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

**Leilani Jean Chamberlain,**  
Petitioner,

v.

Case No.: **CV 05-109**

**Adam Hall, Enrollment Officer of the Ho-  
Chunk Nation,**  
Respondent.

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**ORDER  
(Denial of Contempt Motion)**

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**INTRODUCTION**

14 The Court must determine whether to hold the respondent in contempt of court for  
15 allegedly failing to provide discovery responses, thereby violating an order of the Court. The  
16 Court holds that the respondent has exhibited a reasonable and diligent effort to respond when  
17 viewed against the backdrop of applicable discovery rules. The analysis of the Court follows  
18 below.  
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**PROCEDURAL HISTORY**

22 The Court recounts the procedural history in significant detail within a previous  
23 judgment. *Order (Denying Petitioner's Req. for Costs & Fees)*, CV 05-105 (HCN Tr. Ct., Aug.  
24 7, 2006) at 1-3. For purposes of this decision, the Court notes that it amended the February 15,  
25 2006 *Scheduling Order* on April 26, 2006, to provide the respondent an extension of time to  
26 answer the petitioner's March 13, 2006 *Discovery Requests*. *Id.* at 6; *see also Am. Scheduling*  
27 *Order*, CV 05-109 (HCN Tr. Ct., Apr. 26, 2006) at 7 (requiring discovery responses "on or  
28

1 before June 9, 2006). On June 8, 2006, the respondent filed the *Answer to First Set of*  
2 *Interrogatories & Request for Documents*, which the petitioner regarded as “incomplete and  
3 evasive.” *Mot. to Compel Disc., Mot. for Relief from Scheduling Order, & Mot. for New Trial*  
4 *Date*, CV 05-109 (July 26, 2006), Aff. of Att’y at 2.

5  
6 On September 13, 2006, the respondent submitted the *Stipulation & Order to Revise the*  
7 *Scheduling Order, Set New Defendant [sic] Initial Discovery Response Timeline, Continue Other*  
8 *Matters, & Withdraw Request for Sanctions & Fees*, proposing October 13, 2006, as a deadline  
9 to respond to the petitioner’s initial discovery request. The respondent subsequently informed  
10 the Court on October 30, 2006, that the parties agreed to further extend the deadline to  
11 November 10, 2006. Thereafter, neither party corresponded with the Court for over a year and a  
12 half, prompting the entry of the May 22, 2008 *Order (Conditional Dismissal with Prejudice)*.  
13 The respondent, however, filed the *Stipulation & Order (Maintaining in Open Status)* on June 5,  
14 2008, which the Court signed on June 10, 2008.

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17 On August 5, 2008, the petitioner filed the *Motion to Compel Discovery; Motion for*  
18 *Costs, Fees, & Sanctions; & Motion for Scheduling Conference & to Amend Scheduling Order*  
19 (hereinafter *Second Motion to Compel*). In response, the Court issued its August 6, 2008 *Order*  
20 *(Motion Hearing)* and accompanying *Notice(s) of Hearing*, informing the parties of the date,  
21 time and location of the *Motion Hearing*. The respondent, however, filed the *Stipulation &*  
22 *Order for Continuance* on September 5, 2008, which the Court signed on September 8, 2008.

23  
24 The petitioner corresponded with the Court on January 20, 2009, and requested that the  
25 Court schedule a hearing to address the outstanding *Second Motion to Compel*.<sup>1</sup> The Court  
26 consequently issued *Notice(s) of Hearing* on January 27, 2009, informing the parties of the date,  
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<sup>1</sup> The parties neglected “to submit a joint report to the Trial Court by November 1, 2008, updating as to the status of the case.” *Stipulation & Order for Continuance* at 1.

1 time and location of the *Status Hearing*. Prior to the *Hearing*, the respondent filed the *Response*  
2 *in Opposition to [Second] Motion to Compel & Scheduling Proposal*. The Court convened the  
3 *Status Hearing* on February 23, 2009 at 1:30 p.m. CST. The following parties attended the  
4 *Hearing*:<sup>2</sup> Attorney Joanne Harmon Curry, petitioner’s counsel (by telephone), and Attorney  
5 Michael P. Murphy, respondent’s counsel.  
6

7 On April 2, 2009, the petitioner filed the *Motion to Adjudge Defendant [sic] to Be in*  
8 *Contempt of Court & for Costs, Fees, & Sanctions* (hereinafter *Contempt Motion*). See  
9 CONTEMPT ORDINANCE, 2 HCC § 5.5a(1)(a); see also *Ho-Chunk Nation Rules of Civil Procedure*  
10 (hereinafter *HCN R. Civ. P.*), Rule 18. The Court accordingly entered its April 23, 2009 *Order*  
11 (*Show Cause*) and accompanying *Notice(s) of Hearing*, informing the parties of the date, time  
12 and location of the *Show Cause Hearing*. Prior to the *Hearing*, the respondent filed the *Response*  
13 *to Plaintiff’s [sic] Motion for Contempt, Costs, Fees, & Sanctions* (hereinafter *Contempt*  
14 *Response*). See *HCN R. Civ. P.* 19(B). The Court convened the *Show Cause Hearing* on May  
15 13, 2009 at 11:00 a.m. CDT. The following parties attended the *Hearing*: Attorney Joanne  
16 Harmon Curry, petitioner’s counsel; Adam J. Hall, respondent; and Attorney Michael P.  
17 Murphy, respondent’s counsel.  
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24 <sup>2</sup> At the *Hearing*, the Court ruled that its September 13, 2006 *Order* did not relieve the respondent of his obligation  
25 to answer the petitioner’s July 25, 2007 *Second Set of Interrogatories & Requests for Production of Documents*  
26 (hereinafter *Second Discovery Request*). *Status Hr’g* (LPER at 5, Feb. 23, 2009, 01:49:52 CST). The petitioner had  
27 not earlier filed this discovery request with the Court, but procedural rules do not necessarily require such a filing.  
28 Nonetheless, as a result, the Court ordered the respondent to submit a response on or before March 20, 2009. *Id.*,  
01:51:25 CST; see also *Am. Scheduling Order*, CV 05-109 (HCN Tr. Ct., Feb. 24, 2009) at 7 (noting that  
“[r]esponses to standing discovery requests are due on or before March 20, 2009”). The Court also stated as  
follows: “To the extent that a response is not forthcoming, the petitioner should note that failure to respond to the  
Court; the Court would enter an *Order (Show Cause)*; the *Show Cause Hearing* would be held to deal with the issue  
of contempt.” LPER, 01:52:05 CST.

