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**IN THE
HO-CHUNK NATION TRIAL COURT**

Clarence Pettibone,
Plaintiff,

v.

Case No.: **CV 01-84**

**Ho-Chunk Nation Legislature and Ho-
Chunk Nation Legislators Kathyleen
Whiterabbit, Sharon Whiterabbit, George
Lewis, Myrna Thompson, Gerald
Cleveland, Christine Funmaker-Romano,
Dallas Whitewing, Wade Blackdeer, Tracy
Thundercloud and Elliot Garvin, in their
official capacity,**
Defendants.

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**ORDER
(Granting Motion to Strike)**

INTRODUCTION

The Court must determine whether to accept the plaintiff's October 26, 2001 *Second Amended Complaint*. The plaintiff has not sought to modify the September 24, 2001 *Scheduling Order* in accordance with the *Ho-Chunk Nation Rules of Civil Procedure* [hereinafter *HCN R. Civ. P.*], Rule 42, seeking permission to allow further amendments to the pleadings. Therefore, the Court grants the defendants' November 1, 2001 *Motion to Strike*.

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PROCEDURAL HISTORY

The plaintiff, Clarence Pettibone, initiated the current action by filing a *Complaint* with the Court on July 16, 2001. Consequently, the Court issued a *Summons* accompanied by the above-mentioned *Complaint* on July 16, 2001, and delivered the documents by personal service to the defendants' representative, Ho-Chunk Nation Department of Justice [hereinafter DOJ].¹ The *Summons* informed the defendant of the right to file an *Answer* within twenty (20) days of the issuance of the *Summons* pursuant to *HCN R. Civ. P. 5(B)*. The *Summons* also cautioned the defendant that a *default judgment* could result from failure to file within the prescribed time period.

The defendants, by and through DOJ Attorney Michael P. Murphy, timely filed the *Defendants' Notice & Motion for Extension of Time to Answer* accompanied by the *Defendants' Motion for Expedited Consideration* on August 1, 2001, serving such documents on the plaintiff via first class mail. Prior to the Court responding to the *Motion*, Attorney Jeffrey S. DeCora filed a *Notice and Entry of Appearance* on behalf of the plaintiff on August 3, 2001. The Court granted the *Motion* in its August 6, 2001 *Order (Granting Extension of Time)*, allowing the defendants until September 5, 2001 to file their *Answer*. However, the defendants, by and through Attorney Alysia E. LaCounte, filed the *Answer* shortly thereafter on August 6, 2001.

On September 11, 2001, the plaintiff filed his *Amended Complaint*. The Court mailed *Notice(s) of Hearing* to the parties two (2) days later, informing them of the date, time and location of the *Scheduling Conference*. The Court convened a *Scheduling Conference* on September 21, 2001 at 10:00 A. M. CST. The following parties appeared by telephone at the

¹ The *HCN R. Civ. P.* permit the Court to serve the *Complaint* upon the DOJ when the plaintiff/petitioner names as a

1 *Conference*: Attorney Jeffrey S. DeCora, plaintiff's counsel, and DOJ Attorney Alysia E.
2 Lacounte, defendants' counsel. The Court entered the September 24, 2001 *Scheduling Order*,
3 memorializing the agreed upon timelines of the parties.
4

5 The defendants filed the *Answer to Plaintiff's Amended Complaint* on October 1, 2001.
6 The parties then submitted the October 15, 2001 *Stipulated Facts*. The plaintiff and the
7 defendants consequently filed *Motion(s) for Summary Judgment* and supportive legal briefs on
8 October 26, 2001. Additionally, the plaintiff filed a *Second Amended Complaint*. The
9 defendants responded to this filing by submitting the November 1, 2001 *Defendants' Notice of*
10 *Motion and Motion to Strike* accompanied by a *Motion for Expedited Consideration*. The
11 following day, the defendants filed the *Defendants' Brief in Reply to Plaintiff's Motion for*
12 *Summary Judgment*.
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14 **APPLICABLE LAW**

15 **CONSTITUTION OF THE HO-CHUNK NATION**

16 **Article XII – Sovereign Immunity**

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20 Section 1. Immunity of Nation from Suit. The Ho-Chunk Nation shall be immune from suit
21 except to the extent that the Legislature expressly waives its sovereign immunity, and officials or
22 employees of the Ho-Chunk Nation acting within the scope of their duties or authority shall be
immune from suit.

