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

3 **Ho-Chunk Nation,**
4 Plaintiff,

5 v.

Case No.: **CV 02-93**

6 **Bank of America, N.A.,**
7 Defendant.

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**ORDER
(Regarding Pending Motions)**

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INTRODUCTION

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14 The Court must determine whether to grant the outstanding motions filed by the plaintiff.
15 The Court enters this order to facilitate and explain the discovery process, including identifying
16 the applicable procedure and law that governs the instant case. The analysis and holding of the
17 Court follows below.
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PROCEDURAL HISTORY

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22 The Court recounts the procedural history in significant detail within its May 19, 2003
23 *Order (Denying Motion to Dismiss)*. For purposes of this decision, the Court notes that the
24 defendant, Bank of America, N.A. (hereinafter Bank), by and through Attorney Thomas E.
25 Harms, appealed the interlocutory decision of the Court on June 18, 2003. On July 10, 2003, the
26 Ho-Chunk Nation Supreme Court (hereinafter Supreme Court) rejected the appeal due to a
27 failure to comply with relevant procedural requirements. *Order Denying Appeal*, SU 03-06
28

1 (HCN S. Ct., July 10, 2003). Thereafter, the defendant/appellant filed a July 14, 2003 motion to
2 reconsider with the Supreme Court. On September 11, 2003, the Supreme Court declined to
3 reverse its earlier decision. *Order (Denying Mot. for Recons. & Denying Req. for Stay of*
4 *Proceedings)*, SU 03-06 (HCN S. Ct., Sept. 11, 2003).

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6 Consequently, the Court mailed *Notice(s) of Hearing* to the parties on November 25,
7 2003, informing them of the date, time and location of the *Scheduling Conference*. The Court
8 convened the *Conference* on December 2, 2003 at 1:30 p.m. CST. The following parties
9 appeared at the *Scheduling Conference*: Attorneys Justice E. Lindell and Brooks F. Pooley,
10 plaintiff's counsel (by telephone), and Attorney Thomas E. Harms, defendant's counsel (by
11 telephone). The Court entered the *Scheduling Order* on December 3, 2003, setting forth the
12 timelines and procedures to which the parties should adhere prior to trial. The Court later
13 entered the May 6, 2004 *Amended Scheduling Order* pursuant to the mutual request of the
14 parties.
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17 On August 5, 2004, the plaintiff filed its *Motion to Compel Discovery* (hereinafter
18 *Plaintiff's Motion I*) and accompanying legal memorandum entitled, *Plaintiff's Memorandum of*
19 *Law in Support of Plaintiff's Motion to Compel Discovery* (hereinafter *Plaintiff's Memorandum*
20 *I*), and affidavit of counsel. See *Ho-Chunk Nation Rules of Civil Procedure* (hereinafter *HCN R.*
21 *Civ. P.*), Rules 18, 38.¹ The plaintiff requested an August 10, 2004 teleconference in relation to
22 its request during which the parties agreed to convene a motion hearing. *Pl.'s Mot. I* at 1. The
23 defendant filed the timely *Defendant's Response to Plaintiff's Motion to Compel Discovery*
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27 ¹ Individuals can obtain a copy of the applicable rules by contacting the Ho-Chunk Nation Judiciary at (715) 284-
28 2722 or (800) 434-4070 or visiting the judicial website at www.ho-chunknation.com/government/judicial/cons_law.htm. Ho-Chunk Nation Bar members receive copies of the *HCN R. Civ. P.* and the *Ho-Chunk Nation Rules of Appellate Procedure* (hereinafter *HCN R. App. P.*) upon admission. *Order (Denying Mot. for Recons. & Denying Req. for Stay of Proceedings)*, SU 03-06 at 12.