1 **APPLICABLE LAW**

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

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4 **Art. III - Organization of the Government**

5 **Sec. 3. Separation of Functions.** No branch of the government shall exercise the powers  
6 or functions delegated to another branch.

7 **Art. IV - General Council**

8 **Sec. 2. Delegation of Authority.** The General Council hereby authorizes the legislative  
9 branch to make laws and appropriate funds in accordance with Article V. The General Council  
10 hereby authorizes the executive branch to enforce the laws and administer funds in accordance  
11 with Article VI. The General Council hereby authorizes the judicial branch to interpret and apply  
12 the laws and Constitution of the Nation in accordance with Article VII.

13 **Art. V - Legislature**

14 **Sec. 2. Powers of the Legislature.** The Legislature shall have the power:

15 (a) To make laws, including codes, ordinances, resolutions, and statutes;

16 **Art. VII - Judiciary**

17 **Sec. 7. Powers of the Supreme Court.**

18 (b) The Supreme Court shall have the power to establish written rules for the Judiciary,  
19 including qualifications to practice before the Ho-Chunk courts, provided such rules are  
20 consistent with the laws of the Ho-Chunk Nation.

21 **HO-CHUNK NATION JUDICIARY ESTABLISHMENT & ORGANIZATION ACT, 1 HCC §**  
22 **1**

23 **Subsec. 5. Rules and Procedures.**

24 c. The Judiciary shall have exclusive authority and responsibility to employ  
25 personnel and to establish written rules and procedures governing the use and operation of the  
26 Courts.

27 d. All matters shall be tried in accordance with the Ho-Chunk Rules of Procedures  
28 and the Ho-Chunk Rules of Evidence which shall be written and published by the Supreme Court  
and made available to the public.

1 DISCOVERY ACT, 2 HCC § 3

2 Subsec. 2. Findings.

3 a. The Nation has an obligation to protect confidential and other essentially private  
4 information from public disclosure.

5 b. Nation has an obligation to protect its members from public scrutiny of private  
6 information maintained by the Nation.

7 c. The Nation has a right to disclose any information maintained by the Nation when  
8 required in the best interest of the Nation, the administration of justice, or other applicable law.

9 Subsec. 3. Purpose and Intent. This Act prescribes procedures for production or disclosure  
10 of any material contained in the files of the Nation, any information relating to material  
11 contained in the files of the Nation, or any materials or information acquired by any person while  
12 such person is or was an employee of the Nation as a part of the performance of that person's  
13 official duties or because of that person's official status, in any federal, state and tribal legal  
14 proceeding whether or not the Nation is a party, including any proceeding in which the Nation is  
15 representing a tribal government or employee, when a subpoena, order, request, or demand of a  
16 court or other authority is issued for such material or information.

14 Subsec. 7. General Production or Disclosure in Proceedings in which the Nation is a Party.

15 a. In any proceeding in which the Nation is a party, no past or present official or  
16 employee of the Nation shall, by oral or written testimony or any other means, in response to a  
17 request or demand, produce or disclose any material contained in the files of the Nation, produce  
18 or disclose any information relative to or based upon such material, or produce or disclose any  
19 information or any material acquired because of the performance of that person's employment or  
20 official status, without the prior written approval of the Attorney General. This Act shall not be  
21 deemed to apply to those cases brought between or among the Legislative, Executive, or Judicial  
22 Branches of the Ho-Chunk Nation in the Ho-Chunk Trial Court.

21 b. Whenever a demand for production or disclosure is made upon a past or present  
22 official or employee under this Section, the official or employee shall immediately notify the  
23 Attorney General. The Attorney General shall request a copy of the request or demand, a  
24 summary of the material, information, or testimony sought, and its relevance to the proceeding.

24 c. The Attorney General may approve any request for production or disclosure  
25 within the scope of this Section and subject to Section 8 of this Act; provided, that:

26 (1) any production or disclosure shall be limited to the scope of the demand  
27 or the request; and

28 (2) the Attorney General shall not approve production or disclosure to any  
proceeding without such demand or request.

1 CONTEMPT ORDINANCE, 2 HCC § 5

2 Subsec. 4. Definitions. As used in this Ordinance, the following shall have the meaning  
3 provided here.

4 b. “Contempt of Court” means any or all of the following:

5 (2) Disobedience, resistance, or obstruction of the authority, process, or order  
6 of the Court.

7 c. “Punitive Sanction” means a sanction imposed to punish a past contempt of court  
8 for the purpose of upholding the authority of the Court, regardless of whether or not the  
underlying action has ended or is ongoing.

