24. This change is the "modernization of federal procedure, namely, the abandonment or relaxation of restrictive rules which prevent the hearing of the cases on the merits." *H. F. Livermore*, 432 F.2d at 691.

II. The Minority's Narrow Approach to Rule 55(a) Is More Logically Sound, Is More Just, and Better Reflects the Intent of Default Judgments.

"Similar to a baseball team's forfeit because it did not show up to compete, COMM'R OF BASEBALL, *supra* note 5, R. 4.17, at 72 ("A game shall be forfeited to the opposing team when a team is unable or refuses to place nine players on the field."). a Rule 55(a) default because the defendant did not "'otherwise defend' presume[s] the absence of some affirmative action on the part of a defendant which would operate as a bar to the satisfaction of the moving party's claim."" *Wickstrom v. Ebert*, 101 F.R.D. 26, 32 (E.D. Wis. 1984).

"As quoted above, a "default judgment must normally be viewed as available *only when* the adversary process has been halted [by] . . . an essentially unresponsive party."" *H. F. Livermore*, 432 F.2d at 691 (emphasis added). (In this

case, the unresponsive party is like the baseball team that does not show up to play.) As such, "the diligent party must be protected lest he be faced with interminable delay and continued uncertainty as to his rights." Conversely, when a party *is* responsive (e.g., it files a responsive pleading)—when the baseball team *does* show up to play—default judgment (at least a Rule 55(a) default judgment. Default judgment based on a rule other than Rule 55(a) might still be appropriate. should be inappropriate. Otherwise, it would be like an umpire declaring one team the victor via forfeit even though both teams at least initially indicated that they were ready, willing, and able to play.

"The Fifth Circuit, *Bass v. Hoagland*, 172 F.2d 205, 209 (5th Cir. 1949)." a district court of the Seventh Circuit, *Wickstrom*, 101 F.R.D. the Eleventh Circuit, *Solaroll Shade & Shutter Corp. v. Bio-Energy Sys., Inc.*, 803 F.2d 1130, 1134 (11th Cir. 1986). and arguably the Ninth Circuit agree. *Rashidi v. Albright,* 818 F. Supp. 1354, 1356–57 (D. Nev. 1993) (agreeing with a narrow interpretation of failure "to plead or otherwise defend"). But see *Ringgold Corp. v. Worrall,* 880 F.2d 1138, 1141 (9th Cir. 1989) (affirming default judgment against defendants who did not attend pretrial conferences, did not participate in litigation, and did not attend the first day of trial).

""These courts interpret "otherwise defend" to mean "some affirmative action on the part of a defendant which would operate as a bar to the satisfaction of the moving party's claim."" *Wickstrom*, 101 F.R.D. (citing *George & Anna Portes Cancer*

Prevention Ctr., Inc. v. Inexco Oil Co., 76 F.R.D. 216, 217 (W.D. La. 1977)). Of course, a defendant's responsive pleading is indeed an affirmative action. These courts, therefore, qualify responsive pleadings as a bar to the satisfaction of the plaintiff's claim. *See, e.g., Bass*, 172 F.2d at 210 ("Rule 55(a) authorizes the clerk to enter a default 'When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules.' This does not require that to escape default the defendant must not only file a sufficient answer to the merits, but must also have a lawyer or be present in court when the case is called for a trial.").

"To go back to the baseball analogy, these courts believe that both teams have showed up to play if each party affirmatively acts, which can be done by pleading or otherwise defending. As such, the umpire should not declare a forfeit, just as these courts would not issue a default judgment." The Eleventh Circuit perhaps said it best: "Rule 55 applies to parties against whom affirmative relief is sought who fail to 'plead or otherwise defend.' Thus, a court can enter a default judgment against a defendant who never appears or answers a complaint, for in such circumstances the case never has been placed at issue." *Solaroll Shade*, 803 F.2d at 1134 (citation omitted).

"That is, the case is not placed at issue because the defendant did not contest the plaintiff's claims. Simply put, the defendant concedes liability. The Colorado Court of Appeals explains this logic in the converse:" "A defendant who has

participated throughout the pretrial process and has filed a responsive pleading, placing the case at issue, has not conceded liability." *Rombough v. Mitchell,* 140 P.3d 202, 204 (Colo. App. 2006) (quoting *Wright, Miller & Kane, supra* note 12, § 2682, at 18).

III. Whole Foods Market Group, Inc., Failed to Plead or Otherwise Defend

"In *Ackra Direct Mktg. Corp. v. Fingerhut Corp.*, 86 F.3d 852, 856 (8th Cir. 1996) the 8th Circuit affirmed default judgment against defendants who did not participate in litigation." "In *Home Port Rentals, Inc. v. Ruben*, 957 F.2d 126, 133 (4th Cir. 1992), the 4th Circuit affirmed default judgment for failure to defend or participate in discovery." "In *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 917–19 (3d Cir. 1992); the 3d Circuit affirmed entry of default against a party who answered but failed to appear at trial." "In *Ringgold Corp. v. Worrall,* 880 F.2d 1138, 1141 (9th Cir. 1989), the 9th Circuit affirmed the District Court ruling of default judgment against defendants who did not attend pretrial conferences, did not participate in litigation, and did not attend the first day of trial."
Whole Foods Market Group, Inc., failed to plead or otherwise defend. Whether analyzing the majority of federal circuits interpretation of the "failed to plead or otherwise defend" language in Rule 55(a) and, therefore, permit entry of default unless the party both pleads *and* otherwise defends;" or the minority narrow approach that indicates the "default judgment must normally be viewed as available *only when* the adversary process has been halted [by] . . . an essentially

unresponsive party;" Whole Foods Market Group, Inc., conceded liability when it failed to plead or otherwise defend against claims in Ms. Adkins' Amended Complaint. In *Adkins v. Whole Foods Market Group, Inc.*, Record No. 18-1102 (Unpublished) (4th Cir. 2018), the 4th Circuit affirmed the U. S. District Court for the Eastern District of Virginia, "Order" that granted Whole Foods Market Group, Inc.'s "Motion to Dismiss for Failure to State a Claim" and dismissed the action after Whole Foods Market Group, Inc., failed to plead or otherwise defend.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition for writ of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition for writ of certiorari, and review the judgment below.

Respectfully submitted,

December 31, 2018

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