1 (hereinafter *Defendant's Response I*) on August 24, 2004. See *HCN R. Civ. P. 19(B)*.
2 Additionally, the defendant filed its *Motion for Protective Order and Other Relief* (hereinafter
3 *Defendant's Motion II*) on the same date accompanied by a legal memorandum entitled,
4 *Defendant's Memorandum in Support of Motion for Protective Order and Other Relief. Id.*,
5 Rules 18, 36.
6

7 The plaintiff submitted a letter reply to the defendant's filings on August 30, 2004. The
8 next day, the Court convened the *Motion Hearing* at 10:00 a.m. CDT. The following parties
9 appeared at the *Hearing*: Attorney Justice E. Lindell, plaintiff's counsel (by telephone), and
10 Attorney Thomas E. Harms, defendant's counsel (by telephone). On August 31, 2004, the Court
11 entered its *Order (Denying Motion for Protective Order)*, which addressed the defendant's
12 concern regarding pending depositions, but did not address concerns regarding transcribing a
13 recording of an April 27, 2000 legislative meeting.
14

15 On September 14, 2004, the defendant submitted excerpts from a deposition in order to
16 establish the point in time at which the defendant believed the plaintiff's actions "reasonably
17 indicate[d] the prospect of litigation." *Mot. Hr'g* (LPER at 6, Aug. 31, 2004, 10:52:09 CDT).
18 The defendant intended that the excerpts respond to the plaintiff's earlier request for the
19 defendant to support its response with affidavits. *Id.*, 10:36:33, 10:49:13 CDT. Later that day,
20 the plaintiff formally objected to the defendant's filing on the basis of timeliness, citing *HCN R.*
21 *Civ. P. 19(B)*.
22

23 On September 16, 2004, the plaintiff filed its *Motion for Sanctions* (hereinafter *Plaintiff's*
24 *Motion II*) and accompanying legal memorandum entitled, *Memorandum of Law in Support of*
25 *Plaintiff's Motion for Sanctions* (hereinafter *Plaintiff's Memorandum II*), and affidavit of counsel.
26 See *HCN R. Civ. P. 18, 37*. The defendant responded to the plaintiff's September 14, 2004
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1 correspondence in a September 17, 2004 letter, arguing that it had complied with *HCN R. Civ. P.*
2 19(B) and that the procedural rules did not preclude a further filing, especially since the
3 deposition had not occurred until after the August 31, 2004 *Motion Hearing*. Subsequently, the
4 defendant timely filed the *Defendant's Response to Plaintiff's Motion for Sanctions* (hereinafter
5 *Defendant's Response II*). See *HCN R. Civ. P.* 19(B). The parties filed the April 28, 2005
6 *Stipulation*, thereby resolving the remaining concerns presented in the *Defendant's Motion II*.
7

8 Due to an extended period of inactivity, the Court mailed *Notice(s) of Hearing* to the
9 parties on September 23, 2005, informing them of the date, time and location of a *Status*
10 *Hearing*. The Court convened the *Hearing* on October 14, 2005 at 1:30 p.m. CDT. The
11 following parties appeared at the *Status Hearing*: Attorney Justice E. Lindell, plaintiff's counsel
12 (by telephone), and Attorney Thomas E. Harms, defendant's counsel (by telephone).²
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15 APPLICABLE LAW

16 CONSTITUTION OF THE HO-CHUNK NATION

17 Art. I - Territory and Jurisdiction

18 Sec. 1. Territory. The territory of the Ho-Chunk Nation shall include all lands held by
19 the Nation or the People, or by the United States for the benefit of the Nation or the People, and
20 any additional lands acquired by the Nation or by the United States for the benefit of the Nation
21 or the people, including but not limited to air, water, surface, subsurface, natural resources and
22 any interest therein, notwithstanding the issuance of any patent or right-of-way in fee or
23

24 ² The presiding judge extends his sincerest apologies to the parties for the failure of the Court to enter a timely
25 decision in this matter. Each trial judge maintains a duty to "dispose promptly of the business of the court." *HCN*
26 *Rules of Judicial Ethics*, § 4-1(E); see also *In the Matter of Timely Issuance of Decisions*, ADMIN. RULE 04-09-05(1)
27 (HCN S. Ct., Apr. 9, 2005) (requiring issuance of final judgments within ninety (90) days following completion of
28 trial level process). Former Chief Judge William H. Bossman utterly failed in this regard by not issuing a judgment
prior to the expiration of his legislative appointment on July 1, 2005. In the interests of justice, the Court informs
the parties of the availability of seeking mandamus relief from the Ho-Chunk Nation Supreme Court in order to
compel action of a trial level judge. See *In re: Casimir T. Ostrowski*, SU 05-01 (HCN S. Ct., Feb. 21, 2005) (citing
CONSTITUTION OF THE HO-CHUNK NATION (hereinafter CONSTITUTION), ART. VII, § 6(a)).