9 d. “Remedial Sanction” means a sanction imposed for the purpose of terminating an  
10 ongoing contempt of Court that is purgeable upon compliance with the process, order, or  
11 directive of the Court.

12 Subsec. 5. Requirements of the Contempt Process.

13 a. Standing.

14 (1) A Show Cause Hearing shall be requested upon *Motion* by any of the  
15 following:

16 (a) A party whose interests are harmed by the alleged contemnor.

17 b. Prima facie Burden of Proof.

18 (1) The movant must demonstrate the presence of an otherwise valid process,  
19 order, or directive of the Court.

20 (2) The movant must show that the alleged contemnor had actual or  
21 constructive knowledge of the process, order, or directive.

22 (3) The movant must demonstrate that the authority, process, order, or  
23 directive of the Court has been violated by the alleged contemnor through clear and  
convincing evidence.

24 (4) The movant need not prove the alleged contemnor’s state of mind.

25 (5) The Court may establish reasonable findings of fact and conclusions of  
26 law from available information only if it is constitutionally capable of doing so.

27 c. Opportunity to Be Heard.  
28

1 (2) If the alleged contempt occurs out of the presence of the Court, the  
2 presiding Judge or Justice may schedule a Show Cause Hearing to be set at a reasonable  
3 date and time in the future in order for the Court to consider available defenses and  
4 appropriate punitive or remedial sanctions. Proper notice in accordance with the Nation's  
5 Rules of Civil Procedure shall be provided, although expedited measures may be taken.

6 d. Burden of Contemnor. Either during the Summary Procedure or at the Show  
7 Cause Hearing, the alleged contemnor bears the burden of establishing that he or she should not  
8 be held in contempt because:

- 9 (1) He or she can demonstrate a reasonable inability to comply;
- 10 (2) He or she can show that the underlying order is ambiguous; or
- 11 (3) He or she can demonstrate reasonable and diligent efforts of compliance.

12 Subsec. 6. Authorized Sanctions.

13 a. Kinds of Sanctions.

14 (1) Payment of a sum of money sufficient to compensate a party for a loss or  
15 injury suffered as a result of the contempt of Court.

16 (2) Payment of a sum of money to the Court not to exceed \$100 for each day  
17 the contempt of Court continues.

18 (3) An order to designed to redress past disobedience with a prior order of the  
19 Court.

20 (4) An order designed to ensure compliance with an ongoing order of the  
21 Court.

22 (5) Any other appropriate sanction or order if the Court expressly finds that  
23 paragraphs (1) thru (4) above, would be ineffective to address, terminate, or otherwise  
24 ensure compliance in a past or continuing contempt of court.

25 HO-CHUNK NATION RULES OF CIVIL PROCEDURE

26 Ch. I - Introduction to the Rules

27 Rule 1. Scope of Rules. CONSTITUTION OF THE HO-CHUNK NATION, ART. VII, sec. 7(B)  
28 requires that the Supreme Court establish written rules for the Judiciary. These rules, adopted by  
the Supreme Court, shall govern the procedure of the Trial Court in all actions and proceedings.  
The judges of the Trial Court may look to Ho-Chunk customs and traditions for guidance in  
applying justice and promoting fairness to parties and witnesses.

1 Ch. III - General Rules for Pleading

2 Rule 18. Types of Motions.

3 *Motions* are requests directed to the Court and must be in writing except for those made in Court.  
4 *Motions* based on factual matters shall be supported by affidavits, references to other documents,  
5 testimony, exhibits or other material already in the Court record. *Motions* based on legal matters  
6 shall contain or be supported by a legal memorandum, which states the issues and legal basis  
7 relied on by the moving party. The *Motions* referenced within these rules shall not be considered  
8 exhaustive of the *Motions* available to litigants.

8 Rule 19. Filing and Responding to Motions.

9 (B) Responses. A *Response* to a written *Motion* must be filed at least one (1) day before the  
10 hearing. If no hearing is scheduled, the *Response* must be filed with the Court and served on the  
11 other parties within ten (10) calendar days of the date the *Motion* was filed. The party filing the  
12 *Motion* must file any *Reply* within three (3) calendar days.

12 Ch. V - Discovery

13 Introduction. Discovery is the process used among parties to uncover evidence relevant to the  
14 action, including identity of persons having knowledge of facts. Discovery may take place  
15 before an action has been filed and may be used for the purpose of preserving testimony or other  
16 evidence which might otherwise be unavailable at the time of trial. Discovery may include  
17 written interrogatories, depositions, and requests for the production of documents and things. It  
18 is the policy of the Court to favor open discovery of relevant material as a way of fostering full  
19 knowledge of the facts relevant to a case by all parties. It is the intent of these rules that  
20 reasonably open discovery will encourage settlement, promote fairness and further justice.

19 Rule 32. Interrogatories.

20 A party may submit interrogatories (written questions) to other parties. The requesting party  
21 must receive the responding party's written answers, under oath, within twenty-five (25) calendar  
22 days of receiving them. The responding party must include facts he/she knows, facts available to  
23 him/her, and give opinions, if requested.

23 Rule 34. Requests for Documents and Things.

24 A party may request another party to produce any documents or things within his/her possession  
25 or control for the purpose of inspection and/or copying. This includes permission to enter onto  
26 land for testing. The responding party must make the documents or things available to the  
27 requesting party within twenty-five (25) calendar days of the date of receiving the request.

28

1 Rule 36. Protective Orders.

2 For good cause, the Court on its own motion or at the request of any party or witness, may enter  
3 an *Order* to protect a party or other person from undue annoyance, embarrassment, oppression or  
4 undue burden or expense.

