

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

QUINTIN SCOTT, individually and)	
for a class,)	
)	
<i>Plaintiffs,</i>)	
)	Case No. 17-cv-7135
v.)	
)	Hon. Martha M. Pacold
SHERIFF OF COOK COUNTY and)	Magistrate Hon. David Weisman
COOK COUNTY, ILLINOIS)	
)	
<i>Defendants.</i>)	
)	

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

Defendants, SHERIFF OF COOK COUNTY and COOK COUNTY, ILLINOIS, by their attorney EILEEN O'NEILL BURKE, State's Attorney of Cook County, through her Special Assistant State's Attorneys, JOHNSON & BELL, LTD., submit the following reply in support of their motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1):

Plaintiff is wrong that the Seventh Circuit addressed the issue raised in Defendants' motion to dismiss. Defendants could not have addressed the invalidity of Rule 23(e) on direct appeal because Rule 23(e) did not become invalid until *after* the Seventh Circuit issued its opinion. When the Seventh Circuit declared, without briefing from the parties on the issue, that Rule 23(e) provided the source of substantive relief to Plaintiff in the form of an incentive award, the Seventh Circuit created an intervening change in the law. This change in the law created a *new* issue, one the Seventh Circuit has not yet decided, which is whether Rule 23(e) is now invalid under the Rules Enabling Act given its new, substantive effect as recently interpreted by the Seventh Circuit. The Seventh Circuit is "a court of review, not first view," *United States v. Dingwall*, 6 F.4th 744, 762 (7th Cir. 2021) (citation omitted), and Defendants are asking this Court to take the first view

of this issue and hold that Rule 23 is invalid as applied to this case, thus depriving Plaintiff of standing.

Tellingly, Plaintiff's response does not address the merits of Defendants' argument that Rule 23(e) is invalid, so he has waived the point. *See Boogaard v. NHL*, 891 F.3d 289, 295 (7th Cir. 2018) (stating that a plaintiff forfeits his claim if he "fails to respond to the substance of the defendant's motion to dismiss"). Plaintiff's sole argument is that Defendants should not have brought the motion because the Seventh Circuit already decided the issue. As set forth below, the Seventh Circuit has not decided whether Rule 23(e) is now invalid, so this Court must address the issue in the first instance. *See Dingwall*, 6 F.4th at 762. Because Plaintiff declined to address the merits of Defendants' argument, he has waived his opportunity to do so, and Defendants' motion must be granted.

I. The Mandate Rule Does Not Apply Because Defendants Are Raising a New Issue that Was Not Briefed or Decided in the Initial Appeal and that Implicates this Court's Jurisdiction.

This Court has the authority to consider a new legal issue created by the Seventh Circuit's mandate. This authority is grounded in the Seventh Circuit's interpretation of the mandate rule and the law of the case doctrine, which allow for flexibility in addressing issues arising for the first time on remand or in light of changed circumstances.

The mandate rule "requires a lower court to adhere to the commands of a higher court on remand." *Kovacs v. United States*, 739 F.3d 1020, 1024 (7th Cir. 2014) (quoting *United States v. Polland*, 56 F.3d 776, 777 (7th Cir. 1995)). However, the Seventh Circuit has clarified that a district court may address three categories of issues on remand: "(1) the issues remanded, (2) issues arising for the first time on remand, or (3) issues that were timely raised before the district and/or appellate courts but which remain undecided." *United States v. Morris*, 259 F.3d 894, 898 (7th Cir. 2001).

A new legal issue created by an appellate court mandate falls squarely within the second category, as it arises for the first time on remand and was not previously addressed by the parties. *See Cheli v. Taylorville CUSD #3*, 657 F. Supp. 3d 1136, 1143 (C.D. Ill. 2023) (finding the district court had the authority to address “an issue arising for the first time post-remand”). A new legal issue created by the Seventh Circuit’s mandate could not have been anticipated or addressed during the initial appeal and must be considered by this Court in the first instance.

The Seventh Circuit has consistently recognized that district courts retain discretion to address new issues arising on remand. For example, in *United States v. Hagenow*, 487 F.3d 539, 543 (7th Cir. 2007), the Seventh Circuit held that the district court did not err when it addressed issues arising for the first time on remand. In *EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 796 (7th Cir. 2005), the Seventh Circuit noted that an appellate mandate does not render a district judge powerless to address issues that become relevant due to subsequent developments in law or fact.

