

# REPLY OR PERISH: THE FEDERAL RULE 83(A)(1) PROBLEM WITH LOCAL RULES REQUIRING RESPONSES TO 12(B)(6) MOTIONS

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*The federal courts of appeals are divided over whether district courts have the legal authority to grant Federal Rule of Civil Procedure 12(b)(6) motions to dismiss solely for lack of reply pursuant to local rules requiring responses to motions. Seven circuits hold that district courts must always consider the merits of an unopposed Rule 12(b)(6) motion to dismiss. However, the First and D.C. Circuits allow district courts to dismiss Rule 12(b)(6) motions for lack of response pursuant to local rules in certain circumstances. The majority view is that the use of these local rules in the First and D.C. Circuits effectively shifts the Rule 12(b)(6) movants' burden of proof onto the nonmovant and thus violates Federal Rule of Civil Procedure 83(a)(1)'s requirement of consistency between federal and local rules.*

*This Note examines this split and the federal and local rules issues underlying the circuits' diverging holdings. This Note then proposes a bifurcated solution, implemented through either the adoption of a model local rule or the interpretation of existing local rules as implicitly adopting the solution. First, district courts may grant Rule 12(b)(6) motions to dismiss solely for lack of response pursuant to a local rule only when dismissed without prejudice. However, when dismissing with prejudice, courts must conduct an analysis of the underlying merits. This solution aims to bring these local rules into compliance with Rule 83(a)(1) and give litigants and courts alike uniform expectations when parties fail to respond to Rule 12(b)(6) motions to dismiss.*

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#### INTRODUCTION

Plaintiffs Belva and Faith Webb filed their response in opposition to defendant Joseph Morella’s motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6)<sup>1</sup> (“Rule 12(b)(6)”) one day late and without a table of contents or table of authorities.<sup>2</sup> The result was severe. A federal district court in the Western District of Louisiana dismissed

1. FED. R. CIV. P. 12(b)(6). This Note uses “12(b)(6) motions” to refer to motions to dismiss for failure to state a claim under Rule 12(b)(6).

2. See *Webb v. Morella*, 457 F. App’x 448, 450 (5th Cir. 2012) (“The district court granted the motion to dismiss as ‘unopposed’ under local rules, because the Webbs’ response in opposition was one day late and did not contain a table of contents and a table of authorities.”).

the Webbs' complaint with prejudice<sup>3</sup> and awarded Morella \$18,221.72 in attorneys' fees and costs.<sup>4</sup> A dismissal with prejudice bars plaintiffs from bringing suit on the claim again in the same federal court.<sup>5</sup> The legal authority for this draconian result was the Western District of Louisiana's Local Rule 7.5 ("Local Rule 7.5"),<sup>6</sup> which provides, in relevant part, that "[i]f the respondent opposes a motion, he or she shall file a response, including opposing affidavits, memorandum, and such supporting documents as are then available, within twenty-one days after service of the motion."<sup>7</sup> Further, the memorandum "shall contain a concise statement of reasons in opposition to the motion, and a citation of authorities upon which respondent relies."<sup>8</sup> The district court applied this rule, construing Morella's 12(b)(6) motion as "unopposed" and therefore granted Morella's motion with prejudice without considering the underlying merits of either Morella's motion or the Webbs' response.<sup>9</sup>

While the Webbs' case is a particularly egregious example, federal district courts' use of similar local rules requiring responses to 12(b)(6) motions<sup>10</sup> as a way to dismiss "unopposed" motions—sometimes with prejudice and without considering the underlying merits—is not a new phenomenon.<sup>11</sup>

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3. See *Webb v. Morella*, No. 10-cv-01557, slip op. at 2 (W.D. La. Jan. 24, 2011) (dismissing the Webbs' complaint with prejudice), *vacated*, 457 F. App'x 448 (5th Cir. 2012).

4. See *Webb*, 457 F. App'x at 450.

5. See 9 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2373 (4th ed. 2021) ("[A] Rule 41(b) dismissal on the merits for one of the grounds stated in that provision only necessarily bars a plaintiff from refiling the same claim in the same federal court, but not in other courts.").

6. See *Webb*, No. 10-cv-01557, slip op. at 1–2 (explaining that plaintiffs' complaint was dismissed as unopposed with prejudice because the plaintiffs failed to file a timely opposition response pursuant to the deadlines established by the requirements of Local Rule 7.5); *Webb*, 457 F. App'x at 452 ("The district court dismissed the Webbs' complaint on the grounds that it failed to comply with a local rule which 'requir[es] parties who oppose motions to file statements in opposition.'" (alteration in original) (quoting W.D. LA. R. 7.5)).

7. W.D. LA. R. 7.5.

8. *Id.*

9. See *Webb*, No. 10-cv-01557, slip op. at 2.

10. See Appendix. This Note will refer to local rules requiring a response to 12(b)(6) motions as "compulsory-reply local rules."

11. See, e.g., *Marcure v. Lynn*, No. 18-cv-03137, slip op. at 15–16 (C.D. Ill. Sept. 30, 2019) (dismissing plaintiff's complaints with prejudice for failure to respond to a motion to dismiss as required by Local Rule 7.1(B)(2)), *rev'd*, 992 F.3d 625 (7th Cir. 2021); *Giummo v. Olsen*, No. 15-cv-3928, 2016 WL 5387649, at \*4 (N.D. Ga. May 11, 2016) (denying a motion to reconsider the granting of a motion to dismiss as unopposed pursuant to Local Rule 7.1(B) requiring a response), *rev'd*, 701 F. App'x 922 (11th Cir. 2017); *Cohen v. Bd. of Trs. of Univ. of D.C.*, 307 F.R.D. 287, 291 (D.D.C. 2014) (invoking Local Rule 7(b) to grant the motion to dismiss on the ground that its merits were unopposed and thus conceded by plaintiff, thereby dismissing plaintiff's complaint and case with prejudice), *aff'd in part, rev'd in part*, 819 F.3d 476 (D.C. Cir. 2016); *Shuey v. Schwab*, No. 08-cv-1190, 2008 WL 4186208, at \*2 (M.D. Pa. Sept. 9, 2008) (granting defendant's motion to dismiss "without a merits analysis" with prejudice because plaintiff failed to respond as required by Local Rule 7.6), *vacated*, 350 F. App'x 630 (3d Cir. 2009); *ITI Holdings, Inc. v. Pro. Scuba Ass'n*, No. 05-184-P-S, 2006 WL 240618, at \*14–15 (D. Me. Jan. 31, 2006) ("This court has repeatedly granted motions to dismiss when the plaintiff files no opposition. The First Circuit has upheld this practice. I see no reason to deviate from that practice in this case." (citations omitted)), *report and*

Many district courts have their own “compulsory-reply local rules,”<sup>12</sup> which, read on their face, allow district courts to treat movants’ 12(b)(6) motions as conceded because of their failure to respond.<sup>13</sup> For example, the Central District of Illinois’s Local Rule 7.1(B)(2)<sup>14</sup> (“Local Rule 7.1(B)(2)”) requires respondents to “file a response to the motion,” including a statement of the specific points of law and supporting authorities on which the responding party relies, within fourteen days after service of the movant’s motion and memorandum.<sup>15</sup> If the respondent fails to do so, the judge “will presume there is no opposition to the motion and may rule without further notice to the parties.”<sup>16</sup>

Compulsory-reply local rules are troubling because, based on their text alone, they seem to permit district judges to grant 12(b)(6) motions to dismiss with prejudice without analyzing the underlying merits of the motion.<sup>17</sup> Thus, regardless of the equity of dismissal without any consideration of the merits, this reading of compulsory-reply local rules violates Federal Rule of Civil Procedure 83(a)(1)<sup>18</sup> (“Rule 83(a)(1)”) and the Rules Enabling Act<sup>19</sup> because it permits a district judge to dismiss a lawsuit with prejudice based solely on a complaint and a 12(b)(6) motion without any requirement to consider the merits of the motion, as required by Rule 12(b)(6).<sup>20</sup> Rule 83(a)(1) requires local rules to “be consistent with—but not duplicate—federal statutes and rules.”<sup>21</sup> Federal courts uniformly hold that, for 12(b)(6) motions, the movant bears the burden of showing that dismissal of the claims as alleged in the complaint is warranted.<sup>22</sup> Any reading of compulsory-reply local rules that allows the dismissal of complaints with prejudice without consideration of the merits effectively shifts the burden of proof to the

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*recommendation adopted*, No. 05-CV-184-P-S, 2006 WL 616069 (D. Me. Mar. 9, 2006), *aff’d sub nom.* ITI Holdings, Inc. v. Odom, 468 F.3d 17 (1st Cir. 2006).

12. The appendix provides a list of federal compulsory-reply local rules and their relevant text organized by circuit. *See infra* Appendix. The term “compulsory-reply local rules” reflects that this type of local rule includes language explicitly requiring a response to motions. Although all compulsory-reply local rules have a similar underlying requirement that nonmovants file responses to 12(b)(6) motions, the language of individual rules varies widely from district to district. To be clear, not all district courts have a compulsory-reply local rule, but many do. Additionally, some compulsory-reply local rules require responses to other types of motions in addition to 12(b)(6) motions. This Note will focus only on compulsory-reply local rules’ interplay with Rule 12(b)(6).

13. *See infra* Appendix.

14. C.D. ILL. R. 7.1.

15. *Id.* 7.1(B)(2).

16. *Id.*

17. *See* cases cited *supra* note 11.

18. FED. R. CIV. P. 83(a)(1).

19. 28 U.S.C. §§ 2071–2077.

20. *See* cases cited *supra* note 11.

21. FED. R. CIV. P. 83(a)(1).

22. *See* Marcure v. Lynn, 992 F.3d 625, 631 (7th Cir. 2021) (“While the text does not discuss the burden of proof, every circuit court to address this issue—this Court included—has interpreted Rule 12(b)(6) as requiring the movant to show entitlement to dismissal.”); 5B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1357 (3d ed. 2021) (“All federal courts are in agreement that the burden is on the moving party to prove that no legally cognizable claim for relief exists.”).

nonmovant because, if the nonmoving party fails to respond, the nonmoving party will lose the case regardless of whether or not the movant has carried the burden of showing that the dismissal for failure to state a claim is warranted.<sup>23</sup> Thus, to the extent compulsory-reply local rules effectively shift this burden to the nonmovant, those rules are not consistent with Rule 12(b)(6) and are therefore invalid under Rule 83(a)(1).<sup>24</sup>

The fact that circuit courts currently disagree on whether district courts can, pursuant to compulsory-reply local rules, grant a Rule 12(b)(6) motion to dismiss with prejudice solely because the nonmovant fails to oppose it<sup>25</sup> reflects the difficulty and ambiguity in interpreting and applying compulsory-reply local rules.<sup>26</sup> Seven circuits hold that district courts must always consider the merits of an unopposed 12(b)(6) motion to dismiss because Rule 12(b)(6) requires movants to prove entitlement to relief.<sup>27</sup> However, the First Circuit has straightforwardly held that Rule 12(b)(6)'s requirement can nevertheless be "overridden" by compulsory-reply local rules in certain circumstances.<sup>28</sup> According to the First Circuit, when a district court grants an unopposed motion to dismiss pursuant to a compulsory-reply local rule, it will "uphold the sanction."<sup>29</sup> However, the D.C. Circuit has adopted a different approach and has specified that district courts may only dismiss complaints pursuant to compulsory-reply local rules if dismissed explicitly without prejudice.<sup>30</sup> The majority view argues that the First and D.C. Circuit holdings impermissibly ignore movants' Rule 12(b)(6) burden to establish the complaint's insufficiency and therefore conflict with Rule 83(a)(1).<sup>31</sup>

In response to this circuit split, this Note proposes that courts, in the context of 12(b)(6) motions, adopt a bifurcated solution implemented either through the adoption of a model local rule or through a reinterpretation of existing compulsory-reply local rules. First, where district courts, in their discretion, grant unopposed 12(b)(6) motions with prejudice pursuant to compulsory-reply local rules, district courts will conduct an independent

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23. See *Cohen v. Bd. of Trs. of Univ. of D.C.*, 819 F.3d 476, 481 (D.C. Cir. 2016) ("To the extent that it allows a district court to treat an unopposed motion to dismiss as conceded, Local Rule 7(b) effectively places the burden of persuasion on the nonmoving party: when he fails to respond, he loses. But Federal Rule 12(b)(6) places this burden on the moving party.").