5 Rule 37. Non-Compliance.

6 If a party fails to appear or respond as requested under these rules, a party may request or the  
7 Court may *sua sponte* issue an *Order* requiring a response and imposing costs, attorney's fees,  
8 and sanctions as justice requires in order to secure compliance.

9 Rule 38. Power to Compel.

10 The Court retains the inherent authority to compel disclosure of material it has cause to believe is  
11 relevant to the matter before it.

12 Ch. VI – Trials

13 Rule 42. Scheduling Conference.

14 *Scheduling Order.* The Court may enter a scheduling order on the Court's own motion or on the  
15 motion of a party. The *Scheduling Order* may be modified by motion of a party upon showing of  
16 good cause or by leave of the Court.

17 Rule 44. Presence of Parties and Witnesses.

18 (C) Failure to Appear. If any party fails to appear at a hearing or trial for which they received  
19 proper notice, the case may be postponed or dismissed, a judgment may be entered against the  
20 absent party, or the Court may proceed to hold the hearing or trial.

21 Ch. VII - Judgments and Orders

22 Rule 54. Default Judgment.

23 (A) General. A *Default Judgment* may be entered against a party who fails to answer if the party  
24 was personally served in accordance with Rule 5(C)(1)(a)(i) or 5(C)(1)(a)(ii) or informed  
25 through other means of judicially authorized service such as publication or if a party fails to  
26 appear at a hearing, conference or trial for which he/she was given proper notice. A *Default  
27 Judgment* shall not award relief different in kind from, or exceed the amount stated in the request  
28 for relief. A *Default Judgment* may be set aside by the Court only upon a timely showing of  
good cause.

1 Rule 56. Dismissal of Action.

2 (B) Involuntary Dismissal. After an *Answer* has been filed, a party must file a *Motion to*  
3 *Dismiss*. A *Motion to Dismiss* will be granted at the discretion of the Court. A *Motion to*  
4 *Dismiss* may be granted for lack of jurisdiction; if there has been no order or other action in a  
5 case for six (6) months; if a party substantially fails to comply with these rules; if a party  
6 substantially fails to comply with an order of the Court; if a party fails to establish the right to  
relief following presentation of all evidence up to and including trial; or, if the plaintiff so  
requests.

7 FEDERAL RULES OF EVIDENCE<sup>3</sup>

8 Art. IV - Relevancy and Its Limits

9 Rule 401. Definition of "Relevant Evidence".

10 "Relevant evidence" means evidence having any tendency to make the existence of any  
11 fact that is of consequence to the determination of the action more probable or less probable than  
12 it would be without the evidence.

13 Art. V - Privileges

14 Rule 501. General Rule.

15 Except as otherwise required by the Constitution of the United States or provided by Act  
16 of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the  
17 privilege of a witness, person, government, State, or political subdivision thereof shall be  
18 governed by the principles of the common law as they may be interpreted by the courts of the  
19 United States in the light of reason and experience. However, in civil actions and proceedings,  
20 with respect to an element of a claim or defense as to which State law supplies the rule of  
decision, the privilege of a witness, person, government, State, or political subdivision thereof  
shall be determined in accordance with State law.

21 **FINDINGS OF FACT**

22  
23 1. The Court incorporates by reference *Findings of Fact* 2-3 as enumerated in a prior  
24 decision. *Order (Denying Petitioner's Req. for Costs & Fees)* at 5.

25 2. On July 25, 2007, the petitioner served her *Second Discovery Request* upon the  
26 respondent. *Contempt Mot.*, Aff. of Att'y at 1.  
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<sup>3</sup> The Supreme Court adopted the FEDERAL RULES OF EVIDENCE (hereinafter FED. R. EVID.) for usage in all tribal  
judicial proceedings. *In re Adoption of Fed. R. Evid.* (HCN S. Ct., June 5, 1999).

1 3. On February 23, 2009, the Court issued a directive from the bench, namely: “the Court  
2 will require that the respondent comply with the discovery request of the petitioner and offer a  
3 response on or before March 20, 2009.” LPER, 01:51:27 CST; *see supra* note 2.

4 4. Subsequently, on February 24, 2009, the Court incorporated the preceding directive into a  
5 judgment: “Responses to standing discovery requests are due on or before March 20, 2009.”  
6  
7 *Am. Scheduling Order* at 7.

8 5. On March 20, 2009, the respondent served the *Defendant’s [sic] Response to Plaintiff’s*  
9 *[sic] Second Set of Discovery* (hereinafter *Second Discovery Response*) upon the petitioner.  
10  
11 *Contempt Mot., Aff. of Att’y* at 2.

12 6. Despite receipt of the *Second Discovery Response*, the petitioner regarded the response as  
13 “incomplete, evasive, and generally unresponsive” to several interrogatories within the *Second*  
14 *Discovery Request. Id.*

15 7. Furthermore, the petitioner regarded two (2) responses for production of documents as  
16 inappropriate wherein the respondent asserted that he was “seeking approval from the HCN  
17 Attorney General under the Nation’s Discovery Act.” *Id.* (citing *Second Disc. Resp.* at 14-15);  
18 *see also* DISCOVERY ACT, 2 HCC § 3.3, 7a-c. The petitioner regarded a third response as  
19 inappropriate wherein the respondent asserted that “requests have been made to the U.S.  
20 Department of Interior, Bureau of Indian Affairs, for information dating back to the Nation’s  
21 original submission of revenue allocation plan documents.” *Id.* (citing *Second Disc. Resp.* at 16).