1 otherwise, by the governments of the United States or the Ho-Chunk Nation, existing or in the
2 future.

3 Sec. 2. Jurisdiction. The jurisdiction of the Ho-Chunk Nation shall extend to all territory
4 set forth in Section 1 of this Article and to any and all persons or activities therein, based upon
the inherent sovereign authority of the Nation and the People or upon Federal law.

5 Art. III - Organization of the Government

6 Sec. 3. Separation of Functions. No branch of government shall exercise the powers and
7 functions delegated to another branch.

8 Sec. 4. Supremacy Clause. This Constitution shall be the supreme law over all territory
9 and persons within the jurisdiction of the Ho-Chunk Nation.

10 Art. IV - General Council

11 Sec. 1. Powers of the General Council. The People of the Ho-Chunk Nation hereby grant
12 all inherent sovereign powers to the General Council. All eligible voters of the Ho-Chunk
13 Nation are entitled to participate in General Council.

14 Sec. 2. Delegation of Authority. The General Council hereby authorizes the legislative
15 branch to make laws and appropriate funds in accordance with Article V. The General Council
16 hereby authorizes the executive branch to enforce the laws and administer funds in accordance
with Article VI. The General Council hereby authorizes the judicial branch to interpret and
17 apply the laws and Constitution of the Nation in accordance with Article VII.

18 Art. V - Legislature

19 Sec. 1. Composition of the Legislature.

20 (c) The Legislature shall select from among its Members a Vice President to serve
21 throughout such Member's term. The President shall preside over meetings of the Legislature.
The Vice President shall preside over meetings of the Legislature in the absence of the President
22 and at such times the Vice President shall retain the power to vote.

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

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

25 (i) To negotiate and enter into treaties, compacts, contracts, and agreements with
26 other governments, organizations, or individuals;

1 Art. VII - Judiciary

2 Sec. 5. Jurisdiction of the Judiciary.

3 (a) The Trial Court shall have original jurisdiction over all cases and controversies,
4 both criminal and civil, in law or in equity, arising under the Constitution, laws, customs and
5 traditions of the Ho-Chunk Nation, including cases in which the Ho-Chunk Nation, or its
6 officials and employees, shall be a party. Any such case or controversy arising within the
7 jurisdiction of the Ho-Chunk Nation shall be filed in the Trial Court before it is filed in any other
8 court. This grant of jurisdiction by the General Council shall not be construed to be a waiver of
9 the Nation's sovereign immunity.

8 Sec. 6. Powers of the Tribal Court.

9 (a) The Trial Court shall have the power to make findings of fact and conclusions of
10 law. The Trial Court shall have the power to issue all remedies in law and in equity including
11 injunctive and declaratory relief and all writs including attachment and mandamus.

12 Sec. 7. Powers of the Supreme Court.

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

16 HO-CHUNK NATION JUDICIARY ESTABLISHMENT AND ORGANIZATION ACT, 1
17 HCC § 1

18 Subsec. 4. Jurisdiction. The Ho-Chunk Judiciary shall exercise jurisdiction over all matters
19 with the power and authority of the Ho-Chunk Nation including controversies arising out of the
20 Constitution of the Ho-Chunk Nation; laws, statutes, ordinances, resolutions, and codes enacted
21 by the Legislature; and such other matters arising under enactments of the Legislature or the
22 customs and traditions of the Ho-Chunk Nation. The jurisdiction extends over the Nation and its
23 territory, persons who enter its territory, its members, and persons who interact with the Nation
24 or its members wherever found.