23 Section 2. Suit Against Officials and Employees. Officials or employees of the Ho-Chunk
24 Nation who act beyond the scope of their duties or authority shall be subject to suit in equity only
25 for declaratory and non-monetary injunctive relief in Tribal Court by persons subject to its
26 jurisdiction for purposes of enforcing rights and duties established by this constitution or other
27 applicable laws.
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party a unit of government, enterprise or an official or employee of the Ho-Chunk Nation. *HCN R. Civ. P. 27(B)*.

1 HO-CHUNK NATION RULES OF CIVIL PROCEDURE

2 Article II – Beginning an Action

3 Rule 5. Notice of Service of Process.

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5 (B) *Summons*. The *Summons* is the official notice to the party informing him/her that he/she is
6 identified as a party to an action or is being sued, that an *Answer* is due in twenty (20) calendar
7 days (See, *HCN R. Civ. P. 6*) and that a *Default Judgement* may be entered against them if they
8 do not file an *Answer* in the limited time. It shall also include the name and location of the
Court, the case number, and the names of the parties. The *Summons* shall be issued by the Clerk
of Court and shall be served with a copy of the filed complaint attached.

9 Article IV – Parties to an Action

10 Rule 27. The Nation as a Party.

11 (B) Civil Actions. When the Nation is filing a civil suit, a writ of mandamus, or the Nation is
12 named as a party, the *Complaint* should identify the unit of government, enterprise or name of
13 the official or employee involved. The *Complaint*, in the case of an official or employee being
14 sued, should indicate whether the official or employee is being sued in his or her individual or
15 official capacity. Service can be made on the Ho-Chunk Nation Department of Justice and will
be considered proper unless otherwise indicated in these rules, successive rules of the Ho-Chunk
Nation Court, or Ho-Chunk Nation Law.

16 Article VI – Trials

17 Rule 42. Scheduling Conference.

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19 Scheduling Order. The Court may enter a scheduling order on the Court’s own motion or on the
20 motion of a party. The Scheduling Order may be modified by motion of a party upon a showing
of good cause or by leave of the Court.

21 Article VII – Judgements and Orders

22 Rule 55. Summary Judgement.

23 Any time after the an *Answer* is due or filed, a party may file a *Motion for Summary Judgement*
24 on any or all of the issues presented in the action. The Court will render summary judgement in
25 favor of the moving party if there is no genuine issue as to material fact and the moving party is
26 entitled to judgement as a matter of law.
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DECISION

The parties voluntarily entered into the September 24, 2001 *Scheduling Order*, establishing the deadline for submission of the *Stipulation of Facts* and the procedure for summary judgment. The plaintiff, however, deviated from the *Scheduling Order* when he attempted to further amend his pleadings. Typically, the Court will allow the parties to file amendments to pleadings following the close of discovery. Yet, in the instant case, the parties neither entered into a period of discovery nor preserved the option of filing further amendments. Moreover, since a *Motion for Summary Judgment* must rest upon the absence of any “genuine issue as to material fact,” alleging additional unstipulated facts within the *Second Amended Complaint* appears to undermine the entire process. *HCN R. Civ. P. 55*.

The Court recognizes that the *Scheduling Order* did not contemplate the defendants’ October 26, 2001 *Motion for Summary Judgment*, but the *HCN R. Civ. P.* permit either party to file such a motion “[a]ny time after the date an *Answer* is due or filed” *Id.* No analogous provision relating to amendments to the pleadings exists in the *HCN R. Civ. P.*² Therefore, since the plaintiff did not preserve the ability to file the *Second Amended Complaint* at the *Scheduling Conference*, the plaintiff needed to request leave of the Court to permit this subsequent filing. *HCN R. Civ. P. 42*. The plaintiff has not demonstrated good cause to modify the *Scheduling Order*, and the Court accordingly strikes the amended pleadings from the record.