22 8. Finally, the petitioner stated that the respondent failed to respond to two (2) other  
23 requests for production of documents wherein he objected on the bases of relevancy and/or  
24 materiality. *Contempt Mot., Aff. of Att’y* at 2 (citing *Second Disc. Resp.* at 14-15); *see also*  
25  
26 *HCN R. Civ. P. Ch. V, Intro.*; FED. R. EVID. 401.  
27  
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1 9. The petitioner moves, in part, for contempt of court pursuant to federal rule. *Contempt*  
2 *Mot.* at 1 (citing FED. R. CIV. P. 37(b)(2)(B)); *but see* CONSTITUTION OF THE HO-CHUNK NATION,  
3 ART. VII, § 7(b); HCN JUDICIARY ESTABLISHMENT & ORG. ACT, 1 HCC § 1.5c-d; *HCN R. Civ.*  
4 *P. 1.* Alternatively, the petitioner presents her motion in reliance upon a tribal procedural rule  
5 that provides a mechanism for addressing a non-responsive party.<sup>4</sup> *Contempt Mot.* at 1 (citing  
6 *HCN R. Civ. P. 37*).

8 10. The respondent asserts that petitioner’s counsel did not confer with his legal counsel in  
9 relation to the aforementioned concerns prior to filing the *Contempt Motion*. *Contempt Resp.* at  
10 2.

11 11. At the *Show Cause Hearing*, the petitioner cites to foreign case law as persuasive  
12 authority for the recognition and/or adoption of the following principles:

13 a. “Evidentiary privileges . . . interfere with the trial’s search for truth, and must be  
14 strictly construed, consistent with the fundamental tenet that the law has the right to every  
15 person’s evidence.” LPER at 5, 11:14:03 CDT (quoting *Sands v. Whitnall Sch. Dist.*, 312 Wis.  
16 2d 1, 16-17 (Wis. 2008) (citation omitted)); *see also* WIS. STAT. § 804.01(2)(a) (2008)  
17 (permitting discovery of relevant information, provided such information is “not privileged”).

18 b. “[W]hen interrogatories are served on the government, the person answering them  
19 must consult all other government officials who have relevant information.” LPER at 7,  
20 11:22:54 CDT (quoting *Trane Co. v. Klutznick*, 87 F.R.D. 473, 475 (W.D. Wis. 1980)  
21 (concerning discovery requests made upon the United States or the President of the United  
22 States)).

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28 <sup>4</sup> The petitioner later identified a tribal statutory provision as grounds for issuing a default judgment against the  
respondent for his failure to adhere to the Court orders. *Show Cause Hr’g* (LPER at 18, May 13, 2009, 12:11:10  
CDT) (citing CONTEMPT ORDINANCE, § 5.6a(5)).

1 States)); *see also* FED. R. CIV. P. 33(b)(1)(B) (2009) (directing “any officer or agent” to “furnish  
2 the information available to the [governmental agency] party”).

3 c. “In responding to an interrogatory a party cannot unreasonably limit his [or her]  
4 answer to matters within his [or her] own knowledge and ignore information immediately  
5 available to him [or her] or under his [or her] control.” LPER at 8, 11:25:47 CDT (quoting  
6 *Pilling v. Gen. Motors Corp.*, 45 F.R.D. 366, 369 (D. Utah 1968) (requiring a discovery response  
7 to include information under the control of a party’s attorneys, agents, representatives or others  
8 acting on his or her behalf)); *see also* FED. R. CIV. P. 34(a)(1) (2009) (acknowledging that  
9 discovery extends to “items in the responding party’s possession, custody, or control”).  
10

11 d. “It is well established that an answer to an interrogatory ‘must be responsive to  
12 the question. It should be complete in itself . . . .’” LPER at 9, 11:29:26 CDT (quoting *Scaife v.*  
13 *Boenne*, 191 F.R.D. 590, 594 (N.D. Ind. 2000) (citation omitted)); *see also* FED. R. CIV. P.  
14 37(a)(4) (2009) (stating that “an evasive or incomplete disclosure, answer, or response must be  
15 treated as a failure to disclose, answer, or respond”).  
16

17 e. “Airtex’s answers were evasive and incomplete and appear to have been framed  
18 to impede discovery rather than to facilitate it. . . . [W]hen, as here, the fact that answers to  
19 interrogatories are evasive or incomplete[,] answers are tantamount to no answer at all . . . .”  
20 LPER at 13, 11:50:32 CDT (quoting *Airtex Corp. v. Shelley Radiant Ceiling Co.*, 536 F.2d 145,  
21 155 (7th Cir. 1976));<sup>5</sup> *see also* FED. R. CIV. P. 37(a)(4) (2009).  
22

23 f. “[A]n answer to an interrogatory ‘should not refer to the pleadings, or to  
24 depositions or other documents, or to other interrogatories, at least where such reference make it  
25 impossible to determine whether an adequate answer has been given without an elaborate  
26  
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28 \_\_\_\_\_  
<sup>5</sup> The preceding sentence within the appellate decision reads: “Airtex’s answers do not comport with the duty of cooperation and disclosure imposed by the discovery provisions of the federal rules.” *Airtex Corp.*, 536 F.2d at 155.

1 comparison of answers.” LPER at 13, 11:53:34 CDT (quoting *Scaife*, 191 F.R.D. at 594  
2 (citation omitted)); *see also* FED. R. CIV. P. 37(b)(3) (2009) (“Each interrogatory must, to the  
3 extent it is not objected to, be answered separately and fully in writing under oath.”).