22 Subsec. 5. Rules and Procedures.

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

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

1 CIVIL PRACTICE LAW AND RULES

2 Art. 31 - Disclosures

3 Sec. 3101. Scope of disclosure.

4
5 (a) Generally. There shall be full disclosure of all matter material and necessary in
6 the prosecution or defense of an action, regardless of the burden of proof, by:

- 7 (1) a party, or the officer, director, member, agent or employee of a party;
- 8 (2) a person who possessed a cause of action or defense asserted in the action;
- 9 (3) a person about to depart from the state, or without the state, or residing at
10 a greater distance from the place of trial than one hundred miles, or so sick or infirm as to
11 afford reasonable grounds of belief that he or she will not be able to attend the trial, or a
12 person authorized to practice medicine, dentistry or podiatry who has provided medical,
13 dental or podiatric care or diagnosis to the party demanding disclosure, or who has been
14 retained by such party as an expert witness; and
- (4) any other person, upon notice stating the circumstances or reasons such
disclosure is sought or required.

15 (b) Privileged matter. Upon objection by a person entitled to assert the privilege,
16 privileged matter shall not be obtainable.

17 (c) Attorney's work product. The work product of an attorney shall not be obtainable.

18 (d) Trial preparation.

19 (2) Materials. Subject to the provisions of paragraph one of this subdivision,
20 materials otherwise discoverable under subdivision (a) of this section and prepared in
21 anticipation of litigation or for trial by or for another party, or by or for that other party's
22 representative (including an attorney, consultant, surety, indemnitor, insurer or agent),
23 may be obtained only upon a showing that the party seeking discovery has substantial
24 need of the materials in the preparation of the case and is unable without undue hardship
25 to obtain the substantial equivalent of the materials by other means. In ordering discovery
26 of the materials when the required showing has been made, the court shall protect against
27 disclosure of the mental impressions, conclusions, opinions or legal theories of an
28 attorney or other representative of a party concerning the litigation.

1 Art. 45 - Evidence

2 Sec. 4503. Attorney.

3 (a)1. Confidential communication privileged. Unless the client waives the privilege, an
4 attorney or his or her employee, or any person who obtains without the knowledge of the client
5 evidence of a confidential communication made between the attorney or his or her employee and
6 the client in the course of professional employment, shall not disclose, or be allowed to disclose
7 such communication, nor shall the client be compelled to disclose such communication, in any
8 action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by
9 or on behalf of any state, municipal or local governmental agency or by the legislature or any
10 committee or body thereof. Evidence of any such communication obtained by any such person,
11 and evidence resulting therefrom, shall not be disclosed by any state, municipal or local
12 governmental agency or by the legislature or any committee or body thereof. The relationship of
13 an attorney and client shall exist between a professional service corporation organized under
14 article fifteen of the business corporation law to practice as an attorney and counselor-at-law and
15 the clients to whom it renders legal services.

12 HO-CHUNK NATION RULES OF CIVIL PROCEDURE

13 Ch. I - Introduction to the Rules

14 Rule 1. Scope of Rules.

15 The HO-CHUNK NATION CONSTITUTION, Art. VII, Section 7(B) requires that the HCN Supreme
16 Court establish written rules for the Judiciary. These rules, adopted by the Supreme Court of the
17 Ho-Chunk Nation, shall govern the proceedings of the Trial Courts in all actions and
18 proceedings. The judges of the Trial Court may look to Ho-Chunk customs and traditions for
19 guidance in applying justice and promoting fairness to parties and witnesses.

19 Rule 2. Liberal Construction.

20 These rules shall be liberally construed to secure a just and speedy determination of every action.

21 Ch. II - Beginning an Action

22 Rule 3. Complaints.

23 General. A civil action begins by filing a written *Complaint* with the clerk of court and paying
24 the appropriate fees. The *Complaint* shall contain short, plain statements of the grounds upon
25 which the Court's jurisdiction depends; the facts and circumstances giving rise to the action; and
26 a demand for any and all relief that the party is seeking. Relief should include, but is not limited
27 to the dollar amount that the party is requesting. The *Complaint* must contain the full names and
28 addresses of all parties and any counsel, as well as a telephone number at which the Complainant
may be contacted. The *Complaint* shall be signed by the filing party or his/her counsel, if any.