24. See *Marcure*, 992 F.3d at 632–33 (finding that the Central District of Illinois Local Rule 7.1(B)(2) was invalid to the extent that it was used by the district court to dismiss claims with prejudice solely because defendant's motion was unopposed).

25. See Jean-Claude André et al., *Seventh Circuit Weighs In on Circuit Split and Concludes That Courts Cannot Grant Rule 12(b)(6) Motions to Dismiss Solely Because They Are Unopposed*, JD SUPRA (Apr. 7, 2021), <https://www.jdsupra.com/legalnews/seventh-circuit-weighs-in-on-circuit-1211718/> [<https://perma.cc/5SPS-WTV8>].

26. See Appendix.

27. See André et al., *supra* note 25.

28. See *Marcure*, 992 F.3d at 632 (explaining that the First Circuit "held that Rule 12(b)(6)'s requirement could nevertheless be overridden by local rules" (citing *Pomerleau v. W. Springfield Pub. Schs.*, 362 F.3d 143, 145 (1st Cir. 2004))).

29. See *Pomerleau*, 362 F.3d at 145.

30. See *Cohen v. Bd. of Trs. of Univ. of D.C.*, 819 F.3d 476, 480 (D.C. Cir. 2016).

31. See *Marcure*, 992 F.3d at 631.

merits analysis to ensure the movant met its Rule 12(b)(6) burden of proof. Second, district courts will grant unopposed 12(b)(6) motions without conducting an analysis on the merits pursuant to compulsory-reply local rules only when the motion is granted without prejudice. Because plaintiffs who have their complaints dismissed without prejudice may file a new complaint in the same court,<sup>32</sup> the second prong of the solution balances Rule 83(a)(1)'s consistency requirement with the necessary docket management function that local rules play. For the second option, courts may consider exceptions when parties demonstrate factors such as lack of bad faith, short delay, absence of prejudice to the defendant, and efforts to respond. Ultimately, this solution will bring compulsory-reply local rules into compliance with Rule 83(a)(1), and litigants and courts alike will have one uniform and predictable set of expectations when parties fail to respond to 12(b)(6) motions to dismiss.

#### I. THE DEVELOPMENT OF LOCAL RULES AND FEDERAL RULE 12(B)(6)

The lawful scope of federal local rules and the requirements of Rule 12(b)(6) sit at the core of the current conflict among the circuit courts. Thus, Part I will provide the necessary background on local rules and Rule 12(b)(6) to contextualize both the circuit split and this Note's solution. Specifically, Part I.A will track the statutory authority for, and judicial review of, local rules. Part I.B then will examine the procedural basics and standard of review of Rule 12(b)(6).

##### A. *Statutory Authority for and Judicial Review of Federal Local Rules*

District courts wield great power to create local procedural rules that, if valid, carry the force of law.<sup>33</sup> Local rules are valid if they do not conflict with the federal rules approved by the U.S. Supreme Court, U.S. Congress, or the U.S. Constitution.<sup>34</sup> Federal district courts derive their local rulemaking authority from two sources: (1) the Rules Enabling Act and (2) Rule 83(a)(1), which is itself a rule under the Rules Enabling Act.<sup>35</sup> The Rules Enabling Act provides that "all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business."<sup>36</sup> Further, Rule 83(a)(1) establishes that "a district court, acting by a majority of its district judges, may adopt and amend rules governing its practice."<sup>37</sup> However, these same sources also limit district courts' rulemaking authority.<sup>38</sup> The Rules Enabling Act requires that local rules be "consistent

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32. *See Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505 (2001) ("The primary meaning of 'dismissal without prejudice,' we think, is dismissal without barring the plaintiff from returning later, to the same court, with the same underlying claim." (quoting FED. R. CIV. P. 41)).

33. *See* 12 WRIGHT ET AL., *supra* note 22, § 3153.

34. *See Contino v. United States*, 535 F.3d 124, 126 (2d Cir. 2008).

35. FED. R. CIV. P. 83(a)(1).

36. 28 U.S.C. § 2071.

37. FED. R. CIV. P. 83(a)(1).

38. *See* Samuel P. Jordan, *Local Rules and the Limits of Trans-Territorial Procedure*, 52 WM. & MARY L. REV. 415, 432 (2010).

with Acts of Congress and rules of practice and procedure” prescribed under the Act’s authority.<sup>39</sup> Additionally, Rule 83(a)(1) mandates that local rules “be consistent with—but not duplicate—the Federal Rules themselves.”<sup>40</sup> Further, under the Rules Enabling Act, a Federal Rule of Civil Procedure may not “abridge, enlarge or modify any substantive right.”<sup>41</sup>

District courts have made wide use of their Rule 83(a)(1) power.<sup>42</sup> Thousands of local rules now exist on a wide range of topics and serve significant roles within district courts.<sup>43</sup> As Professor Stephen Subrin has argued, local rules are necessary tools for overburdened court systems to manage their dockets, especially with the number and complexity of federal court cases rising dramatically.<sup>44</sup> Accordingly, local rules are an important and enduring aspect of modern-day federal litigation, but their proliferation has been criticized.<sup>45</sup>

The exact burdens, review requirements, and means of enforcement that Rule 83(a)(1)’s consistency requirement imposes on district court rulemaking power remain unclear.<sup>46</sup> Notably, since the 1938 promulgation of the Federal Rules of Civil Procedure, the Supreme Court has only addressed the proper scope of local rules a handful of times.<sup>47</sup> The Court’s analysis begins in the 1960 case, *Miner v. Atlass*,<sup>48</sup> which suggests that local rules should not introduce “basic procedural innovations.”<sup>49</sup> The Court held that a local rule under which a district court ordered the taking of oral depositions during discovery was not consistent with the General Admiralty

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39. 28 U.S.C. § 2071(a).

40. FED. R. CIV. P. 83(a)(1).

41. 28 U.S.C. § 2072(b).

42. See David M. Roberts, *The Myth of Uniformity in Federal Civil Procedure: Federal Civil Rule 83 and District Court Local Rulemaking Powers*, 8 U. PUGET SOUND L. REV. 537, 538 (1985) (explaining that federal judges have “taken up their rulemaking power with an enthusiasm that would astound the framers of Rule 83”).

43. See *id.* (explaining that, as of the source article’s publication in 1985, nearly 3000 local rules have been promulgated since Rule 83’s passage, and that “[i]n some districts, they are now nearly as important as the federal rules themselves”).

44. See Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2018 (1989) (“The number of cases in the federal courts has risen dramatically, and cases may have become far more complex than the drafters of the Federal Rules anticipated. Discovery and documentation is often vast.” (footnote omitted)); Daniel R. Coquillette et al., *The Role of Local Rules*, 75 A.B.A. J. 62, 65 (1989) (“Busy trial judges need more specificity to meet daily problems and provide uniformity and predictability within their districts.”).

45. See Jordan, *supra* note 38, at 418 (“Hostility toward local rules is as old as the Federal Rules themselves. Over the past seventy years, a steady stream of commentators and committees has recommended that the role of local rules in the federal procedural structure be reduced or eliminated.”).

46. See 12 WRIGHT ET AL., *supra* note 22, § 3153.

47. See Jordan, *supra* note 38, at 417.

48. 363 U.S. 641 (1960).

49. *Id.* at 650 (calling for “exacting observance of the statutory procedures surrounding the rule-making powers of the Court designed to insure that basic procedural innovations shall be introduced only after mature consideration of informed opinion from all relevant quarters with all the opportunities for comprehensive and integrated treatment which such consideration affords.” (citations omitted)).

Rules<sup>50</sup> because the Court had already concluded that the discovery deposition procedure was not authorized by the General Admiralty Rules themselves.<sup>51</sup> The Court characterized discovery by deposition as “weighty,” “substantive,” and “complex.”<sup>52</sup> Therefore, a district court could not effectuate “a change so basic” through local rulemaking power.<sup>53</sup> The Court specified that its decision did not imply any “desirability or undesirability” of the discovery deposition procedure in admiralty cases and that Congress may amend the rule to allow it.<sup>54</sup> However, the procedure was simply not provided for in the General Admiralty Rules and therefore could not be imposed by a local rule.<sup>55</sup>

The Supreme Court expanded on Rule 83(a)(1)’s consistency requirement in the 1973 case *Colgrove v. Battin*.<sup>56</sup> In *Colgrove*, the Court upheld a District of Montana local rule that reduced the size of a civil jury from twelve to six,<sup>57</sup> despite Federal Rule of Civil Procedure 48<sup>58</sup> (“Rule 48”), which at the time implicitly assumed a jury to have twelve members.<sup>59</sup> In reconciling the District of Montana’s local rule with Rule 48, the Court held that Rule 48’s twelve-person jury requirement was just an “assumption of the draftsmen” that the Court could not read as an “implied direction”<sup>60</sup> to impanel twelve-person juries because a smaller jury could still effectively fulfill its fact-finder role.<sup>61</sup>

In squaring *Colgrove*’s holding with the “basic procedural innovations” standard set forth in *Miner*, the Court found that adjusting the number of jurors was not a basic procedural innovation within the scope of *Miner*.<sup>62</sup> The *Colgrove* Court reasoned that *Miner*’s reference to basic procedural innovations referred only to “aspects of the litigatory process which bear upon the ultimate outcome of the litigation.”<sup>63</sup> Because the change in the number of jurors pursuant to the local rule did not make a “discernible difference” on the outcome of litigation, the local rule was valid.<sup>64</sup> Professor

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50. *See id.* at 641–42. This case arose before unification of admiralty and civil procedure, when admiralty cases were governed by General Admiralty Rules, which included a similar authority to adopt local rules. *See* 12 WRIGHT ET AL., *supra* note 22, § 3153.

51. *See Miner*, 363 U.S. at 650.

52. *Id.* at 649–50.

53. *Id.* at 650.

54. *Id.* at 651.

55. *See id.* at 652.

56. 413 U.S. 149 (1973).

57. *Id.* 149–51.

58. *See* FED. R. CIV. P. 48; Paul D. Carrington, *A New Confederacy?: Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 950 (1996).

59. *See* 12 WRIGHT ET AL., *supra* note 22, § 3153 n.50 (explaining that from 1938 to 1991, Rule 48 was titled “Juries of Less Than Twelve-Majority Verdict” and read: “The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.”).

60. *See Colgrove*, 413 U.S. at 163.

61. *See id.* at 157 (finding that twelve members is not a substantive aspect of the right to jury trial because the reliability of the jury as a fact-finder is not “a function of its size”).

62. *See id.* at 164 n.23.

63. *See id.*

64. *See id.*

Paul D. Carrington has criticized *Colgrove* and its impact on local rulemaking, arguing that the Supreme Court's acceptance of such a radical local rule allowed for rampant use of local rulemaking power.<sup>65</sup> Overall, *Colgrove*'s acceptance of the District of Montana's six-person jury local rule made it difficult for courts to determine exactly what factors might suffice to invalidate a local rule under Rule 83(a)(1).<sup>66</sup>

To mitigate the seeming scope of local rulemaking power blessed by *Colgrove*, the Judicial Improvements and Access to Justice Act<sup>67</sup> revised the Rules Enabling Act to place the burden on the circuit judicial councils to review local rules.<sup>68</sup> Notably, only a small number of judicial councils have developed rigorous review standards up to par with Rule 83(a)(1) and the Rules Enabling Act.<sup>69</sup> Additionally, these standards' onerous requirements have impeded the review of many circuits with limited resources.<sup>70</sup> As a result, some academics have criticized the federal judiciary's failure to develop strong guidelines for district courts' use of their Rule 83(a)(1) rulemaking power.<sup>71</sup>

### B. Federal Rule 12(b)(6) Motions to Dismiss

This section will provide background information on Rule 12(b)(6), paying particular attention to how district courts analyze the sufficiency of a 12(b)(6) motion to dismiss, the movant's burden of proof, and the difference between a dismissal with or without prejudice. Rule 12(b)(6) states that a litigant may file a motion to dismiss a complaint for "failure to state a claim upon which relief can be granted."<sup>72</sup> When considering the motion to dismiss, the court takes the complaint's allegations as true,<sup>73</sup> construes the complaint in the light most favorable to the plaintiff, and draws all reasonable inferences in favor of the pleader.<sup>74</sup> A court's Rule 12(b)(6) analysis focuses

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65. See Carrington, *supra* note 58, at 950 (calling *Colgrove* an "epic blunder").