4  
5 g. “Material outside the answers and their addendum ordinarily should not be  
6 incorporated by reference.” LPER at 13, 11:54:08 CDT (quoting *Pilling*, 45 F.R.D. at 369); *see*  
7 *also* FED. R. CIV. P. 37(b)(3) (2009).

8 h. “A general objection that interrogatories are onerous and burdensome and require  
9 the party to make research and compile data raises no issue. The objection must make a specific  
10 showing of reasons why the interrogatory should not be answered.” LPER at 16, 12:03:42 CDT  
11 (citing *Sherman Park Cmty. Assoc. v. Wauwatosa Realty Co.*, 486 F. Supp. 838, 845 (E.D. Wisc.  
12 1980) (citation omitted)); *see also* FED. R. CIV. P. 33(b)(4) (2009) (“The grounds for objecting to  
13 an interrogatory must be stated with specificity. Any ground not stated in a timely objection is  
14 waived unless the court, for good cause, excuses the failure.”).

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16  
17 i. “[T]he party objecting to . . . discovery bears the burden of “showing why  
18 discovery should not be permitted.”” LPER at 16, 12:03:42 CDT (citing *Alexander v. FBI*, 194  
19 F.R.D. 299, 302 (D.D.C. 2000) (citations omitted)); *see also* FED. R. CIV. P. 34(b)(2)(B) (2009)  
20 (requiring the expression of an objection “[f]or each item or category” of documents, “including  
21 the reasons”).

22  
23 j. “Before a trial court can impose discovery sanctions . . . , the court must find on  
24 the part of the noncomplying party willfulness, bad faith, or fault, or ‘persistent dilatory tactics  
25 frustrating the judicial practice.’ Once the trial court determines that sanctions are appropriate,  
26 ‘the choice of an appropriate discovery sanction is primarily the responsibility of the trial  
27 judge.” LPER at 18, 12:08:36 CDT (quoting *Morton v. Cont’l Baking Co.*, 938 P.2d 271, 274  
28

1 (Utah 1997) (citations omitted) (involving a plaintiff who requested three (3) delays, thereby  
2 increasing the timeframe of the action from approximately six (6) months to three (3) years, and  
3 who failed to respond to a discovery request despite a subsequent motion to compel and an order  
4 requiring responses in ten (10) days to prevent dismissal); *see also* UTAH R. CIV. P. 37(b)(2)(C)  
5 (2009) (permitting the entrance of a default judgment against a party that fails to obey an order  
6 requiring discovery responses after granting a motion to compel); *accord* FED. R. CIV. P.  
7 37(b)(2)(A)(vi) (2009).

9 12. Neither the Ho-Chunk Nation Supreme Court nor the Trial Court has ever expressly  
10 adopted any of the above-enumerated principles, and such principles are not explicitly  
11 incorporated within the applicable procedural rules. *HCN R. Civ. P. Ch. V, Intro., 32, 34, 37-38.*

## 14 **DECISION**

15 As reflected above, the petitioner relied heavily upon foreign case law in presenting her  
16 *Contempt Motion*. The Court oftentimes refers to federal, state or other tribal case law when  
17 performing its interpretive function, and a litigant's citation to such authority is not improper,  
18 especially if the Court has not previously encountered the matter presented for resolution. In  
19 these instances, however, the Court must detect some similarity between the constitutional or  
20 statutory provisions at issue in a given case and those receiving attention in the foreign courts. A  
21 greater degree of similarity will likely yield a greater degree of reliance upon the analysis present  
22 in the foreign opinions. To be clear, these judgments do not possess binding authority, and any  
23 ability to persuade rests in the thoroughness of the analysis and its relative congruence with Ho-  
24 Chunk law or procedure.

27 The Court can wholly understand the petitioner's resort to foreign case law in hopes of  
28 analogizing between the discovery processes since there is a dearth of tribal case law on our

1 discovery process. In large part, the absence of tribal jurisprudence derives from the fact that  
2 parties have rarely litigated discovery issues. Discovery has not proven particularly contentious  
3 outside the present case and a single other contemporaneous action, which the Court earlier  
4 disclosed to the parties. *Status Hr'g* (LPER at 6, 01:55:36 CST) (citing *Gerald Cleveland, Jr. v.*  
5 *Elliot Garvin et al.*, CV 08-36 (HCN Tr. Ct., Jan. 6, 2009) (concerning the performance of  
6 discovery on non-parties)).

7  
8 The Ho-Chunk Nation Supreme Court has only tangentially addressed discovery once  
9 when it recognized the Trial Court's discretion "to extend the discovery period to bring forth  
10 further facts to render a final judgment."<sup>6</sup> *Regina K. Baldwin et al. v. Ho-Chunk Nation et al.*,  
11 SU 02-01 (HCN S. Ct., Feb. 15, 2002) at 2. The Court had reopened the discovery period to  
12 allow the parties to obtain legislative history upon an employment provision. *Baldwin*, CV 01-  
13 16, -19, -21 (HCN Tr. Ct., Jan. 9, 2002) at 32; *see also Ronald K. Kirkwood v. Francis Decorah*  
14 *et al.*, CV 04-33 (HCN Tr. Ct., Feb. 11, 2005) at 21-22 (reopening discovery rather than  
15 proceeding to trial). Otherwise, the Supreme Court refrained from ruling upon discovery-related  
16 issues on two (2) more occasions in which it declined interlocutory appeals. *Wayne S. Hanrahan*  
17  
18  
19

20 \_\_\_\_\_  
21 <sup>6</sup> The Court has commented before on the nature of judicial discretion, which it reiterates below. *Gerald Cleveland,*  
22 *Jr. v. Elliot Garvin et al.*, CV 08-36 (HCN Tr. Ct., Apr. 24, 2009) at 4 n.1. As expressed by the Ninth Circuit Court  
23 of Appeals:

24 " [D]iscretion" is defined as: "The power exercised by courts to determine questions to  
25 which no strict rule of law is applicable but which, from their nature, and the  
26 circumstances of the case, are controlled by the personal judgment of the court." BOUVIER'S LAW DICTIONARY 884 (8th ed. 1914). Judicial action - discretionary in that  
27 sense - is said to be final and cannot be set aside on appeal except when there is an abuse  
28 of discretion.

