

**MICHAEL D. DEAN, LLC**  
ATTORNEY AT LAW

MAILING ADDRESS:  
P.O. BOX 2545  
BROOKFIELD, WI 53008

17035 WEST WISCONSIN AVENUE  
Suite 100  
BROOKFIELD, WI 53005

Telephone: (262) 798-8044  
Telefax: (262) 798-8045  
Email: miked@michaelddeanllc.com

January 6, 2012

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CLERK OF SUPREME COURT  
OF WISCONSIN

BY TELEFACSIMILE, ORIGINAL BY MAIL

Mr. A. John Voelker  
Acting Clerk of Supreme Court  
Wisconsin Supreme Court  
110 East Main Street, Suite 215  
Madison, WI 53703

Re: *Clinard et al. v. Brennan et al.*, Waukesha County Circuit Court Case No. 11 CV 3995  
*Clinard et al. v. Brennan et al.*, Wisconsin Supreme Court Case No. 2011 XX 1409  
*Clinard et al. v. Brennan et al.*, Wisconsin Supreme Court Case No. 2011 AP 2677-OA

Dear Mr. Voelker:

Yesterday, intervenors filed a Motion for Leave to File a Reply Brief to Petitioners' Response to Intervenors' Motion for Recusal or Disqualification in Case No. 2011 AP 2677-OA, which petitioners filed January 3. Intervenors' Motion should be denied.

Petitioners filed the "62 page brief" that "raises a number of issues" of which intervenors complain because intervenors' initial Motion failed to identify or discuss cursory issues, authority, or argument relevant to the substance of the Motion. The burden therefore fell to petitioners to anticipate those issues, authorities, and arguments that petitioners' believed J. Gableman and the court would likely contemplate in considering intervenors' Motion, and to include in their Response the threshold background and analysis that are the ordinary obligation and province of an opening motion or brief.

As intervenors note, a reply is not contemplated under § 809.14, Stats. Further, intervenors' failure to provide an adequate initial submission should not be rewarded by the opportunity to sandbag on reply. *See, e.g., Pampered Chef v. Alexanian*, 2011 WL 2746460, 19 n. 17 (N.D.Ill., 2011) ("In order to prevent the 'sandbagging' that results from belated presentations in reply briefs, issues that could and should have been raised in an opening brief are waived." Citing *Mohamad v. Rajoub*, 634 F.3d 604, 608 (D.C.Cir.2011); *Dexia Credit Local v. Rogan*, 629 F.3d 612, 625 (7th Cir.2010); *United States v. Boyle*, 484 F.3d 943, 946 (7th Cir.2007)).<sup>1</sup>

<sup>1</sup> Decisions from the Northern District of Illinois may be cited in this court. *See State v. Duchow*, 2008 WI 57 ¶ 25, n. 20, 310 Wis.2d 1, 21, 749 N.W.2d 913, 922 (*Plock v. Bd. of Educ. of Freeport Sch. Dist.*

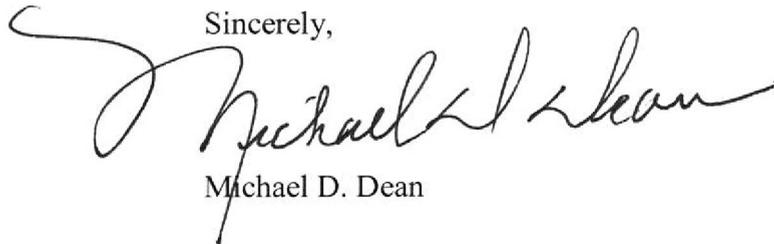
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In the event the court does grant intervenors' motion to file a reply brief, petitioners request the opportunity to file a surreply. *See Jeffries v. Wells Fargo Bank, NA*, Slip Op. 2011 WL 5023396, 2 (N.D.Ill.,2011), citing *Franek v. Walmart Stores, Inc.*, 2009 WL 674269, \*19 n. 14 (N.D.Ill. Mar.13, 2009) ("recognizing that a surreply might be appropriate 'when a moving party 'sandbags' an adversary by raising new arguments in a reply brief'").

Finally, the undersigned counsel regrets the typographical errors in petitioners' Response filed January 3. A computer drive failure that day prevented editing the penultimate draft, and having previously requested an extension of the court's December 6 briefing order, I did not wish to request a second extension beyond the filing period provided under Rules 809.63 and 809.14.

Counsel are being served by copy of this letter. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael D. Dean". The signature is fluid and cursive, with a large initial "M" and "D".

Michael D. Dean

MDD:jm

Enc.

cc: Maria S. Lazar, Esq.

Douglas M. Poland, Esq.

Jeremy P. Levinson, Esq.

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*No. 145*, 545 F.Supp.2d 755 (N.D.Ill.2007), is an unpublished opinion from the United States District Court for the Northern District of Illinois. That court adheres to the Federal Rules of Appellate Procedure, permitting citation to unpublished opinions. Fed. R.App. P. 32.1.")