66. See 12 WRIGHT ET AL., *supra* note 22, § 3153.

67. Pub. L. No. 100-702, 102 Stat. 4642 (1988) (codified as amended in scattered sections of the U.S.C.).

68. See 28 U.S.C. § 2071(c)(1) ("A rule of a district court prescribed under subsection (a) shall remain in effect unless modified or abrogated by the judicial council of the relevant circuit.").

69. See Carl Tobias, *Suggestions for Circuit Court Review of Local Procedures*, 52 WASH. & LEE L. REV. 359, 362 (1995).

70. See *id.* at 364-65 (explaining that Congress has not allotted sufficient funding for councils to implement these standards and that the Ninth Circuit, which has an especially large number of district courts, has had to rely on volunteer attorneys and law student interns).

71. See *id.* at 362 ("Unfortunately, very few circuit judicial councils in the twelve United States Circuit Courts of Appeal have fully implemented the requirements relating to appellate court oversight that are found in the 1985 amendment of Rule 83 or the 1988 JIA."); Note, *Rule 83 and the Local Federal Rules*, 67 COLUM. L. REV. 1251, 1276 (1967) ("But courts have failed to realize fully both the potentials and the limitations of Rule 83. They have not attempted to determine the Rule's proper place within the Federal Rules, and thus have not evolved any meaningful guidelines for the use of the powers granted therein.").

72. FED. R. CIV. P. 12(b)(6).

73. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007) (explaining that courts must conduct their Rule 12(b)(6) analysis assuming that the complaint's allegations are true).

74. See 5B WRIGHT ET AL., *supra* note 22, § 1357.

on whether the allegations form a valid claim under Federal Rule of Civil Procedure 8(a)(2), which requires a complaint to contain a “short and plain” statement showing that the pleader is entitled to relief.<sup>75</sup> Courts review the complaint under the “plausibility” standard, where plaintiffs must plead facts that plausibly show an entitlement to relief.<sup>76</sup>

The sufficiency of a complaint is a matter of law that the court can determine on its own based on its reading of the complaint and the law, even though parties are still given reasonable opportunities to respond to the complaint.<sup>77</sup> When a litigant presents a district court with a 12(b)(6) motion, the court should, in theory, conduct a two-part analysis.<sup>78</sup> First, the court separates the factual and legal elements of the claim.<sup>79</sup> The court may disregard any legal conclusions but must accept all “well-pleaded facts” as true.<sup>80</sup> Second, the court determines whether the facts alleged in the complaint are sufficient to show that the plaintiff has a plausible claim for relief.<sup>81</sup> Making this determination is “context-specific” and requires courts to draw on their “experience and common sense.”<sup>82</sup> In deciding a motion to dismiss, courts must usually limit their analysis to the four corners of the complaint.<sup>83</sup> However, courts may consider documents attached to the complaint as exhibits or incorporated by reference into the complaint.<sup>84</sup> For instance, the Second Circuit has upheld district courts’ consideration of the full text of documents partially quoted in the complaint,<sup>85</sup> of a contract between parties integral to the complaint alleging breach,<sup>86</sup> and of documents integral to the complaint relied upon by a plaintiff in drafting a complaint.<sup>87</sup>

Although not in the text of Rule 12(b)(6), federal courts agree that, for 12(b)(6) motions, the moving party carries the burden to prove that the nonmoving party failed to plead a legally cognizable claim for relief.<sup>88</sup> For instance, in *Mediacom Southeast LLC v. BellSouth Telecommunications*,

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75. FED. R. CIV. P. 8(a)(2).

76. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

77. See *McCall v. Pataki*, 232 F.3d 321, 322 (2d Cir. 2000).

78. See *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210–11 (3d Cir. 2009).

79. See *id.*

80. See *id.*

81. See *id.* at 211.

82. See *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

83. See *Maniolas v. United States*, 741 F. Supp. 2d 555, 560 (S.D.N.Y. 2010), *aff’d*, 469 F. App’x 56 (2d Cir. 2012).

84. See *id.*; *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002) (“[A] plaintiff’s reliance on the terms and effect of a document in drafting the complaint is a necessary prerequisite to the court’s consideration of the document on a dismissal motion; mere notice or possession is not enough.”); *Rothman v. Gregor*, 220 F.3d 81, 88 (2d Cir. 2000) (deeming a complaint to include “any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference”).

85. See *San Leandro Emergency Med. Grp. Profit Sharing Plan v. Philip Morris Cos.*, 75 F.3d 801, 808–09 (2d Cir. 1996).

86. See *Int’l Audiotext Network, Inc. v. Am. Tel. & Tel. Co.*, 62 F.3d 69, 72 (2d Cir. 1995).

87. See *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47–48 (2d Cir. 1991).

88. See *Marcure v. Lynn*, 992 F.3d 625, 631 (7th Cir. 2021); 5B WRIGHT ET AL., *supra* note 22, § 1357.

*Inc.*,<sup>89</sup> the Sixth Circuit reversed the district court's decision placing the 12(b)(6) burden of proof on the nonmoving party.<sup>90</sup> There, the court found that the district court improperly considered the persuasiveness of the nonmoving party's allegations and whether there were any genuine issues of material fact, rather than merely accepting the allegations as true and evaluating whether there was a cognizable claim in the complaint.<sup>91</sup> Many federal courts have reached similar conclusions on this issue.<sup>92</sup>

A substantial amount of case law reflects that the Federal Rules of Civil Procedure themselves have a policy preference for resolution of disputes on the merits,<sup>93</sup> especially when courts dismiss with prejudice.<sup>94</sup> Courts have invoked this pro-merits policy when deciding on 12(b)(6) motions, especially when determining whether to grant a motion with or without prejudice.<sup>95</sup> However, in determining whether to dismiss with prejudice, circuit courts have also permitted district courts to consider factors such as a litigant's refusal to abide by court deadlines,<sup>96</sup> bad faith, short delay, absence of prejudice to the defendant, and a plaintiff's efforts to respond.<sup>97</sup>

Whether a court grants a 12(b)(6) motion with or without prejudice has important implications for litigants.<sup>98</sup> 12(b)(6) motions operate as adjudications on the merits—in other words, with prejudice<sup>99</sup>—unless the

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89. 672 F.3d 396 (6th Cir. 2012).

90. *See id.* at 399 (explaining that “[o]n a motion to dismiss, AT&T, the moving party, bore the burden, not the non-moving party, Mediacom”).

91. *See id.*

92. *See, e.g.,* Cohen v. Bd. of Trs. of Univ. of D.C., 819 F.3d 476, 481 (D.C. Cir. 2016) (“Rule 12(b)(6) places this burden on the moving party.”); Kundraic v. Thomas, 407 F. App'x 625, 627 (3d Cir. 2011) (“The defendant bears the burden of proving the plaintiff has failed to articulate a claim upon which relief could be granted.”); Spirit Lake Tribe v. Jaeger, No. 18-cv-222, 2020 WL 625279, at \*8 (D.N.D. Feb. 10, 2020) (“The burden is on the moving party to prove that no legally cognizable claim for relief exists.”).

93. *See, e.g.,* Krupski v. Costa Crociere S. p. A., 560 U.S. 538, 550 (2010) (explaining that the Federal Rules have a general preference for resolution of disputes on the merits); Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002) (“The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim.”); 5B WRIGHT ET AL., *supra* note 22, § 1357.

94. *See* Rudder v. Williams, 666 F.3d 790, 794 (D.C. Cir. 2012) (“Dismissal with prejudice is the exception, not the rule, in federal practice because it ‘operates as a rejection of the plaintiff’s claims on the merits and [ultimately] precludes further litigation of them.’” (alteration in original) (quoting Belizan v. Hershon, 434 F.3d 579, 583 (D.C. Cir. 2006))).

95. *See, e.g.,* Cohen, 819 F.3d at 482 (explaining that granting an unopposed 12(b)(6) motion to dismiss “risks circumventing the clear preference of the Federal Rules to resolve disputes on their merits”); Partridge v. Two Unknown Police Officers of Hous., 791 F.2d 1182, 1189 (5th Cir. 1986) (granting leave to amend a 12(b)(6) motion as “guided by the policy of the federal rules favoring adjudication on the merits”).

96. *See* Boazman v. Econ. Lab’y, Inc., 537 F.2d 210, 212 (5th Cir. 1976).

97. *See* Cohen, 819 F.3d at 484.

98. *See* 9 WRIGHT ET AL., *supra* note 5, § 2373 (“In the context of determining the effect of a Rule 41(b) dismissal on a second action based on the same claim, the distinction between a dismissal with prejudice and one without prejudice is significant.”).

99. *See id.* (“[B]ecause an involuntary dismissal is an adjudication on the merits, it is, in the words commonly used by the federal courts, ‘with prejudice.’”).

court specifies otherwise in its order of dismissal.<sup>100</sup> This is because Federal Rule of Civil Procedure 41(b) (“Rule 41(b)”) states that certain dismissals, specifically, those for lack of jurisdiction, improper venue, and failure to join an indispensable party, are presumed to not be on the merits.<sup>101</sup> Therefore, all other dismissals, including dismissals for failure to state a claim under Rule 12(b)(6), operate as adjudications on the merits unless the court states otherwise.<sup>102</sup> A dismissal without prejudice means that the plaintiff may file a new complaint in the same court.<sup>103</sup> On the other hand, a dismissal with prejudice, in the context of 12(b)(6) motions, bars a plaintiff from refiling the same claim in the same federal court but not in other courts.<sup>104</sup>

## II. THREE APPROACHES TO WHETHER COURTS MAY GRANT 12(B)(6) MOTIONS PURSUANT TO COMPULSORY-REPLY LOCAL RULES

As compulsory-reply local rules have proliferated,<sup>105</sup> courts have struggled to determine where and how they interact with Rule 12(b)(6)’s mechanics and Rule 83(a)(1)’s consistency requirement.<sup>106</sup> The circuit courts disagree over whether district courts may rely on compulsory-reply local rules to grant 12(b)(6) motions solely because the motions are unopposed.<sup>107</sup> Nine circuit courts have addressed this split, and three distinct approaches have developed.<sup>108</sup> Seven of the circuits require movants to always prove entitlement to relief, even when the nonmoving party does not respond as required by local rule.<sup>109</sup> The First Circuit, on the other hand, has held that district courts’ obligation to examine the merits of the complaint itself could “nevertheless be overridden by local rules,”<sup>110</sup> thus empowering district courts to grant motions to dismiss as unopposed pursuant to compulsory-reply local rules.<sup>111</sup> Alternatively, the D.C. Circuit takes a “middle approach,” where district courts may grant a motion to dismiss solely on the basis that the nonmovant fails to oppose, but only without prejudice.<sup>112</sup>

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100. *See id.* (“[A] dismissal under Rule 41(b) or any other dismissal not provided for in Rule 41, including a default judgment, will operate as an adjudication on the merits.”).

101. *See* FED. R. CIV. P. 41(b).

102. *Id.*; *see* 9 WRIGHT ET AL., *supra* note 5, § 2373.

103. *See* 9 WRIGHT ET AL., *supra* note 5, § 2373.

104. *See* *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 506 (2001) (explaining that the effect of the “adjudication upon the merits” default provision of Rule 41(b) “is simply that, unlike a dismissal ‘without prejudice,’ the dismissal in the present case barred refiling of the same claim” in the same district court).

105. *See infra* Appendix.

106. *See* André et al., *supra* note 25.

107. *See id.*

108. *See id.*

109. *See* *Marcure v. Lynn*, 992 F.3d 625, 631 (7th Cir. 2021) (“Of the eight circuit courts to consider this issue, six have held that courts may not grant Rule 12(b)(6) motions solely because they are unopposed.”).