26 *Delno v. Market St. Ry. Co.*, 124 F. 2d 965, 967 (9th Cir. 1942). In this regard, the Ho-Chunk Nation Supreme  
27 Court has adopted the following definition of abuse of discretion: "any unreasonable, unconscionable and arbitrary  
28 action taken without proper consideration of facts and law pertaining to the matter submitted." *Daniel*  
*Youngthunder, Sr. v. Jonette Pettibone et al.*, SU 00-05 (HCN S. Ct., July 28, 2000) at 2 (*quoting* BLACK'S LAW  
DICTIONARY 11 (6th ed. 1990)).

1 v. *Representative Sharyn Whiterabbit et al.*, SU 04-03 (HCN S. Ct., Apr. 1, 2004); *Loa L. Porter*  
2 v. *Chloris Lowe, Jr.*, SU 96-05 (HCN Tr. Ct., Aug. 19, 1996).

3  
4 Aside from the foregoing, the Trial Court has directly resolved discovery issues by means  
5 of written judgments in just a few cases. The Court required disclosure of certain facts in  
6 opposition to the Nation's assertion of confidentiality in 2001, finding the requested information  
7 decidedly non-confidential. The Court continued by noting: "The purpose of the discovery  
8 process is to allow the plaintiff to develop her case and determine whether or not she would like  
9 to call certain people as witnesses." *Aleksandra Cichowski v. HCN Hotel & Convention Ctr.*,  
10 CV 01-25 (HCN Tr. Ct., June 14, 2001) at 1. In 2002, the Court required the release of the  
11 plaintiff's personnel records upon a motion to compel despite such documents' confidential  
12 status under a predecessor version of the DISCOVERY ACT. *Joseph Decorah v. Ho-Chunk Nation*  
13 *et al.*, CV 02-47 (HCN Tr. Ct., Oct. 22, 2002). Finally, the Court conditionally required the  
14 Nation to respond to an interrogatory,<sup>7</sup> which it had failed to answer. In light of further non-  
15  
16 responsiveness to a motion to compel, the Court ruled as follows:  
17

18 The stated purpose of discovery is to enable the "parties to uncover  
19 evidence relevant to the action," and the Court must ensure that the parties  
20 experience "reasonabl[y] open discovery." *HCN R. Civ. P.*, Ch. V, Intro.  
21 The prevailing definition of relevant evidence is exceedingly broad, that  
22 being: "evidence having any tendency to make the existence of any fact  
23 that is of consequence to the determination of the action more probable or  
24 less probable than it would be without the evidence." FED. R. EVID. 401.  
25 The plaintiff contends that it formulated its discovery request with the  
26 intent of gaining such evidence. If the defendants objected to the scope of  
27 the request, then the defendants could have sought a protective order  
28 against the resulting "undue burden." *HCN R. Civ. P.* 36. Alternatively,  
the defendants may have possessed the ability to wage an objection on the  
basis of the HO-CHUNK NATION DISCOVERY ACT. Otherwise, the

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<sup>7</sup> The Court conditioned the response upon the plaintiff overcoming a pending motion to dismiss on the grounds of sovereign immunity from suit. *Marx Adver. Agency, Inc. v. Ho-Chunk Nation et al.*, CV 04-16 (HCN Tr. Ct., Aug. 24, 2004) at 7. The defendants ultimately prevailed upon its asserted defense. *Id.*, CV 04-16 (HCN Tr. Ct., Sept. 10, 2004), *aff'd*, SU 04-07 (HCN Tr. Ct., Apr. 29, 2005).

1 defendants have an obligation to comply with the reasonable discovery  
2 requests of the plaintiff.

3 *Marx. Adver. Agency, Inc.* at 6-7.

4 The quoted paragraph represents the Court’s most lengthy discussion of the discovery  
5 process and related expectations, and remains an appropriate guideline. In the instant case, the  
6 petitioner requests that the Court hold the respondent in contempt of court for failure to answer  
7 the *Second Discovery Request*. More specifically, the petitioner must establish that the “order . .  
8 . or directive of the Court has been violated by the alleged contemnor through clear and  
9 convincing evidence.”<sup>8</sup> CONTEMPT ORDINANCE, § 5.5b(3). The relevant order demands as  
10 follows: “Responses to standing discovery requests are due on or before March 20, 2009.” *Am.*  
11 *Scheduling Order* at 7. In this regard, the respondent indisputably served his *Second Discovery*  
12 *Response* upon the petitioner on March 20, 2009.