“An appellate mandate does not turn a district judge into a robot, mechanically carrying out orders that become inappropriate in light of subsequent factual discoveries or changes in the law.” *Id.* (quoting *Barrow v. Falck*, 11 F.3d 729, 731 (7th Cir. 1993)). Instead, the district court may exercise its judgment to address new issues that are necessary to resolve the case fairly. *See id.* “Similarly, the law of the case doctrine permits ‘a court to revisit an issue if an intervening change in the law, or some other special circumstance, warrants reexamining the claim.’” *Id.* (quoting *United States v. Thomas*, 11 F.3d 732, 736 (7th Cir. 1993)). This flexibility ensures that the district court can address new legal issues that were not foreseeable or available during the initial appeal. *See id.*

Moreover, Defendants are raising a challenge to this Court’s jurisdiction, and the force of the law of the case doctrine is at its “lowest when applied to jurisdictional questions.” *Flynn v.*

FCA US LLC, 39 F.4th 946, 953 (7th Cir. 2022) (internal citations omitted). “Subject-matter jurisdiction is so central to the district court’s power to issue any orders whatsoever that it may be inquired into at any time, with or without a motion, by any party or by the court itself.” *Craig v. Ont. Corp.*, 543 F.3d 872, 875 (7th Cir. 2008). “[A] federal court’s ongoing obligation to assure itself of its jurisdiction means that revisiting such matters is almost always on the table.” *Flynn*, 39 F.4th at 953.

In this case, the Seventh Circuit’s mandate created a new legal issue that this Court must decide in the first instance. In issuing its mandate, the panel majority identified Rule 23 as the sole source of legal authority for incentive awards. By interpreting Rule 23 in such a manner and giving it substantive effect rather than a purely procedural scope, the panel majority created a new legal issue: If Rule 23 authorizes a class representative to extract an incentive award from a defendant, does Rule 23 now violate the Rules Enabling Act? As set forth in Defendants’ motion to dismiss, the substance of which Plaintiff does not dispute, the answer is yes. Rules of civil procedure are valid only to the extent they concern procedure and do not regulate “the available remedies” for legal violations. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010); *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) (stating that rules of procedure cannot abridge, enlarge, or modify any substantive right). By grounding a right to incentive awards in Rule 23, the Seventh Circuit turned Rule 23 into a substantive rule, which violates the Rules Enabling Act, and thus renders it invalid here.

Although Defendants raised this issue in its petition for rehearing en banc, the Seventh Circuit denied the petition summarily without explaining the bases for its denial. A summary denial of a petition for rehearing is “insufficient to confer any implication or inference regarding a court’s opinion relative to the merits of a case.” *Moore v. Anderson*, 222 F.3d 280, 284 (7th Cir. 2000)

(citation omitted). Thus, the summary denial of Defendants’ petition for rehearing “did not create law of the case nor did it expand the compass of [the Seventh Circuit’s] original mandate.” *Id.* Even in cases where a dissenting opinion addressed a new issue that arose from the mandate, such as Judge Easterbrook’s dissent in this case, the dissenting opinion is not a disposition on the merits and does not create law of the case or a new mandate. *See United States v. Griffin*, No. 92-2550, 1993 U.S. App. LEXIS 20466, *4 n.2 (7th Cir. Aug. 11, 1993) (explaining that a “denial of petition for rehearing en banc, even where dissenting opinion was issued, does not constitute disposition on the merits such as would establish law of the case” (citation omitted)).