110. *Id.* at 632.

111. *See* *Pomerleau v. W. Springfield Pub. Schs.*, 362 F.3d 143, 145 (1st Cir. 2004).

112. *Marcure*, 992 F.3d at 631 (“The D.C. Circuit takes a middle approach and ‘reluctantly’ permits courts to grant Rule 12(b)(6) motions on this basis—but only if the court does so

Thus, as courts have grappled with compulsory-reply local rules, a variety of judicial approaches have emerged. In the following sections, this Note tracks the three approaches circuit courts have taken to this issue. Part II.A surveys the majority view, focusing especially on the Seventh Circuit's recent decision in *Marcure v. Lynn*.<sup>113</sup> Part II.B explains the First Circuit's opposing rule and examines the justifications for its conflicting jurisprudence. Part II.C investigates the D.C. Circuit's "middle approach" and demonstrates how it stands apart from both the majority and First Circuit's approach to granting 12(b)(6) motions.

*A. Majority Approach: Courts May Not Dismiss Solely for Lack of Response Pursuant to Local Rule*

The Second,<sup>114</sup> Third,<sup>115</sup> Fifth,<sup>116</sup> Sixth,<sup>117</sup> Seventh,<sup>118</sup> Tenth,<sup>119</sup> and Eleventh<sup>120</sup> Circuits agree that district courts must address the merits of a defendant's 12(b)(6) motion and may not dismiss a complaint solely on the ground that a plaintiff failed to respond pursuant to a compulsory-reply local rule.

The Seventh Circuit most recently weighed in on this issue in *Marcure v. Lynn*.<sup>121</sup> There, the Seventh Circuit held that Rule 12(b)(6) prevents courts from granting unopposed motions to dismiss solely because the nonmovant failed to respond as required by local rule.<sup>122</sup> A federal district court in the Central District of Illinois had granted the defendant's motion to dismiss with prejudice because the plaintiff failed to file a response, as required by the Central District of Illinois's Local Rule 7.1(B)(2).<sup>123</sup> On appeal, the Seventh

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without prejudice." (quoting *Cohen v. Bd. of Trs. of Univ. of D.C.*, 819 F.3d 476, 480 (D.C. Cir. 2016))).

113. 992 F.3d 625 (7th Cir. 2021).

114. See *McCall v. Pataki*, 232 F.3d 321, 323 (2d Cir. 2000) ("The district court in the present case did not address the merits of defendants' Rule 12(b)(6) motion and appears to have dismissed the complaint solely on the ground that Herrera did not respond to the motion. Dismissal on that basis was error.").

115. See *Stackhouse v. Mazurkiewicz*, 951 F.2d 29, 30 (3d Cir. 1991) (holding dismissal without a merits analysis improper when based solely on noncompliance with a local rule requiring responses to motions).

116. See *Webb v. Morella*, 457 F. App'x 448, 452 n.4 (5th Cir. 2012); *Ramsey v. Signal Delivery Serv., Inc.*, 631 F.2d 1210, 1214 (5th Cir. 1980).

117. See *Carver v. Bunch*, 946 F.2d 451, 453 (6th Cir. 1991) ("Interpreting Local Rule 6(b)(1)(A) as authorizing a district court to dismiss Carver's complaint would seemingly make that rule inconsistent with the Federal Rules of Civil Procedure.").

118. See *Marcure v. Lynn*, 992 F.3d 625, 631–32 (7th Cir. 2021).

119. See *Issa v. Comp USA*, 354 F.3d 1174, 1178 (10th Cir. 2003) ("Consequently, even if a plaintiff does not file a response to a motion to dismiss for failure to state a claim, the district court must still examine the allegations in the plaintiff's complaint and determine whether the plaintiff has stated a claim upon which relief can be granted.").

120. See *Giummo v. Olsen*, 701 F. App'x 922, 925 (11th Cir. 2017) ("[T]he district court must address the merits of the defendants' motion to dismiss.").

121. See *Marcure*, 992 F.3d at 631; see also *André et al.*, *supra* note 25.

122. See *Marcure*, 992 F.3d at 631.

123. See *id.* at 628. The Central District of Illinois's Local Rule 7.1(B)(2) requires that any party opposing a motion must file a response to the motion within fourteen days after the service of the motion and memorandum, including "a brief statement of the specific points or

Circuit rejected the district court's application of Local Rule 7.1(B)(2) because Rule 12(b)(6) puts the burden on the moving party to prove that no claim exists.<sup>124</sup> The Seventh Circuit found that the district court's use of Local Rule 7.1(B)(2) was invalid under Rule 83(a)(1)'s consistency requirement because the district court's use of Local Rule 7.1(B)(2) effectively placed the burden of proof on the nonmovant.<sup>125</sup> Instead, the Seventh Circuit held that district courts must rule on unopposed 12(b)(6) motions by reaching the merits, instead of granting the motion solely because the nonmovant failed to oppose.<sup>126</sup> The court emphasized that district courts could rule on a 12(b)(6) motion even absent a response by looking to the complaint to determine the sufficiency of the pleadings.<sup>127</sup> The court read this requirement into the text of Local Rule 7.1(B)(2) itself.<sup>128</sup> The Seventh Circuit explicitly mentioned the First and D.C. Circuits' respective holdings on this issue and dismissed their reasoning as not persuasive.<sup>129</sup> Other circuits have come to similar conclusions as the *Marcure* court.<sup>130</sup>

The Seventh Circuit leaned heavily on its prior Federal Rule of Civil Procedure 56<sup>131</sup> ("Rule 56") motion for summary judgment cases, explaining that this line of case law was "analogous" because both Rule 56 and Rule 12(b)(6) impose the same requirement that movants prove their entitlement to relief.<sup>132</sup> The *Marcure* court cited its own prior case where it held that Rule 56 "imposes an affirmative obligation" of proof on the movant because Rule 56's text requires the movant to show that it is entitled to judgment as a matter of law.<sup>133</sup> On one hand, the court recognized that Rule 12(b)(6)'s text, unlike Rule 56's text, does not expressly assign the burden of proof to the movant.<sup>134</sup> However, the court noted that federal courts have read a similar burden of proof into Rule 12(b)(6).<sup>135</sup> Therefore, the court found that

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propositions of law and supporting authorities upon which the responding party relies." C.D. ILL. R. 7.1(B)(2). Further, if no response is filed by the deadline, the "judge will presume there is no opposition to the motion and rule without further notice to the parties." *Id.*

124. *See Marcure*, 992 F.3d at 631.

125. *See id.* at 632.

126. *See id.*

127. *See id.* at 633 n.5.

128. *See id.* at 632 ("We note first that the text of the local rule does not require or expressly authorize courts to *grant* a motion solely because there is no response filed.")

129. *See id.* at 631–32 ("Neither the First Circuit nor the officers square this logic with Rule 83(a)(1), which provides that local rules 'must be consistent with' the Federal Rules of Civil Procedure. We thus reject the First Circuit's approach in favor of the majority view, which has the sounder reading of the federal rules and more closely aligns with our own treatment of Rule 12(b)(6)." (citing FED. R. CIV. P. 83(a)(1))).

130. *See id.* at 631 ("The majority of circuit courts have made explicit what our precedent implies.")

131. FED. R. CIV. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.")

132. *See Marcure*, 992 F.3d at 631.

133. *See id.* (citing *Raymond v. Ameritech Corp.*, 442 F.3d 600, 608 (7th Cir. 2006)).

134. *See Marcure*, 992 F.3d at 631.

135. *See id.*

it should treat the dispositions of unopposed Rule 56 and Rule 12(b)(6) motions equally because, under both rules, the movant has an “identical requirement” to prove entitlement to relief.<sup>136</sup> Thus, the court held that the logic of Rule 56 applied to Rule 12(b)(6) and that 12(b)(6) movants were also obligated to prove entitlement to relief.<sup>137</sup> For these reasons, the Seventh Circuit ultimately joined the majority in holding that district courts may not grant 12(b)(6) motions solely for lack of opposition pursuant to their compulsory-reply local rules.<sup>138</sup>

*B. The First Circuit’s Outlier Approach: Courts May Dismiss 12(b)(6) Motions Solely for Lack of Response Pursuant to Local Rule*

Unlike the majority of circuits described above, the First Circuit has held that district courts have the discretion to dismiss an action because of a party’s failure to respond to a motion when a response is required by a local rule.<sup>139</sup> The First Circuit has emphasized that district courts may insist on strict compliance with their local rules.<sup>140</sup> On one hand, the court has acknowledged Rule 12(b)(6)’s requirement that district courts examine the complaint and determine whether it sufficiently states a claim.<sup>141</sup> However, despite acknowledging that Rule 12(b)(6) itself does not require a response to a motion, the court has expressly stated that when a local rule requires a response to a motion, the nonmoving party is placed on notice that failure to respond may result in procedural default.<sup>142</sup> In other words, if the nonmoving party fails to respond, the nonmoving party forfeits the opportunity to contest the motion to dismiss.<sup>143</sup> According to the court, in

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136. *See id.* (“Both rules thus impose the same requirement—movants must prove entitlement to relief. The officers proffer no explanation for why the disposition of unopposed motions under these two rules ought to differ despite that identical requirement.”).

137. *See id.*

138. *See id.*

139. *See NEPSK, Inc. v. Town of Houlton*, 283 F.3d 1, 7 (1st Cir. 2002) (“[I]t is within the district court’s discretion to dismiss an action based on a party’s unexcused failure to respond to a dispositive motion when such response is required by local rule, at least when the result does not clearly offend equity.”); *see also* *Pinto v. Universidad de Puerto Rico*, 895 F.2d 18, 19 n.1 (1st Cir. 1990) (expressly distinguishing compulsory-reply local rules from the First Circuit’s general rule that courts may not take failure to respond to a motion as a default).

140. *See NEPSK*, 283 F.3d at 7 (“A district court simply may insist upon compliance with its local rules.” (quoting *United States v. Proceeds of Sale of 3,888 Pounds of Atl. Sea Scallops*, 857 F.2d 46, 49 (1st Cir. 1988))); *Air Line Pilots Ass’n v. Precision Valley Aviation, Inc.*, 26 F.3d 220, 224 (1st Cir. 1994) (“District courts enjoy broad latitude in administering local rules. In the exercise of that discretion, district courts are entitled to demand adherence to specific mandates contained in the rules.” (citation omitted)); *United States v. Roberts*, 978 F.2d 17, 20 (1st Cir. 1992) (“A district court possesses great leeway in the application and enforcement of its local rules.”); *Mendez v. Banco Popular de Puerto Rico*, 900 F.2d 4, 7 (1st Cir. 1990) (“Rules are rules—and the parties must play by them.”).

141. *See Pomerleau v. W. Springfield Pub. Schs.*, 362 F.3d 143, 145 (1st Cir. 2004).

142. *See id.* (explaining that where a local rule expressly requires a response to a motion, “the local rule provides the basis for dismissal rather than [Rule] 12(b)(6), which does not on its own terms require a response to a motion to dismiss”). In other words, if a complainant fails to respond to a 12(b)(6) motion, the court may dismiss the case pursuant to a compulsory-reply local rule.

