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December 30, 2010

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You are hereby notified that the Court has entered the following order:

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2010AP1291  
2010AP2022

Sean Dilweg v. Wells Fargo Bank (L.C. # 2010CV1576)  
Sean Dilweg v. Wells Fargo Bank (L.C. # 2010CV1576)

Before Lundsten, J.

Aurelius Capital Management LP, Fir Tree Inc., King Street Capital Master Fund, Ltd., King Street Capital, L.P., Monarch Alternative Capital LP and Stonehill Capital Management LLC (collectively, the RMBS policyholders) move for permission to file a single reply brief of up to 6,000 words for these consolidated appeals, rather than two reply briefs of 3,000 words each.<sup>1</sup> The Office of the Commissioner of Insurance (OCI) objects, primarily on the grounds that the request should have been made at the time the other parties were stipulating to a modified briefing schedule. OCI's objection also appears to be premised on the assumption that, under the rules of appellate procedure and/or this court's prior order, the RMBS policyholders

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<sup>1</sup> They have also filed a reply to OCI's objection which we will disregard because replies to motions are not authorized by the appellate rules, and we are not persuaded there is any compelling need for one here.

would otherwise be entitled to file only one reply brief, since they are the appellants in only one of the two appeals.

We disagree with OCI's interpretation of both the appellate rules and this court's prior order. These appeals present an unusual procedural posture, in that they were consolidated after the Appellants' opening briefs had already been filed. In Appeal No. 2010AP1291, there were three notices of appeal filed: one on behalf of all the LVM bondholders; one on behalf of all the RMBS policyholders; and one by the Federal Home Loan Mortgage Corporation (Freddie Mac). The LVM bondholders and Freddie Mac filed a joint opening brief, while the RMBS policyholders filed their own opening brief. In Appeal No. 2010AP2022, there were two notices of appeal filed: one on behalf of the LVM bondholders and one by Wells Fargo Bank. The LVM Bondholders and Wells Fargo filed a joint opening brief for that appeal, thus resulting in a total of three Appellant's opening briefs.

In their proposal to consolidate the appeals and modify the briefing schedule, Respondents OCI and Ambac asserted that the appellate rules would permit each of them to file a respondent's brief to each opening appellant's brief that had been filed. Although the appellate rules do not explicitly address how to handle briefing situations in which there are multiple appellants and respondents, we agree that it has been this court's longstanding practice to permit (although we strongly discourage) a separate respondent's brief to be submitted for each appellant's brief that has been filed. *See generally* WIS. STAT. RULE 809.19. However, OCI does not seem to recognize that the same principle applies to reply briefs. In other words, the number of reply briefs that may be filed will ordinarily be dictated by the number of respondent's briefs that were filed, not the number of appeals included in a consolidation order or the number of appellants or respondents involved in the litigation.

Here, OCI and Ambac were each permitted to file a consolidated respondent's brief of up to 16,000 words, which represented an enlargement of the standard 11,000 words in a single respondent's brief, but a reduction of the 33,000 words they each would have been allowed if they had filed a separate respondent's brief for each of the three appellant's briefs. Each consolidated respondent's brief addressed each appeal. Therefore, each appellant (or group of appellants that had filed a joint notice of appeal) would ordinarily have been permitted to file two reply briefs of up to 3,000 words.

The parties all appeared to recognize this concept when they stipulated that the LVM bondholders would submit a consolidated reply brief of 4,800 words, rather than two reply briefs of 3,000 words each. Contrary to OCI's assertions, however, we see nothing in the proposal submitted by the LVM bondholders that states the RMBS bondholders were also agreeing to limit themselves to one reply brief or a reduced word count. To the contrary, page 6 of the proposal explicitly states, "This limitation would not affect the permissible length of the reply briefs to be filed by the RMBS policyholders and Freddie Mac" in Appeal No. 2010AP1291. (Emphasis added.) Rather, it appears that LVM was purporting only that the other appellants had agreed to the requests of OCI, Ambac and the RMBS policyholders.

We therefore conclude that it is appropriate to permit the RMBS policyholders to file a consolidated reply brief of up to 6,000 words, rather than a 3,000 word reply brief to each of the briefs filed by OCI and Ambac.

Although we grant the request, we caution the Appellants that they should not view 6,000 words as the new target. Rather, the target should remain a reply brief that is as short as reasonably possible. When the time comes for a panel of judges to read the briefs, it will not be

viewed favorably if the reply brief meets the 6,000 word limit, but repeats arguments made in the briefs-in-chief or co-appellants' reply briefs, or otherwise contains unnecessary argument or embellishment.

By separate motion, the LVM bondholders ask us to accept their replacement reply brief as timely. Our clerk's office rejected their original reply brief because it had the wrong colored covers. We grant that motion.

IT IS ORDERED that the RMBS policyholders may file a single, consolidated reply brief of up to 6,000 words. The brief shall be due within 5 business days of the date of this order.

IT IS FURTHER ORDERED that the replacement reply brief filed by the LVM bondholders is accepted as timely filed.

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*A. John Voelker*  
*Acting Clerk of Court of Appeals*