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 those made at trial.
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 the 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 the 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 for 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 reasonable [*sic*] open discovery will encourage settlement, promote fairness and further justice.
21 There is an ongoing obligation by any party subject to a discovery request, which continues up to
22 and through the trial, to supplement any response previously answered if new or freshly
23 discovered material previously unavailable is discovered or revealed to them.

21 Rule 32. Interrogatories.

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

25 Rule 33. Depositions.

26 A party may take a deposition (testimony, under oath and recorded) of a deponent (another party
27 or witness) after giving at least five (5) calendar days notice of the time and place where the
28 deposition will occur to all parties and the deponent. All parties may ask the deponent questions.
Depositions may take place by telephone and be recorded steno graphically [*sic*], by tape
recording or other means if the parties agree or the Court so orders.

1 Rule 34. Requests for Documents and Things.

2 A party may request another party to produce any documents or things within is/her [sic]
3 possession or control for the purpose of inspection and/or copying. This includes permission to
4 enter onto land for testing. The responding party must make the documents or things available to
5 the requesting party within twenty-five (25) calendar days of the date of receiving the request.

6 Rule 36. Protective Orders.

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

10 Rule 37. Non-Compliance.

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

14 Rule 38. Power to Compel.

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

17 Ch. VI - Trials

18 Rule 42. Scheduling Conference.

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
21 of good cause or by leave of the Court.

22 Ch. VII - Judgments and Orders

23 Rule 54. Default Judgment.

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

1 Ch. VIII - Enforcement and Remedies

2 Rule 68. Stays Pending Appeal.

3 The Trial Court may delay execution of the final *Order* or *Judgment* during the appeal on its own
4 motion or on the request of either party if a bond is given or other conditions prescribed by the
5 Court are met that protect the interests of the party whose favor the final *Judgment* or *Order* is
6 entered.

7 FEDERAL RULES OF EVIDENCE³

8 Art. V - Privileges

9 Rule 501. General Rule.

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

18 Art. IV - Relevancy and Its Limits

19 Rule 401. Definition of "Relevant Evidence".

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

23 **FINDINGS OF FACT**

- 24 1. The parties received proper notice of the August 31, 2004 *Motion Hearing*.
- 25
- 26
- 27

28 ³ 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 2. The plaintiff, Ho-Chunk Nation (hereinafter HCN or Nation), is a federally recognized
2 Indian tribe with principal offices located on trust lands at the HCN Headquarters, W9814
3 Airport Road, P.O. Box 667, Black River Falls, WI. *See* 70 Fed. Reg. 71194 (Nov. 25, 2005).

4
5 3. The defendant, Bank, is a State of Delaware corporation with principal offices located at
6 Bank of America Corporate Center, 100 North Tryon Street, 18th Floor, Charlotte, NC 28255.
7 *Am. Compl.*, CV 02-93 (Oct. 21, 2002) at 3.

8 4. On January 25, 2000, the HCN Legislature (hereinafter Legislature), acting on behalf of
9 the plaintiff, adopted a resolution conferring signature authority upon its Vice President to enter
10 into the *Credit Agreement* (hereinafter *Contract*) with the defendant according to the following
11 terms:
12

13 **NOW, THEREFORE, BE IT RESOLVED**, the Nation shall enter into a
14 Credit Agreement with the Banks and the Agent in substantially the form
15 presented to the Legislature at this meeting of January 25, 2000 under
16 which the Nation may obtain revolving loans and become obligated to
17 reimburse the Agent and the Banks on letters of credit issued for the
18 account of the Nation up to \$45,000,000 in aggregate amount; and the
19 Vice President of the Nation, are [*sic*] hereby authorized and directed at
20 any time and from time to time to execute and deliver to the Banks such
21 Credit Agreement and any promissory notes, security agreements,
22 subordination agreements, pledge agreements, reimbursement agreements,
23 or other agreements and documents as may be contemplated or required
pursuant to such Credit Agreement or otherwise, all in such form
presented to this meeting, and hereafter, pursuant to the [A]gent's request
under Section 5.12 of the Credit Agreement, as such officer may
determine and approve (such determination and approval to be established
conclusively by such officer's execution and delivery of such Credit
Agreement and any such related documents and instruments).