143. *See id.* at 146–47.

these cases, the local rule, and not Rule 12(b)(6), would provide the basis for dismissal, even though Rule 12(b)(6) itself does not expressly require a response.<sup>144</sup> For example, in *Pomerleau v. West Springfield Public Schools*,<sup>145</sup> the First Circuit held that “where a district court grants an unopposed motion to dismiss pursuant to a local rule that requires a response,” it would uphold the dismissal.<sup>146</sup>

In *ITI Holdings, Inc. v. Odom*,<sup>147</sup> the First Circuit’s most recent case to address this issue, the First Circuit upheld the District of Maine’s use of its Local Rule 7(b)<sup>148</sup> to grant a Rule 12(b)(6) motion as unopposed<sup>149</sup> with prejudice.<sup>150</sup> The District of Maine’s Local Rule 7(b) provides that “[u]nless within twenty-one days after the filing of a motion, the opposing party files written objection thereto, incorporating a memorandum of law, the opposing party shall be deemed to have waived objection.”<sup>151</sup> The district court entered judgment for the movant because the form of the nonmovant’s response to the 12(b)(6) motion was insufficient as the movant filed it as a motion to transfer rather than an objection.<sup>152</sup>

The nonmovant unsuccessfully argued that the district court abused its discretion in automatically granting the motion as unopposed pursuant to the District of Maine’s Local Rule 7(b) without considering the standard governing the granting of 12(b)(6) motions.<sup>153</sup> The nonmovant argued that the First Circuit should extend to Rule 12(b)(6) its Rule 56 case law which holds that courts cannot grant a summary judgment motion based solely on the opposing party’s failure to respond to the motion.<sup>154</sup> In rejecting this argument, the First Circuit differentiated Rule 56 and Rule 12(b)(6), concluding that Rule 12(b)(6) lacks Rule 56’s explicit language requiring courts to deny a Rule 56 motion even if unopposed where supporting evidence does not establish the absence of a genuine issue of material fact.<sup>155</sup> The First Circuit held that “[n]othing in [Rule 12(b)(6)’s] text compels the court to apply any particular standard in deciding whether to grant or deny a motion.”<sup>156</sup> Therefore, the district court’s “strict enforcement” of the District

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144. *See id.*

145. 362 F.3d 143 (1st Cir. 2004).

146. *See id.* at 145.

147. 468 F.3d 17 (1st Cir. 2006).

148. D. ME. R. 7(b).

149. *See ITI Holdings*, 468 F.3d at 18.

150. *See ITI Holdings, Inc. v. Pro. Scuba Ass’n*, No. 05-184-P-S, 2006 WL 240618, at \*2, \*14 (D. Me. Jan. 31, 2006) (dismissing a complaint “on the merits” because the plaintiff had “not filed any opposition to the defendants’ motion to dismiss”), *report and recommendation adopted*, No. 05-184-P-S, 2006 WL 616069 (D. Me. Mar. 9, 2006), *aff’d sub nom.* *ITI Holdings, Inc. v. Odom*, 468 F.3d 17 (1st Cir. 2006).

151. D. ME. R. 7(b).

152. *See ITI Holdings*, 468 F.3d at 18.

153. *See id.*

154. *See id.*

155. *See id.*; *see also* FED. R. CIV. P. 56 (“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”).

156. *See ITI Holdings*, 468 F.3d at 19.

of Maine's Local Rule 7(b) created no impermissible conflict with Rule 12(b)(6).<sup>157</sup> For these reasons, the First Circuit breaks from the majority of circuits and holds that district courts may dismiss complaints for failure to state a claim pursuant to compulsory-reply local rules solely for lack of reply.<sup>158</sup>

*C. The D.C. Circuit's "Reluctant" Middle Approach: Courts May Grant 12(b)(6) Motions Without Prejudice*

The D.C. Circuit has taken a middle approach and "reluctantly" held that the District Court for the District of Columbia may, pursuant to a compulsory-reply local rule, treat a 12(b)(6) motion to dismiss as unopposed and dismiss the plaintiff's claim as conceded, but only if the court dismisses the claim without prejudice.<sup>159</sup> The District Court for the District of Columbia's Local Rule 7(b) ("D.C. Rule 7(b)") provides: "Within 14 days of the date of service . . . an opposing party shall serve and file a memorandum of points and authorities in opposition to the motion. If such a memorandum is not filed within the prescribed time, the Court may treat the motion as conceded."<sup>160</sup> The D.C. Circuit has described D.C. Rule 7(b) as "a docket-management tool" that "facilitates efficient and effective resolution of motions"<sup>161</sup> and has indicated that its enforcement ensures that "litigants argue their causes on a level playing field."<sup>162</sup> The D.C. Circuit has also held that D.C. Rule 7(b) applies where a party files a response in opposition to a motion but only addresses some of the arguments raised in the movant's motion.<sup>163</sup> In that case, district courts may treat the unaddressed arguments as conceded.<sup>164</sup>

In *Cohen v. Board of Trustees of the University of the District of Columbia*,<sup>165</sup> the D.C. Circuit upheld the district court's dismissal of the plaintiff's complaint under Rule 12(b)(6) since "its merits were unopposed and thus conceded by [the plaintiff]" because the plaintiff missed D.C. Rule 7(b)'s reply deadline.<sup>166</sup> However, the D.C. Circuit held that the district court's dismissal of the claim with prejudice was an abuse of discretion.<sup>167</sup> Instead, the D.C. Circuit required the district court to consider alternative, less harsh sanctions, such as dismissal without prejudice, before granting motions to dismiss because of a plaintiff's failure to respond.<sup>168</sup>

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157. *Id.*

158. *See id.*

159. *See* *Cohen v. Bd. of Trs. of Univ. of D.C.*, 819 F.3d 476, 484 (D.C. Cir. 2016).

160. D.D.C. R. 7(b).

161. *Fox v. Am. Airlines, Inc.*, 389 F.3d 1291, 1294 (D.C. Cir. 2004).

162. *See* *Texas v. United States*, 798 F.3d 1108, 1114 (D.C. Cir. 2015) (quoting *Fox*, 389 F.3d at 1295).

163. *See id.*

164. *See id.*

165. 819 F.3d 476 (D.C. Cir. 2016).

166. *See id.* at 478; *see also* D.D.C. R. 7(b).

167. *See Cohen*, 819 F.3d at 478.

168. *See id.* at 483 (requiring consideration of "less harsh alternatives before granting a dispositive motion based on the plaintiff's procedural failure").

The court directly addressed the First Circuit's contradictory line of cases, noting that the First Circuit found no conflict between the District of Maine's version of D.C. Rule 7(b) and Rule 12(b)(6).<sup>169</sup> The D.C. Circuit differentiated itself from the First Circuit by holding that D.C. Rule 7(b) stands in tension with Rule 12(b)(6).<sup>170</sup> The D.C. Circuit also noted that D.C. Local Rule 7(b) may violate Rule 83(a)(1) because, in effect, it puts the burden of proof on the nonmoving party.<sup>171</sup> Additionally, the court recognized that D.C. Rule 7(b) allows the district court to dismiss cases without analyzing their merits and therefore conflicts with the "weighty preference" for deciding cases on the merits for case-dispositive motions under Rule 12(b)(6).<sup>172</sup> Although the court expressed these concerns about its holding,<sup>173</sup> it was bound by precedent where it had previously upheld the district court's use of D.C. Rule 7(b) to grant unopposed 12(b)(6) motions with prejudice.<sup>174</sup>

In so holding, the *Cohen* court principally relied on its former case *Fox v. American Airlines, Inc.*,<sup>175</sup> which also addressed D.C. Rule 7(b) as applied to Rule 12(b)(6).<sup>176</sup> In *Fox*, the D.C. Circuit upheld a "straightforward application" of D.C. Rule 7(b) where the district court granted a motion to dismiss because the defendant failed to reply.<sup>177</sup> The *Fox* court also rejected the plaintiff's argument that it should vacate the district court's judgment because the plaintiff failed to receive electronic notice of the defendant's motion to dismiss.<sup>178</sup> The court reasoned that if the plaintiff had checked the court's docket, the plaintiff would have discovered the defendant's motion.<sup>179</sup> For these reasons, the D.C. Circuit has ultimately taken a middle approach to this circuit split and allows dismissal solely for lack of reply pursuant to a compulsory-reply local rule, but only when granted without prejudice.<sup>180</sup>

### III. A MODERATE SOLUTION: A BIFURCATED READING OF COMPULSORY-REPLY LOCAL RULES

To simplify and unify the approaches courts have taken on this circuit split,<sup>181</sup> courts should, in the context of 12(b)(6) motions, implement a bifurcated solution to interpret compulsory-reply local rules. The solution is

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169. *See id.*

170. *See id.* at 482. There is no meaningful difference between the language of D. ME. R. 7(b) and D.D.C. R. 7(b). *See* Appendix.

171. *See Cohen*, 819 F.3d at 481.

172. *See id.* at 483.

173. *See id.* ("[T]his use of [D.C.] Rule 7(b) in a way that seems to undermine the Federal Rules' protections is troubling.").

174. *See id.* at 480–81.

175. 389 F.3d 1291 (D.C. Cir. 2004).

176. *See Cohen*, 819 F.3d at 483.

177. *See Fox*, 389 F.3d at 1294–95.

178. *See id.* at 1293.

179. *See id.*

180. *See Cohen*, 819 F.3d at 480.

181. *See supra* Part II.

“bifurcated” because district courts should take different procedural routes depending on whether the court grants the unopposed 12(b)(6) motion with or without prejudice. First, where courts determine that dismissal with prejudice pursuant to compulsory-reply local rules is appropriate, district courts should conduct an independent merits analysis of the complaint to ensure that the movant met its Rule 12(b)(6) burden of proof. Second, district courts may grant 12(b)(6) motions as unopposed pursuant to compulsory-reply local rules without conducting an independent merits analysis *only when granted without prejudice*. Because dismissal without prejudice allows parties to file a new complaint in the same court,<sup>182</sup> the second option balances courts’ need for effective docket management tools and Rule 83(a)(1)’s consistency requirements.<sup>183</sup> For this second option, courts might consider exceptions for certain factors like those that the Fifth and D.C. Circuits have cited in the context of granting motions to dismiss for lack of response, such as lack of bad faith, short delay, absence of prejudice to the defendant, and efforts to respond.<sup>184</sup> Courts can implement this Note’s solution either by adopting the model local rule this Note proposes or by reinterpreting the text of their existing compulsory-reply local rules to implicitly adopt the solution. Rather than the incompatible array of approaches courts currently take on this issue,<sup>185</sup> this bifurcated approach provides litigants with one consistent set of expectations.

In the following sections, this Note elaborates on this proposed bifurcated solution, demonstrates its compliance with current law, and shows why it effectively addresses relevant policy concerns. Part III.A explains the dismissal-with-prejudice option of the solution, focusing on the independent merits analysis requirement and explaining why dismissal with prejudice solely for lack of opposition violates Rule 83(a)(1) and the Rules Enabling Act. Part III.B describes the dismissal-without-prejudice option and explains why it fulfills necessary docket management functions. Finally, Part III.C demonstrates how courts can implement this solution either by adopting a new model local rule or by reinterpreting existing compulsory-reply local rules. Second, Part III.C illustrates how the bifurcated approach would work in practice by applying it to *Webb v. Morella*.<sup>186</sup>

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182. *See Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505 (2001) (“The primary meaning of ‘dismissal without prejudice,’ we think, is dismissal without barring the plaintiff from returning later, to the same court, with the same underlying claim.” (quoting FED. R. CIV. P. 41)).

183. *See supra* Part I.A.

184. *See Boazman v. Econ. Lab’y, Inc.*, 537 F.2d 210, 212 (5th Cir. 1976); *see also Cohen*, 819 F.3d at 484.

185. *See supra* Part II.

186. No. 10-cv-01557, slip op. (W.D. La. Jan. 24, 2011), *rev’d*, 457 F. App’x 448 (5th Cir. 2012).

*A. Dismissal with Prejudice: District Courts Conduct Independent Merits Analysis*

The first component of the bifurcated approach applies when district courts determine that dismissal with prejudice pursuant to a compulsory-reply local rule is an appropriate option. After making this determination, district courts should not automatically dismiss the 12(b)(6) motion but should instead conduct an independent merits analysis of the complaint to ensure that the movant met its Rule 12(b)(6) burden of proof. Multiple circuit courts already demand that district courts analyze the complaint's underlying merits before dismissing a 12(b)(6) motion.<sup>187</sup> For instance, the Third, Seventh, Sixth, Tenth, and Eleventh Circuits, in overturning dismissals pursuant to compulsory-reply local rules solely for lack of response, have required that courts dismiss unopposed 12(b)(6) motions only after conducting an independent analysis of the merits.<sup>188</sup> The Seventh and Tenth Circuits have explicitly stated that courts may rule on unopposed 12(b)(6) motions by looking to the complaint itself to determine the sufficiency of the pleadings.<sup>189</sup> Since the imposition of this requirement, district courts in these circuits have ruled on unopposed 12(b)(6) motions by conducting merits analyses through looking to the complaint itself to determine if movants met their burden of proof.<sup>190</sup> Part III.A.1 first describes the procedure courts should follow when conducting the independent merits analysis. Then, Part III.A.2 explains why the independent merits analysis ensures that compulsory-reply local rules comply with Rule 83(a)(1) and the Rules Enabling Act.