13  
14  
15 The petitioner, however, attacks the sufficiency of the response, and not the fact that she  
16 received a timely response. Yet, the applicable rules offer only slight guidance in relation to the  
17 sufficiency of a discovery response. Regarding interrogatories, “[t]he responding party must  
18 include facts he/she knows, facts available to him/her, and give opinions, if requested.” *HCN R.*  
19 *Civ. P.* 32. Notably, the procedural rules do not indicate that “an evasive or incomplete  
20 disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.”  
21 *FED. R. CIV. P.* 37(a)(4) (2009). The Court shall not hold the respondent in contempt of court for  
22  
23

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24 <sup>8</sup> The Seventh Circuit Court of Appeals has offered the following observation in relation to this civil evidentiary  
25 standard:

26 The party with the burden of proof “must have been able to ‘place in the ultimate fact-finder an  
27 abiding conviction that the truth of . . . [his or her] factual contentions are “highly probable.”  
28 *Colorado v. New Mexico*, 467 U.S. 310, 317 (1984). This is the Supreme Court’s definition of  
those words so often and so freely bandied about: ‘clear and convincing evidence.’

*Von Gonten v. Research Sys. Corp.*, 739 F.2d 1264, 1268 (7th Cir. 1984); see also *Joelene Smith v. Scott Beard et al.*, SU 00-14 (HCN S. Ct., Mar. 12, 2001) at 1 (acknowledging this standard definition).

1 allegedly violating a non-existent principle in this jurisdiction.<sup>9</sup> Whether the respondent must  
2 further amend his responses poses a separate question, which the Court shall address below.

3           The preceding federal rule equally applies in the context of document production. Rule  
4 37 is entitled, “Failure to Make Disclosures or to Cooperate in Discovery; Sanctions.”  
5 Consequently, the Court’s holding extends to encompass the alleged inappropriate responses to  
6 the petitioner’s document requests. Furthermore, the Court shall not hold the respondent in  
7 contempt for failing to secure documents outside his possession or control. A party responding  
8 to a request for production of documents must “produce any documents or things within his/her  
9 possession or control.” *HCN R. Civ. P.* 34.

10           The petitioner urged the Court to adopt the premise that when discovery requests “are  
11 served on the government, the person answering them must consult all other government  
12 officials who have relevant information.” *Trane Co.*, 87 at 475. The Court’s adoption of this  
13 premise would seem in line with the standing rule, but cited case law employed this rationale  
14 when discovery requests were presented to an agent on behalf of the state or its chief executive  
15 officer. In the case at bar, the respondent occupies the position of a division director within the  
16 Department of Heritage Preservation and oversees a modest staff. If the petitioner desires to  
17 force the production of documents beyond the respondent’s control, then she might consider  
18 serving subpoenas upon select non-parties. *See Cleveland*, CV 08-36 at 7-9.

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<sup>9</sup> Moreover, the Court considers the requested relief of an entry of default judgment as contrary to the expressed  
intention of the applicable rules. A respondent may receive a dismissal of a cause of action for a failure of a  
petitioner to “substantially . . . comply with an order of the Court,” *HCN R. Civ. P.* 56(B), but a petitioner may not  
receive a default judgment against a respondent for the same reason, likely because a default judgment entitles one  
to receive requested relief. *Id.*, Rule 54(A); *but see id.*, Rule 44(C) (giving the Court discretion to enter a dismissal  
or default judgment for “fail[ure] to appear at a hearing or trial for which they received proper notice”). The Court  
has historically interpreted the latter rule to allow a dismissal or default judgment when the hearing was convened to  
entertain a dispositive motion. Also, the Court would deem the catchall provision in the CONTEMPT ORDINANCE as  
somewhat illogical authority for granting either a dismissal or default judgment since the Court would have to  
exhaust all other available options to secure compliance with its orders. CONTEMPT ORDINANCE, § 5.6a(5).

1 At the *Show Cause Hearing*, the Court heard much in the way of alleged insufficiency of  
2 the discovery responses. The Court shall not resolve these allegations in the midst of this  
3 contempt action. Instead, the Court shall require that the parties, by and through respective  
4 counsel, meet in person within thirty days (30) of the issuance of this order. The parties shall  
5 conscientiously and diligently endeavor to definitively address any and all outstanding discovery  
6 concerns. The petitioner shall present any unresolved issues to the Court, along with a certificate  
7 of counsel that the discussion(s) proved unavailing, if in only some respects, within forty-five  
8 (45) days of the issuance of this order unless the petitioner requests a continuance for good  
9 cause. *See HCN R. Civ. P. 42.* The Court shall thereafter convene a hearing to entertain  
10 objections, responses and legitimate excuses.  
11

12  
13 One of the powers which has always been recognized as inherent in  
14 courts,<sup>10</sup> which are protected in their existence, their powers and  
15 jurisdiction by constitutional provisions, has been the right to control its  
16 order of business and to so conduct the same that the rights of all suitors  
17 before them may be safeguarded. This power has been recognized as  
judicial in its nature, and as being a necessary appendage to a court  
organized to enforce rights and redress wrongs.

18 *Riglander v. Star Co.*, 98 A.D. 101, 104 (N.Y. App. Div. 1904) (footnote added). The Court  
19 employs this strategy pursuant to its inherent judicial authority. The Court strongly urges the  
20 parties to work cooperatively in concluding this unfortunately elongated period of discovery.  
21

22 **IT IS SO ORDERED** this 13<sup>th</sup> day of August 2009, by the Ho-Chunk Nation Trial Court  
23 located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.  
24

25 \_\_\_\_\_  
Honorable Todd R. Matha  
Chief Trial Court Judge

26 Attach.: *App.*  
27

28 <sup>10</sup> ““The inherent powers of . . . courts are those which “are necessary to the exercise of all others.”” *Chloris Lowe, Jr. v. HCN Legislature Members Elliot Garvin et al.*, CV 00-104 (HCN Tr. Ct., Mar. 22, 2004) at 21 (quoting *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980) (quoting *United States v. Hudson*, 11 U.S. 32, 34 (1812))).