24 HCN LEG. RES. 01-25-00H; *see also* CONST., ART. V, §§ 1(c), 2(i).

25 5. On January 31, 2000, the plaintiff formally executed the *Contract* when former Vice
26 President Clarence P. Pettibone affixed his signature to such document. *Def. Bank of Am.'s Mot.*
27
28

1 to Dismiss Made by Special Appearance (hereinafter *Defendant's Motion I*), CV 02-93 (Jan. 9,
2 2003), Attach. A.

3
4 6. On September 26, 2000, the Legislature, acting on behalf of the plaintiff, adopted a
5 resolution conferring signature authority upon its Vice President to enter into the ISDA
6 ["International Swap Dealers Association, Inc.] *Master Agreement* (hereinafter *Agreement*) with
7 the defendant according to the following terms:

8 **NOW THEREFORE, BE IT RESOLVED** that the form, terms and
9 provisions of the ISDA Master Agreement between the Bank of America,
10 N.A. ("the Bank") and the Nation ("the Agreement"), by which this Nation
11 may enter into interest rate, commodity and currency exchange
12 transactions with the Bank, be, and hereby is [*sic*], in all respects approved
13 and authorized; and that either of [*sic*] the President or Vice President is
14 authorized to execute and deliver in the name and on behalf of the Nation,
15 agreements in substantially the form of the Agreement, with such changes
16 therein; [*sic*] as the officer executing the same shall approve, as evidenced
17 by his execution thereof; provided that such signator shall obtain
18 Legislative authorization for any change materially affecting the Nation's
19 rights or obligations under the Agreement;

20 HCN LEG. RES. 09-26-00C; *see also* CONST., ART. V, §§ 1(c), 2(i).

21 7. On November 7, 2000, the plaintiff formally executed the *Agreement* when former Vice
22 President Pettibone affixed his signature to such document. *Def.'s Mot. I*, Attach. B.

23 8. The *Agreement* includes the following provision entitled, *Governing Law*: "[t]his
24 Agreement will be governed by and construed in accordance with the law specified in the
25 [ISDA] Schedule [to the Master Agreement]." *Id.* at 10. The *Schedule* specifies that "[t]his
26 Agreement will be governed by and construed in accordance with the laws of the State of New
27 York (without reference to its conflict of laws doctrine)." *Id.*, Attach. C at 6.

28 9. On or about April 22, 2002, Michael Fitzpatrick, current Managing Director of Virchow
Krause Capital, LLC, met with representatives of the defendant, Craig R. Tonies, Marketer, and
client manager James Baka. *Pl.'s Supplemental Answers to Def.'s Interrogs. & Doc. Requests* -

1 *Set I*, CV 02-93 (July 13, 2004) at 8; *see also Pl.'s Mot. I, Aff.*, Attach. H at 2, L at 2. Mr. Tonies
2 recounts the conversation as follows in an April 26, 2002 interoffice electronic mailing:

3
4 On April 22, the client manager and I met with the consultant to discuss a
5 claim by the client that the hedge is improperly structured. According to
6 the consultant, it was the Ho-Chunk's intention to hedge 50% of the loan
7 on an amortizing basis. The consultant has provided a copy of the minutes
8 of the 4-27-00 Council[, *i.e.*, legislative,] meeting that support the position.
9 Our documentation is clean; signed confirmation, ISDA Master and
10 Schedule. The client has asked that we amend the existing trade to reflect
11 50% of the scheduled principal balance as well as to reimburse for monies
12 paid (as a result of the higher notional schedule) since the trade date.

13 *Pl.'s Mot. I, Aff.*, Attach. L at 2.