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187. See *Marcure v. Lynn*, 992 F.3d 625, 632 (7th Cir. 2021) (“[C]ourts may rule on an unopposed Rule 12(b)(6) motion by reaching the merits rather than granting it on the basis that it is unopposed.”); *Giummo v. Olsen*, 701 F. App’x 922, 925 (11th Cir. 2017); *Issa v. Comp USA*, 354 F.3d 1174, 1177 (10th Cir. 2003) (“[E]ven if a plaintiff does not file a response to a motion to dismiss for failure to state a claim, the district court must still examine the allegations in the plaintiff’s complaint and determine whether the plaintiff has stated a claim upon which relief can be granted.”); *Stackhouse v. Mazurkiewicz*, 951 F.2d 29, 30 (3d Cir. 1991) (“[T]he complaint should in the first instance be considered substantively by the district court.”); *Carver v. Bunch*, 946 F.2d 451, 455 (6th Cir. 1991) (requiring the district court “to examine the movant’s motion . . . to ensure that he has discharged that burden”).

188. See cases cited *supra* note 187.

189. See *Marcure*, 992 F.3d at 633 n.5 (“Courts remain free to rule on Rule 12(b)(6) motions even absent a response by looking to the complaint itself to determine the sufficiency of the pleadings.”); see also *Issa v. Comp USA*, 354 F.3d 1174, 1178 (10th Cir. 2003).

190. See, e.g., *Hendrick v. Bryant*, No. 20-cv-00249, 2021 WL 4502159, at \*6 (N.D. Ill. Sept. 30, 2021) (“But even when a plaintiff does not respond to an argument made by a defendant in a motion to dismiss, the defendant still carries the burden of persuasion and a court may not dismiss a claim based only on the plaintiff’s failure to respond.”); *Banks v. LoanCare LLC*, No. 18 C 03358, 2021 WL 4192067, at \*3 (N.D. Ill. Sept. 15, 2021) (“Where the plaintiff fails to respond to a motion to dismiss, as is the case here, the Court must still find the defendant entitled to relief under Rule 12(b)(6) . . . . [T]he Court will look to the complaint to test the sufficiency of the pleadings.” (citing *Marcure v. Lynn*, 992 F.3d 625, 633 (7th Cir. 2021))); *Hall v. Cox*, No. 18-CV-01056, 2019 WL 3736711, at \*3 (D. Colo. July 10, 2019), *report and recommendation adopted*, No. 18-cv-01056, 2019 WL 3733593 (D. Colo. Aug. 7, 2019).

### 1. Procedure for Rule 12(b)(6)'s Independent Merits Analysis

When courts determine that dismissal with prejudice pursuant to a compulsory-reply local rule is warranted, district courts should then conduct an independent merits analysis of the complaint to ensure that the movant met its Rule 12(b)(6) burden of proof. Multiple circuit courts have already read into their compulsory-reply local rules a requirement that district courts conduct an independent merits analysis for dismissal pursuant to a compulsory-reply local rule,<sup>191</sup> and district courts have complied with these requirements by looking to the complaint.<sup>192</sup> By following those circuit courts' lead,<sup>193</sup> district courts can grant Rule 12(b)(6) motions with prejudice, even when the nonmovant fails to reply as required by local rule, if they determine that a movant has met its burden of proof.

For the independent merits analysis, district courts should test the complaint according to Rule 12(b)(6)'s typical analytical procedure.<sup>194</sup> The court should make this determination by looking to the 12(b)(6) motion and to the complaint itself to determine the sufficiency of the pleadings.<sup>195</sup> Once the court receives the complaint, the motion to dismiss, and corresponding memorandum of law, the court should conduct 12(b)(6)'s two-part analysis.<sup>196</sup> The district court should first read the movant's motion, separate the factual and legal elements of the claim, accept all well-pleaded facts as true, and disregard any legal conclusions.<sup>197</sup> Then, the court should determine whether the alleged facts are sufficient to show the plaintiff has a plausible claim for relief, drawing on both the context of the complaint and the court's own "experience and common sense."<sup>198</sup> As part of this process, the court may also consider documents attached to the complaint as exhibits or incorporated by reference into the complaint.<sup>199</sup>

Implementing this requirement when courts want to dismiss with prejudice would bring compulsory-reply local rules in line with Rule 83(a)(1)'s consistency requirement.<sup>200</sup> Before a district court could dismiss pursuant to a compulsory-reply local rule for lack of response, courts would ensure that Rule 12(b)(6) movants meet their burden of proof as Rule 12(b)(6) requires.<sup>201</sup> This innovative approach addresses the D.C. Circuit's concern that compulsory-reply local rules effectively place the burden of proof on the nonmoving party<sup>202</sup> because the nonmoving party would never lose if the

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191. See cases cited *supra* note 187.

192. See cases cited *supra* note 190.

193. See cases cited *supra* note 190.

194. See *supra* Part I.B.

195. See *Marcure v. Lynn*, 992 F.3d 625, 633 n.5 (7th Cir. 2021); *Issa v. Comp USA*, 354 F.3d 1174, 1178 (10th Cir. 2003).

196. See *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210–11 (3d Cir. 2009).

197. See *id.*

198. See *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

199. See *Rothman v. Gregor*, 220 F.3d 81, 88 (2d Cir. 2000).

200. FED. R. CIV. P. 83(a)(1).

201. See *Marcure v. Lynn*, 992 F.3d 625, 631 (7th Cir. 2021).

202. See *supra* Part II.C.

movant could not meet the burden of proof. Even if the nonmovant does not respond, the court will not automatically grant the movant's motion to dismiss with prejudice solely due to lack of response.

Since the Seventh Circuit adopted a similar approach in *Marcure v. Lynn* in March 2021,<sup>203</sup> one district court in the circuit has already conducted its own independent merits analysis to dismiss an unopposed 12(b)(6) motion with prejudice.<sup>204</sup> In *Banks v. LoanCare LLC*,<sup>205</sup> a federal district court in the Northern District of Illinois cited to *Marcure* for the proposition that, although the plaintiff failed to reply, the court was still required to find the defendant entitled to relief under Rule 12(b)(6).<sup>206</sup> To conduct this analysis in the absence of the compulsory brief, the district court looked to the complaint itself to test the sufficiency of the pleadings.<sup>207</sup> In conducting the analysis, the court addressed all three of the plaintiffs' claims.<sup>208</sup> The court identified the legal elements of each claim and then determined whether the plaintiff pleaded sufficient facts in the complaint to meet each element.<sup>209</sup> However, the court found that the plaintiffs had failed to plead "any cognizable theory to support their claims" in the complaint.<sup>210</sup> Ultimately, the court dismissed the plaintiffs' claim with prejudice because the court had previously dismissed the plaintiffs' claims two times prior.<sup>211</sup> *Banks* demonstrates that an independent merits analysis requirement for dismissal with prejudice can be easily adopted by courts. Other district courts can model the Northern District of Illinois's analysis in this case when conducting their own independent merits analyses for dismissal with prejudice pursuant to compulsory-reply local rule.

## 2. Dismissal with Prejudice Solely for Lack of Opposition Violates Rule 83(a)(1) and the Rules Enabling Act

In addition to the independent merits analysis, this Note contends that any reading of compulsory-reply local rules that empowers district courts to dismiss 12(b)(6) motions with prejudice solely for lack of response is invalid under Rule 83(a)(1) and the Rules Enabling Act. This interpretation conflicts with the movant's 12(b)(6) burden of proof because it allows courts to dismiss without considering whether the movant met the burden of proof.<sup>212</sup> This interpretation is particularly problematic when dismissing with prejudice because the nonmovant would not be able to file a new complaint

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203. *Marcure*, 992 F.3d at 631.

204. *See Banks v. LoanCare LLC*, No. 18 C 03358, 2021 WL 4192067, at \*3 (N.D. Ill. Sept. 15, 2021).

205. No. 18 C 03358, 2021 WL 4192067 (N.D. Ill. Sept. 15, 2021).

206. *See id.* at \*3.

207. *See id.*

208. *See id.* at \*4–14.

209. *See id.*

210. *See id.* at \*15.

211. *See id.*

212. *See cases cited supra* note 11.

in the same court.<sup>213</sup> Because courts are allowed to conclusively end the litigation without considering the Rule 12(b)(6) movant's burden,<sup>214</sup> Rule 12(b)(6) and this interpretation of the local rules are not "consistent" as required by Rule 83(a)(1).<sup>215</sup>

This interpretation of compulsory-reply local rules also conflicts with the Rule 83(a)(1) consistency requirement set forth by the Supreme Court in *Miner* and *Colgrove*.<sup>216</sup> Although that standard is admittedly vague, this reading still fulfills *Miner*'s "basic procedural innovation" and *Colgrove*'s "aspects of the litigatory process which bear upon the ultimate outcome of the litigation" language.<sup>217</sup> Like the local rule overturned in *Miner*,<sup>218</sup> this interpretation of compulsory-reply local rules is "substantive" and "basic" because it permits a district court to dismiss the complaint whether or not the movant fulfilled the burden of proof, even though Rule 12(b)(6) imposes this burden on the movant, without a chance for the plaintiff to file a new complaint in the same court. Further, dismissal with prejudice under compulsory-reply local rules fits within the literal language of *Colgrove*'s standard because it bears directly on the "ultimate outcome of the litigation."<sup>219</sup> Unlike the local rule upheld in *Colgrove*,<sup>220</sup> dismissal with prejudice under compulsory-reply local rules makes a "discernible difference" on the outcome of the litigation because it ends the litigation in that court.<sup>221</sup> Accordingly, any reading of compulsory-reply local rules that permits dismissal with prejudice solely for lack of response is not permissible under Rule 83(a)(1) and should not be upheld by courts.

Likewise, dismissal with prejudice solely for lack of response violates the Rules Enabling Act.<sup>222</sup> While the Rules Enabling Act empowers district courts to adopt local rules,<sup>223</sup> it also requires that the local rules be consistent with the Federal Rules of Civil Procedure.<sup>224</sup> Thus, because of this requirement,<sup>225</sup> district courts' compulsory-reply local rules must comply with Rule 12(b)(6). As discussed, courts' use of compulsory-reply local rules to dismiss with prejudice solely for lack of response is inconsistent with Rule 12(b)(6).<sup>226</sup> This, in turn, violates the Rules Enabling Act's consistency requirement. Further, the Rules Enabling Act bars the Federal Rules of Civil

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213. See 9 WRIGHT ET AL., *supra* note 5, § 2373 ("[A] Rule 41(b) dismissal on the merits for one of the grounds stated in that provision only necessarily bars a plaintiff from refiling the same claim in the same federal court, but not in other courts.").

214. See *Marcure v. Lynn*, 992 F.3d 625, 631 (7th Cir. 2021).

215. FED. R. CIV. P. 83(a)(1).

216. See *supra* Part I.A.

217. See *supra* Part I.A.

218. See *Miner v. Atlass*, 363 U.S. 641, 649–50 (1960).

219. See *Colgrove v. Battin*, 413 U.S. 149, 164 n.23 (1973).

220. See *id.* at 159–60.

221. See *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 506 (2001).

222. 28 U.S.C. §§ 2071–2077.

223. See *id.* § 2071.

224. See *id.*

225. *Id.*

226. See Part II.A.2.

Procedure from abridging, enlarging, or modifying any substantive right.<sup>227</sup> Because district courts also derive their rulemaking authority from Rule 83(a)(1),<sup>228</sup> local rules should not be able to abridge, enlarge, or modify any substantive right either. Dismissal with prejudice solely for lack of reply impermissibly abridges and modifies nonmovants' rights under Rule 12(b)(6) because, if the nonmovant fails to reply, the nonmovant's complaint could be dismissed even if the movant failed to meet the 12(b)(6) burden of proof.<sup>229</sup> For these reasons, dismissal of an unopposed 12(b)(6) motion with prejudice without a merits analysis violates the Rules Enabling Act in addition to Rule 83(a)(1), and courts must abandon the practice.