The decision to strike the *Second Amended Complaint* proves relatively immaterial due to the inconsequential nature of the amendments. First, in addition to naming the individual legislators as parties to the suit, the plaintiff sought to further clarify the caption by indicating,

² The Court dissuades the defendants from basing any further arguments upon the FEDERAL RULES OF CIVIL

1 “Each of the above as Individuals acting beyond the scope of their official duties.” *Second*
2 *Amended Complaint* at 1. The Court, however, has never required this level of clarity within the
3 caption of a *Complaint*. The CONSTITUTION OF THE HO-CHUNK NATION [hereinafter
4 CONSTITUTION] provides that “[o]fficials . . . who act beyond the scope of their . . . authority
5 shall be subject to suit in equity only for declaratory and non-monetary injunctive relief”
6 CONSTITUTION, ART. XII § 2. The Supreme Court of the Ho-Chunk Nation [hereinafter Supreme
7 Court] subsequently advised plaintiffs that they “*should indicate* whether the official . . . is being
8 sued in his or her individual or official capacity.” *HCN R. Civ. P. 27(B)* (emphasis added). The
9 Court draws the parties’ attention to the permissive language utilized in Rule 27(B).
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12 In the instant case, the plaintiff has not requested money damages, but declaratory relief.
13 *Amended Complaint* at 3. The plaintiff also has named individual legislators as parties to the
14 litigation. *Id.* at 1. Furthermore, the plaintiff has alleged that a specific legislative action, *i.e.*,
15 the passage of HO-CHUNK NATION LEGISLATURE RESOLUTION 07-03-01G, is unconstitutional.
16 *Id.* at 3. In that officials acting within the scope of their authority cannot be acting in violation of
17 the CONSTITUTION, the plaintiff is clearly presenting a permissible cause of action. *See*
18 CONSTITUTION, ART. XII.
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20 Plaintiffs understandably recognize an official as acting within their official capacity if
21 the disputed action occurred during the course of the official’s employment. Conversely, a
22 plaintiff would seek to sue a seated official in their individual capacity if the disputed action
23 occurred outside of the employment context. For those reasons, Rule 27(B) does not address the
24 constitutional distinction of acting inside or outside one’s “duties or authority.” *Id.*
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PROCEDURE since such rules would possess only persuasive authority in limited circumstances.

1 In an earlier case, the Court dismissed a suit against the Ho-Chunk Nation Legislature
2 [hereinafter Legislature] for lack of personal jurisdiction. *Stewart Miller v. Ho-Chunk Nation*
3 *Legislature*, CV 99-18 (HCN Tr. Ct., Mar. 25, 1999). The Legislature had not waived its
4 sovereign immunity from suit, thereby barring the plaintiff's request for declaratory and
5 injunctive relief. The Court emphasized the Supreme Court's declaration that "[i]t is necessary
6 for the Courts to know which individuals are being sued so that the trier of fact may access (*sic*)
7 whether or not that specific individual has acted outside the scope of their authority or not." *Id.*
8 at 2-3 (*quoting Chloris A. Lowe, Jr. v. Ho-Chunk Nation et al.*, SU 97-01 (HCN S. Ct., June 13,
9 1997) at 4; *see also Roy J. Rhode v. Ona M. Garvin, as Gen. Manager of Rainbow Casino*, CV
10 00-39 (HCN Tr. Ct., Aug. 24, 2001) at 14-16. Due to the plaintiff's failure to name individual
11 defendants, the Court dismissed the suit without prejudice. Consequently, the plaintiff brought a
12 second suit against the Ho-Chunk Nation Election Board and individually named legislators "in
13 their official capacities." *Stewart Miller v. Ho-Chunk Nation Election Bd. et al.*, CV 99-37
14 (*Complaint*, June 11, 1999) at 1. This suit proceeded unimpeded to final resolution. *Id.* (HCN
15 Tr. Ct., June 29, 1999).

19 Second, the newly alleged facts within the amended pleadings merely rephrase earlier
20 factual contentions. For example, *Facts* 13 and 14 allege the absence of notice and a hearing, yet
21 *Fact* 11 already levied an allegation of a violation of due process.³ *Second Amended Complaint*
22 at 3. Finally, the plaintiff did not truly expand his *Request for Relief* in that he had previously
23 requested "all additional relief that the Court determines to be appropriate." *Id.* at 4.

25 **HOWEVER, BASED UPON THE FOREGOING**, the Court grants the defendants
26 November 1, 2001 *Motion to Strike*.

28 ³ The Court offers no opinion regarding the applicability of its past interpretations of the Due Process Clause to the

1 **IT IS SO ORDERED** this 5th day of November, 2001 by the Ho-Chunk Nation Trial
2 Court located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.
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6 Honorable Todd R. Matha
7 Associate Trial Court Judge
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facts of the case at bar.