Plaintiff argues that because the Supreme Court denied Defendants’ petition for writ of certiorari, Defendants “now ask this Court to sit as a super-Supreme Court.” (Pl.’s Resp. at 4, ECF No. 233.) Plaintiff’s argument assumes, incorrectly, that the Supreme Court’s denial of the petition constitutes a decision on the merits or law of the case, but it does not. A “denial of certiorari does not signify that the Court necessarily agrees with the decision (much less the opinion) below.” *Kennedy v. Bremerton Sch. Dist.*, 586 U.S. 1130, 1130 (2019) (Alito, J., statement respecting denial of certiorari); *see also Maryland v. Balt. Radio Show, Inc.*, 338 U.S. 912, 919 (1950) (stating that the Supreme Court “has rigorously insisted that such a denial carries with it no implication whatever regarding the Court’s views on the merits of a case which it has declined to review”). The Supreme Court’s denial of the petition did not create law of the case or a mandate. *See id.*

The Seventh Circuit has not yet addressed the follow-on impact of the panel majority’s reliance on Rule 23 as a source of substantive relief. The Seventh Circuit’s mandate did not include a decision on whether Rule 23 violates the Rules Enabling Act. This Court must decide the issue in the first instance. *See Atkinson v. Garland*, 70 F.4th 1018, 1023 (7th Cir. 2023) (“Aided by the parties’ briefing and the benefits of the adversarial process, the district court is best suited to

conduct the required analysis in the first instance. . . . Before we resolve the question before us, the parties should have a full and fair opportunity to develop their positions before the district court in accordance with the principles of party presentation. Our review, which all agree is inevitable, will be better for what transpires on remand in the district court.”); *Rexing Quality Eggs v. Rembrandt Enters.*, 996 F.3d 354, 369 n.63 (7th Cir. 2021) (“This is a matter that should have been presented to the district court in the first instance.”); *Savory v. Cannon*, 947 F.3d 409, 416 n.4 (7th Cir. 2020) (stating that “the prudent course of action is for [the party] to raise these issues first in the district court, where, with the benefit of full briefing, the court may consider [the issues] in the first instance”).

The parties did not brief the issue of Rule 23(e) before the Seventh Circuit issued its mandate. Instead, the issue arose for the first time on remand. Therefore, the validity of Rule 23(e) falls outside the scope of the mandate rule and the law of the case doctrine, as it was neither expressly nor impliedly decided by the Seventh Circuit. This Court should therefore consider the issue and rule in Defendants’ favor.

II. Plaintiff Chose Not to Address the Substance of Defendants’ Arguments, So He Has Waived Any Objection that Rule 23 Violates the Rules Enabling Act.

Plaintiff’s response to Defendants’ motion is based on the false premise that the issue of Rule 23 and the Rules Enabling Act falls within the Seventh Circuit’s mandate. It does not. As set forth above, this issue was not briefed before the mandate was issued nor was the issue part of the mandate. The panel majority’s interpretation of Rule 23 as the source of substantive relief in the form of an incentive award created the new issue of whether that interpretation now invalidates Rule 23 under the Rules Enabling Act. On this substantive issue, Plaintiff’s response is silent.

Plaintiff had an opportunity to argue why this Court should reject the merits of Defendants’ argument, but he chose not to do so. Accordingly, Plaintiff has waived any objection to the merits

of Defendants' argument, and this Court should rule in Defendants' favor. *See Boogaard*, 891 F.3d at 295–96 (affirming dismissal where the plaintiff failed to respond to the substance of the defendant's motion to dismiss); *Lee v. Ne. Ill. Reg'l Commuter R.R. Corp.*, 912 F.3d 1049, 1053–54 (7th Cir. 2019) (same).

As the Seventh Circuit has stated, “Our system of justice is adversarial, and our judges are busy people. If they are given plausible reasons for dismissing a complaint, they are not going to do the plaintiff's research and try to discover whether there might be something to say against the defendants' reasoning.” *Alioto v. Town of Lisbon*, 651 F.3d 715, 721 (7th Cir. 2011) (citation omitted).

Rule 23(e) as applied is invalid under the Rules Enabling Act because, as interpreted by the panel majority, it now provides substantive relief in the form of a right to incentive awards. But the Rules Enabling Act does not permit the Federal Rules of Civil Procedure to provide substantive relief, rendering Rule 23(e) invalid to the extent it is interpreted to do so here. Because Rule 23(e) is invalid as applied to this case, Plaintiff has no legal authority for an incentive award and thus no standing to pursue this litigation. Plaintiff's case must therefore be dismissed.

Respectfully submitted,

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Dated: April 29, 2025

/s/ Samuel D. Branum
Special Assistant State's Attorney

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