*B. Dismissal Without Prejudice: Courts May Dismiss Solely Because of Lack of Response*

This section will explain the process district courts should follow when dismissing a 12(b)(6) motion *without* prejudice pursuant to a compulsory-reply local rule. Under this dismissal-without-prejudice option, courts may grant unopposed 12(b)(6) motions pursuant to compulsory-reply local rules without conducting an analysis on the merits *only when they grant such motions without prejudice*, with certain exceptions up to the courts' discretion. Unlike a reading of compulsory-reply local rules that allows a 12(b)(6) motion dismissal with prejudice, a reading that allows a dismissal without prejudice would not be offensive to the Supreme Court's Rule 83(a)(1) consistency standard because it would not be an aspect "of the litigatory process which bear[s] upon the ultimate outcome of the litigation."<sup>230</sup> Dismissal without prejudice does not "bear upon the ultimate outcome of the litigation" because, unlike dismissal with prejudice, it allows parties to retry their case in the same court by filing a new complaint.<sup>231</sup> Here, parties would not be conclusively barred from trying their claim again, and the "ultimate outcome" could be determined in a future case.<sup>232</sup> Further, if the parties decide to file their claim again, the same court may still ultimately decide their case on the merits.<sup>233</sup>

This second component of the bifurcated solution would allow courts the discretion to make exceptions in certain scenarios. Under these exceptions, courts could still require movants to prove the merits of their motions even when the court intends to dismiss without prejudice. Here, the court has discretion to consider factors like those that the Fifth and D.C. Circuits have cited in the context of granting motions to dismiss for lack of response, such as plaintiffs' lack of bad faith, short delay, absence of prejudice to the

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227. See 28 U.S.C. § 2072(b).

228. FED. R. CIV. P. 83(a)(1).

229. See *supra* Part I.B.

230. See *Colgrove v. Battin*, 413 U.S. 149, 164 n.23 (1973).

231. See 9 WRIGHT ET AL., *supra* note 5, § 2373.

232. See *id.*

233. See *id.*

defendant, and efforts to respond.<sup>234</sup> Therefore, if plaintiffs do not demonstrate “egregious” behavior or lack of respect for court deadlines,<sup>235</sup> courts would be able to provide this extra measure of protection on a case-by-case basis. Providing exceptions in these scenarios gives courts the discretion to effectively manage their dockets as they see fit according to local needs and varying litigant circumstances.

Courts should adopt this option of the solution instead of the majority’s categorical rule against dismissal solely for lack of response,<sup>236</sup> because it balances district courts’ docket management needs<sup>237</sup> with the Federal Rules of Civil Procedure’s policy preference for decisions on the merits.<sup>238</sup> District courts must retain the ability to dismiss unopposed motions without prejudice because judges need effective tools to be able to manage their heavy caseloads.<sup>239</sup> Especially with the complexity and number of federal cases rising and discovery and documentation becoming more extensive, judges need local rules to provide quick answers to trial lawyers, to meet daily needs, and to promote uniformity.<sup>240</sup> The purpose of Rule 12(b)(6) itself is to empower courts to throw out fatally flawed suits and, in doing so, to save both parties and the court from further unnecessary litigation.<sup>241</sup> As the D.C. Circuit noted regarding D.C. Rule 7(b), compulsory-reply local rules can often serve as docket management tools, facilitating the “efficient and effective resolution of motions.”<sup>242</sup> Still, the court would never dismiss a nonmoving party’s claims with prejudice—thus preventing the nonmoving party from trying the case again in the same court by filing a new complaint—without an analysis of underlying merits of the motion to dismiss. Therefore, this solution would respect the Federal Rules of Civil Procedure’s preference for decisions on the merits<sup>243</sup> because nonmovants could always retry their case in the same court.

### C. Implementing the Moderate Solution

Courts may implement this Note’s bifurcated solution either by adopting a new model local rule or by reinterpreting their existing compulsory-reply local rules. Both implementation options accomplish the underlying goal of

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234. See *Boazman v. Econ. Lab’y, Inc.*, 537 F.2d 210, 212 (5th Cir. 1976); see also *Cohen v. Bd. of Trs. of Univ. of D.C.*, 819 F.3d 476, 484 (D.C. Cir. 2016).

235. See *supra* Part I.B.

236. See *supra* Part II.A.

237. See *supra* Part I.A.

238. See *Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538, 550 (2010) (explaining that the Federal Rules of Civil Procedure have a general preference for resolution of disputes on the merits).

239. See *Coquillet et al.*, *supra* note 44, at 65 (“The Federal Rules are general and permissive. Busy trial judges need more specificity to meet daily problems and provide uniformity and predictability within their districts.”).

240. See *supra* note 44 and accompanying text.

241. See *Advanced Cardiovascular Sys., Inc. v. Scimed Life Sys., Inc.*, 988 F.2d 1157, 1160 (Fed. Cir. 1993).

242. See *Fox v. Am. Airlines, Inc.*, 389 F.3d 1291, 1294 (D.C. Cir. 2004).

243. See *Krupski*, 560 U.S. at 550.

ensuring clarity and uniformity for litigants and courts and conformity with Rule 83(a)(1) and the Rules Enabling Act. Moreover, district courts would have discretion to choose which implementation option is more appropriate for their courts. In the following sections, this Note presents a model local rule that courts may adopt, details an interpretation of existing compulsory-reply local rules to include the solution, and demonstrates how this solution would work in practice.

### 1. Option One: Courts Should Adopt a Model Local Rule

Courts can implement this Note's solution by enacting the model rule detailed below. District courts have the power to adopt new local rules pursuant to the Rules Enabling Act and Rule 83(a)(1).<sup>244</sup> Unlike existing compulsory-reply local rules,<sup>245</sup> this Note's model rule explicitly defines when, and under what conditions, a judge may grant a 12(b)(6) motion with or without prejudice. The model rule, like existing compulsory-reply local rules,<sup>246</sup> still requires the nonmovant to file a reply within a set number of days. However, the model rule clarifies what dismissal options the judge may choose from, pursuant to this Note's bifurcated solution, if the nonmovant fails to meet the reply requirement. As such, courts should adopt the following rule:

Within fourteen days of the date of service or at such other time as the court may direct, an opposing party shall serve and file a memorandum of points and authorities in opposition to a Rule 12(b)(6) motion to dismiss. If no response is timely filed, the court may grant the 12(b)(6) motion and dismiss the complaint without prejudice on the sole basis that the opposing party failed to reply. The court may grant the motion with prejudice only after determining that the complaint failed to state a claim upon which relief can be granted.

Courts should consider adopting this model rule and abandoning their current compulsory-reply local rules because many existing compulsory-reply local rules are inconsistent and unclear.<sup>247</sup> The text and phrasing of compulsory-reply local rules vary significantly from district to district.<sup>248</sup> Further, as demonstrated by the existing circuit split they underlie,<sup>249</sup> many compulsory-reply local rules are ambiguous and fail to state exactly what authority or discretion they purport to grant to the district judge.<sup>250</sup> Additionally, most compulsory-reply local rules ignore the 12(b)(6) movant's burden of proof to show that the complaint failed to state

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244. 28 U.S.C. § 2071; FED. R. CIV. P. 83(a)(1).

245. *See* Appendix.

246. *See id.*

247. *See id.*; *see also* A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567, 1569 (1991) (calling for local rules' uniformity and consistency with the Federal Rules of Civil Procedure); Roberts, *supra* note 42, at 540 (advocating for the "integrity and uniformity" of local rules).

248. *See* Appendix.

249. *See supra* Part II.

250. *See* Appendix.

a claim, both textually and conceptually.<sup>251</sup> The failure of federal courts to conclusively and uniformly determine what compulsory-reply local rules permit<sup>252</sup> demonstrates the current rules' textual insufficiency.

Unlike existing compulsory-reply local rules, the model rule defines the authority granted to the judge, designates the requirements for dismissal with or without prejudice, and addresses the movant's 12(b)(6) burden of proof. Because of those features, parties and judges alike would know exactly what the rule requires of them, and the consequences of failure to comply, simply from reading the rule itself. Thus, in the interests of federal uniformity and legal clarity,<sup>253</sup> district courts should adopt this Note's model local rule.

## 2. Option Two: Courts Should Update Interpretation of Existing Compulsory-Reply Local Rules

Courts may also adopt this solution by reinterpreting ambiguous compulsory-reply local rules. Even though most compulsory-reply local rules seemingly impose similar requirements on litigants,<sup>254</sup> courts have come to a variety of different conclusions regarding what these local rules permit.<sup>255</sup> This array of interpretations<sup>256</sup> is evidence that compulsory-reply local rules are ambiguous regarding their proper reading, function, and interaction with the Federal Rules of Civil Procedure. Thus, the ambiguous text of these local rules already provides a reasonable and effective vehicle for implementation. Multiple circuit courts have independently read merits analysis requirements into their own district courts' ambiguous local rules,<sup>257</sup> and courts may use similar interpretive means to implement this Note's proposed solution.

For example, the Seventh Circuit read a merits analysis requirement into Central District of Illinois Local Rule 7.1(B)(2)<sup>258</sup> itself.<sup>259</sup> In interpreting Local Rule 7.1(B)(2) to include a merits analysis requirement, the Seventh Circuit first held that Local Rule 7.1(B)(2)'s text did not expressly permit a court to grant a 12(b)(6) motion solely for lack of opposition.<sup>260</sup> Instead, the Seventh Circuit found that Local Rule 7.1(B)(2) only empowered the district court to assume no opposition and rule without further notice if a party failed to respond to the 12(b)(6) motion.<sup>261</sup> However, in its ruling, the district court was still required to reach the merits by looking to the complaint itself and

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251. *See id.*

252. *See supra* Part II.

253. *See* Levin, *supra* note 247, at 1569; Roberts, *supra* note 42, at 540.

254. *See* Appendix.

255. *See supra* Part II.

256. *See supra* Part II.

257. *See* cases cited *supra* note 187.

258. C.D. ILL. R. 7.1(B)(2).

259. *See* Marcure v. Lynn, 992 F.3d 625, 632 (7th Cir. 2021). As previously discussed, Local Rule 7.1(B)(2) provides that "[a]ny party opposing a motion . . . must file a response to the motion . . . . If no response is timely filed, the presiding judge will presume there is no opposition to the motion and rule without further notice to the parties." C.D. ILL. R. 7.1(B)(2).

260. *See* Marcure, 992 F.3d at 632.

261. *See id.*

could not dismiss solely for lack of opposition.<sup>262</sup> Courts could mirror the interpretive techniques that the Seventh Circuit applied to Local Rule 7.1(B)(2) and interpret their existing compulsory-reply local rules to include this Note's bifurcated solution.

### 3. *Webb v. Morella*: The Solution in Practice

To further illustrate how this proposition would work in practice, consider the plaintiffs, Belva and Faith Webb, from the district court case, *Webb v. Morella*, discussed earlier.<sup>263</sup> A federal district court in the Western District of Louisiana dismissed the Webbs' complaint with prejudice under its Local Rule 7.5 because the Webbs filed their response to the defendant's 12(b)(6) motion one day late and without a table of contents or table of authorities.<sup>264</sup> In so doing, the court did not consider the merits of the defendant's motion or the plaintiffs' complaint and day-late response.<sup>265</sup>

First, consider how the district court could interpret its existing Local Rule 7.5 to include the solution. Local Rule 7.5 requires that if the nonmovant opposes a 12(b)(6) motion, the nonmovant "shall file a response, including opposing affidavits, memorandum, and such supporting documents as are then available, within twenty-one days after service of the motion."<sup>266</sup> Although the district court interpreted this rule to allow for dismissal with prejudice solely for lack of response,<sup>267</sup> the text of the rule does not necessarily permit, or prevent, the district court's reading.<sup>268</sup> The language of Local Rule 7.5 is thus unclear as to whether a judge may dismiss on the basis that the plaintiffs failed to file the response by the deadline, and the language says nothing about whether the court may grant the motion with or without prejudice.<sup>269</sup> Therefore, the rule is open to interpretation, and the district court should modify its interpretative approach to incorporate this Note's proposal. Alternatively, because of the ambiguity and vagueness in Local Rule 7.5, the district court may also consider replacing the rule with this Note's proposed model local rule.<sup>270</sup> Regardless of whether the district court proceeds by adopting the proposed model rule or by reinterpreting the existing local rule, the next procedural and analytical steps will be the same.