14
15 10. On or about April 24, 2002, Virchow Krause & Company, LLP, a certified public
16 accounting and consulting firm, issued its *Ho-Chunk Nation Debt & Investment Analysis* in
17 which it deduced the following:

18 The swap structure has several flaws. First, according to Treasury
19 personnel, the notional amount of the swap was intended to hedge 50% of
20 the loan amount from Bank of America. The actual contract is for a flat
21 \$22.5 million, which does not decline based on the reduction in the line of
22 credit. By July 1, 2002, the swap amount will exceed the total obligation
23 owed to Bank of America, leaving the Nation unnecessarily in an excess
24 hedge position. Under current interest rate conditions, this represents a
25 contingent liability to the Nation.

26 *Am. Comp.*, Attach. D at 2.

27
28 11. On or about April 24, 2002, Mr. Tonies informed a Managing Director of the defendant,
29 Jeff G. McNeil, of the substance of a conversation between former in-house legal counsel of the
30 defendant, Attorney Robert G. Lendino, and Mr. Fitzpatrick within an interoffice electronic
31 mailing, stating: "Bob spoke w/the consultant and told him we would be doing our due diligence
32 and get back to him with an update on Friday[, April 26, 2006]. He expects that we will need to
33 do a conference call with them some time [*sic*] next week." *Pl.'s Mot. I, Aff.*, Attach. K.

1 12. On or about May 1, 2002, Mr. McNeil summarized a teleconference discussion that
2 occurred earlier in the day amongst the parties in an interoffice electronic mailing to defendant's
3 employee, Gerhard Seebacher, as follows:
4

5 Bob Lendino, Craig Tonies, Kerry Jordan[, Marketer,] and I were on a
6 teleconference call today with Mike Fitzpatrick (consultant with Virchow
7 Krause), Sheila Corbine ([former] attorney general of the Ho-Chunk
8 Nation), Sandy Pl[a]wman ([former] Treasurer of the [N]ation) and Lisa
9 Goch[anour] ([former] Treasury staffer) to discuss the issue surround [sic]
10 the swap between Bank of America and the Ho-Chunk. The Ho-Chunk
11 contend that they believed at execution of the swap that they were hedging
12 half of the Bank of America loan - this is reflected in the minutes of the
13 Tribal meeting. Goch[anour], who is the only person from the tribe still in
14 the capacity she held at the time, says that she remembers it that way (the
15 then-current Treasurer is no longer in office). There seemed to be little
16 direct communication from the Tribe to Kerry that having their swap
17 amortize was indeed their intention. Kerry stated on the call that she had
18 been discussing hedging the aggregate debt when talking about
19 fixed/floating mix, starting back in February of 2000 (the deal was
20 executed in April 2000).

21 We asserted that it was our feeling that there was clearly a
22 misunderstanding with regards to the issue. We also noted that the signed
23 documentation existed and that settlements had been made for the last 1.75
24 years. There was little reply to those points - they are focusing on what is
25 in the tribal minutes and their understanding of the deal. At the end of the
26 conversation, the attorney general still asserted that they should be "made
27 whole" by recuperating the excess settlement amounts from the past and
28 by restructuring the swap to meet what they thought they had. She did
say, however, that if there was more than one way to be made whole, they
would be willing to consider the alternatives (don't know what that really
means).

22 *Id.*, Attach. J.

23 13. On or about June 28, 2002, former Ho-Chunk Nation Department of Justice Attorney
24 Joseph M. Paiement drafted a correspondence to in-house counsel of the defendant, Attorney
25 Jennifer R. Heath, for the purpose of rejecting a settlement offer. Attorney Paiement notes:
26

27 I understand that Bob L[e]ndino is no longer employed with the Bank of
28 America and that you will be handling resolution of this dispute going
forward.

1 As I indicated during our conversation, the Ho-Chunk Nation is unwilling
2 to accept Bank of America's offer to satisfy half of the total losses
3 sustained by the tribe as a result of the discrepancy in the notional amount
4 of the swap agreement. With total damages now estimated to be in excess
5 of \$800,000, the Nation would incur an unacceptable shortfall.

6 If Bank of America is willing to reconsider its position, please contact me.

7 *Id.*, Attach. C.