Under this Note's solution, after the defendant submitted the motion to dismiss and corresponding memorandum of law, the district court would first

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262. *See id.* at 633 n.5 ("Our holding does not render district courts powerless to dispose of motions to dismiss in the face of inactive plaintiffs. Courts remain free to rule on Rule 12(b)(6) motions even absent a response by looking to the complaint itself to determine the sufficiency of the pleadings.").

263. *See supra* notes 1–9 and accompanying text.

264. *See Webb v. Morella*, No. 10-cv-01557, slip op. at 2 (W.D. La. Jan. 24, 2011), *rev'd*, 457 F. App'x 448 (5th Cir. 2012).

265. *See id.*

266. W.D. LA. R. 7.5.

267. *See Webb*, No. 10-cv-01557, slip op. at 2.

268. *See* W.D. LA. R. 7.5.

269. *See id.*

270. *See supra* Part III.C.1.

determine, in its discretion, whether to dismiss the plaintiffs' claim with or without prejudice. If the court had determined that, under Local Rule 7.5, it could grant the defendant's 12(b)(6) motion with prejudice, it would have then conducted an independent analysis of defendant's motion on the merits, even if the plaintiffs failed to respond.<sup>271</sup> Despite not having additional filings from the plaintiffs, the court would have ruled on the motion by looking to the 12(b)(6) motion and the complaint itself to determine the sufficiency of the pleadings.<sup>272</sup> On the other hand, if the court determined that, under Local Rule 7.5, it may dismiss without prejudice, the court would have dismissed solely for the plaintiffs' failure to respond to the defendant's motion.<sup>273</sup> Here though, the court may still want to consider an exception because of the plaintiffs' clear efforts to comply with the rule, as evidenced by the fact that they filed a response one day later.<sup>274</sup>

Regardless of the route the court decides to adopt, Local Rule 7.5 or the model rule discussed above will still comply with Rule 83(a)(1) and the Rules Enabling Act because the court could not dismiss the plaintiffs' claim with prejudice, and thus conclusively bar the plaintiffs from filing another complaint in the same court, without holding the movant to the Rule 12(b)(6) burden of proof.<sup>275</sup> Importantly, the district court would also retain the flexibility necessary to dismiss without prejudice for docket management purposes.<sup>276</sup> Further, the plaintiffs and the district court alike would have a clear and uniform set of expectations when dealing with responses to 12(b)(6) motions to dismiss.

#### CONCLUSION

Federal courts disagree on whether district courts have the legal authority to grant 12(b)(6) motions to dismiss solely for lack of reply pursuant to compulsory-reply local rules. This Note proposes a bifurcated solution—implemented either by adopting a model local rule or by reinterpreting current compulsory-reply local rules—that attempts to resolve the current dispute among the federal district courts. This Note proposes that district courts may grant 12(b)(6) motions to dismiss solely for lack of response pursuant to compulsory-reply local rule *only when dismissed without prejudice*. However, when dismissing with prejudice, this Note asserts that courts must conduct an analysis of the underlying merits.

Ultimately, if this solution is widely adopted, compulsory-reply local rules would be brought into compliance with Rule 83(a)(1) and the Rules Enabling Act. Further, although district courts would retain the discretion necessary to effectively manage their dockets, the Federal Rules of Civil Procedure's

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271. *See supra* Part III.A.1.

272. *Marcure v. Lynn*, 992 F.3d 625, 633 n.5 (7th Cir. 2021).

273. *See supra* Part III.B.

274. *See Boazman v. Econ. Lab'y, Inc.*, 537 F.2d 210, 212 (5th Cir. 1976); *see also Cohen v. Bd. of Trs. of Univ. of D.C.*, 819 F.3d 476, 484 (D.C. Cir. 2016).

275. *See supra* Part III.A.2.

276. *See supra* Part III.B.

preference for decisions on the merits would be respected. Most importantly, litigants and courts alike would have one uniform and predictable set of expectations when a party fails to respond to a 12(b)(6) motion as required by a local rule.

## APPENDIX: COMPULSORY-REPLY LOCAL RULES

District Court Local Rule	Text of Rule
<b>First Circuit</b>	
D. ME. R. 7(b)	“Unless within 21 days after the filing of a motion the opposing party files written objection thereto, incorporating a memorandum of law, the opposing party shall be deemed to have waived objection.”
D.N.H. R. 7.1(b)	“Except as otherwise required by law or order of the court, every objection, except objections to summary judgment motions, shall be filed within fourteen (14) days from the date the motion is filed . . . . The court shall deem waived any objection not filed in accordance with this rule.”
D. MASS. R. 7.1(b)(2)	“A party opposing a motion shall file an opposition within 14 days after the motion is served . . . . A party opposing a motion shall file in the same (rather than a separate) document a memorandum of reasons, including citation of supporting authorities, why the motion should not be granted. Affidavits and other documents setting forth or evidencing facts on which the opposition is based shall be filed with the opposition.”
D.P.R. R. 7(b)	“Unless within fourteen (14) days after the service of a motion the opposing party files a written opposition to the motion, the opposing party shall be deemed to have waived any objection to the motion.”
<b>Third Circuit</b>	
E.D. PA. R. 7.1(c)	“Unless the Court directs otherwise, any party opposing the motion shall serve a brief in opposition together with such answer or other response that may be appropriate, within fourteen (14) days after service of the motion and supporting brief. In the absence of timely response, the motion may be granted as uncontested except as provided under Fed.R.Civ.P 56.”
M.D. PA. R. 7.6	“Any party opposing any motion, other than a motion for summary judgment, shall file a brief in opposition within fourteen (14) days after service of the movant’s brief, or, if a brief in support of the motion is not required under these rules, within seven (7) days after service of the motion. Any

	party who fails to comply with this rule shall be deemed not to oppose such motion.”
<b>Fifth Circuit</b>	
M.D. LA. R. 7(f)	“Each respondent opposing a motion shall file a response, including opposing affidavits, and such supporting documents as are then available, within twenty-one days after service of the motion. Memoranda shall contain a concise statement of reasons in opposition to the motion, and a citation of authorities upon which the respondent relies.”
W.D. LA. R. 7.5	“If the respondent opposes a motion, he or she shall file a response, including opposing affidavits, memorandum, and such supporting documents as are then available, within 21 days after service of the motion. Memoranda shall contain a concise statement of reasons in opposition to the motion, and a citation of authorities upon which respondent relies.”
E.D. LA. R. 7.5	“Each party opposing a motion must file and serve a memorandum in opposition to the motion with citations of authorities no later than eight days before the noticed submission date.”
<b>Sixth Circuit</b>	
S.D. OHIO R. 7.2(2)	“Any memorandum in opposition shall be filed within twenty-one days after the date of service of the motion. Failure to file a memorandum in opposition may result in the granting of any motion that would not result directly in entry of final judgment or an award of attorneys’ fees.”
E.D. & W.D. KY. R. 7.1(c)	“Unless otherwise ordered by the Court, a party opposing a motion must file a response within 21 days of service of the motion. Failure to timely respond to a motion may be grounds for granting the motion.”
M.D. TENN. R. 7.01(a)(3)	“If a timely response is not filed, the motion shall be deemed to be unopposed . . . .”
E.D. TENN. R. 7.2	“Failure to respond to a motion may be deemed a waiver of any opposition to the relief sought.”
<b>Seventh Circuit</b>	
S.D. IND. R. 7.1(c)(5)	“The court may summarily rule on a motion if an opposing party does not file a response within the deadline.”
E.D. WIS. R. 7(d)	“Failure to file a memorandum in opposition to a motion is sufficient cause for the Court to grant the

	motion. The Court also may impose sanctions under General L. R. 83(f).”
C.D. ILL. R. 7.1(B)(2)	“Any party opposing a motion filed pursuant to (B)(1) must file a response to the motion, including a brief statement of the specific points or propositions of law and supporting authorities upon which the responding party relies. The response must be filed within 14 days after service of the motion and memorandum. If no response is timely filed, the presiding judge will presume there is no opposition to the motion and may rule without further notice to the parties.”
S.D. ILL. R. 7.1(c)	“Failure to timely file a response to a motion may, in the Court’s discretion, be considered an admission of the merits of the motion.”
<b>Eighth Circuit</b>	
D.N.D. R. 7.1(F)	“A party’s failure to serve and file a memorandum or a response within the prescribed time may subject a motion to summary ruling. A moving party’s failure to serve and file a memorandum in support may be deemed an admission that the motion is without merit. An adverse party’s failure to serve and file a response to a motion may be deemed an admission that the motion is well taken.”
E.D. ARK. & W.D. ARK. R. 7.2(b)	“Within fourteen (14) days from the date of service of copies of a motion and supporting papers, any party opposing a motion shall serve and file with the Clerk a concise statement in opposition to the motion with supporting authorities.”
N.D. IOWA & S.D. IOWA R. 7(f)	“If no timely resistance to a motion is filed, the motion may be granted without notice.”
<b>Ninth Circuit</b>	
D. IDAHO R. 7.1(e)(1)	“Failure by the moving party to file any documents required to be filed under this rule in a timely manner may be deemed a waiver by the moving party of the pleading or motion. Except as provided in subpart (2) below, if an adverse party fails to timely file any response documents required to be filed under this rule, such failure may be deemed to constitute a consent to the sustaining of said pleading or the granting of said motion or other application. In addition, the Court, upon motion or its own initiative, may impose sanctions in the form of reasonable expenses incurred, including attorney fees, upon the adverse party and/or counsel for failure to comply with this rule.”

W.D. WASH. R. 7(b)(2)	“Except for motions for summary judgment, if a party fails to file papers in opposition to a motion, such failure may be considered by the court as an admission that the motion has merit.”
D. NEV. R. 7-2.(d)	“The failure of a moving party to file points and authorities in support of the motion constitutes a consent to the denial of the motion. The failure of an opposing party to file points and authorities in response to any motion, except a motion under Fed. R. Civ. P. 56 or a motion for attorney’s fees, constitutes a consent to the granting of the motion.”
E.D. CAL. R. 230(c)	“Opposition, if any, to the granting of the motion shall be in writing and shall be filed and served not less than fourteen (14) days preceding the noticed (or continued) hearing date . . . . A failure to file a timely opposition may also be construed by the Court as a non-opposition to the motion.”
<b>Tenth Circuit</b>	
E.D. OKLA. R. 7.1(g)	“If a dispositive motion is not opposed, the Court may in its discretion provide an additional fourteen (14) days for the opposing party to show cause why the motion should not be granted, after which the case will be dismissed or the motion will be deemed confessed, as appropriate.”
D.N.M. R. 7.1(b)	“The failure of a party to file and serve a response in opposition to a motion within the time prescribed for doing so constitutes consent to grant the motion.”
<b>Eleventh Circuit</b>	
M.D. FLA. R. 3.01(c)	“If a party fails to timely respond, the motion is subject to treatment as unopposed.”
S.D. GA. R. 7.5	“Unless these rules or the assigned Judge prescribes otherwise, each party opposing a motion shall serve and file a response within fourteen (14) days of service of the motion . . . . Failure to respond within the applicable time period shall indicate that there is no opposition to a motion.”
S.D. FLA. R. 7.1(c)(1)	“For all motions, except motions served with the summons and complaint, each party opposing a motion shall file and serve an opposing memorandum of law no later than fourteen (14) days after service of the motion. Failure to do so may be deemed sufficient cause for granting the motion by default.”

N.D. GA. R. 7.1(B)	“Any party opposing a motion shall serve the party’s response, responsive memorandum, affidavits, and any other responsive material not later than fourteen (14) days after service of the motion . . . . Failure to file a response shall indicate that there is no opposition to the motion.”
<b>District of Columbia Circuit</b>	
D.D.C. R. 7(b)	“Within 14 days of the date of service or at such other time as the Court may direct, an opposing party shall serve and file a memorandum of points and authorities in opposition to the motion. If such a memorandum is not filed within the prescribed time, the Court may treat the motion as conceded.”