8 14. On September 27, 2002, the Court accepted the filing of the plaintiff's initial pleading that
9 it signed and mailed to the Court on September 26, 2002. *Compl.*, CV 02-93 (Sept. 27, 2002).

10 15. On September 26, 2002, the plaintiff served the *Plaintiff's Interrogatories and Request*
11 *for Production of Documents, Set I* (hereinafter *Plaintiff's Discovery Request*) upon the
12 defendant. *Pl.'s Mem. I* at 3; *see also HCN R. Civ. P.* 32, 34. The *Plaintiff's Discovery Request*
13 includes the following individual interrogatories that remain in contention between the parties:

- 14 a. Identify all documents, including internal [Bank] e-mail, voicemail,
15 memoranda, and meeting minutes, which refer or relate to the Swap.
16 b. Identify all other "swap" or "hedging" agreements entered into by
17 [the Bank].

18 *Pl.'s Disc. Req.*, CV 02-93 (Sept. 27, 2002) at 7 (numerical designations modified). Furthermore,
19 the plaintiff requested production of the same in the following manner:

- 20 a. All documents, including internal [Bank] e-mail, voicemail,
21 memoranda, and meeting minutes, which refer or relate to the Swap.
22 b. All documents setting forth, referring, or relating to all other
23 "swap" or "hedging" agreements entered into by [the Bank].

24 *Id.* at 9 (numerical designations modified). In relation to the foregoing interrogatories and
25 requests for documents, the plaintiff imposed the following condition concerning the designated
26 timeframe: "[u]nless otherwise specified, each discovery request set forth herein calls for
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1 information for the period commencing June 1, 1999, and continuing up to and including the date
2 these discovery requests are answered." *Id.* at 5.

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4 16. On October 7, 2003, the defendant served the *Defendant's Amended Answers to*
5 *Interrogatories and Responses to Request for Production of Documents, Set 1* (hereinafter
6 *Defendant's Amended Discovery Response*) upon the plaintiff.⁴ *Pl.'s Mem. I* at 3. The
7 *Defendant's Amended Discovery Response* includes the following individual responses to the
8 individual interrogatories in the order identified above:

9
10 a. An answer to this interrogatory may be derived or ascertained by
11 Plaintiff from the documents produced in response to Document Request
12 [a].

13 b. Defendant objects to this request on the grounds that it is overly
14 broad, unduly burdensome, seeks irrelevant and immaterial information
15 beyond the scope of the claims alleged, is not reasonably designed to lead
16 to the discovery of admissible evidence, and seeks the disclosure of
17 confidential business information.

18 *Def.'s Am. Disc. Resp.* at 8-9 (numerical designations modified). In addition, the defendant
19 provided the following individual responses to the individual requests for documents in the order
20 identified above:

21 a. Documents responsive to this request will be produced at a time
22 and place mutually agreeable to the parties.

23 b. Defendant objects to this request on the grounds that it is unduly
24 burdensome, seeks irrelevant and immaterial information beyond the
25 scope of the claims alleged, is not reasonably designed to lead to the
26 discovery of admissible evidence, and seeks the disclosure of confidential
27 business information.

28 ⁴ On or about November 7, 2002, the plaintiff received the defendant's preliminary discovery response in which it
declined to offer thorough responses due to the outstanding jurisdictional issue before the Court. *Pl.'s Mot. to
Compel Disc.*, CV 02-93 (Jan. 10, 2003), Attach. A. As an aside, the Court implores the plaintiff to use numerical
designations for its attachments and exhibits. *See Am. Scheduling Order* at 3, para. 5.

1 *Id.* at 12 (numerical designations modified). In conjunction with the foregoing answers, the
2 defendant asserted the following general defense: "Defendant objects to each and every request
3 to the extent that it calls for the disclosure of information or communications protected by the
4 attorney-client and attorney work product privileges." *Id.* at 1.

6 17. On or about November 18, 2003, the defendant complied with its above assertion
7 concerning Interrogatory/Request for Documents (a), producing a document listing entitled,
8 *Defendant's Privilege Log*, which included several interoffice electronic mailings and two (2)
9 handwritten notes, but redacted or wholly excluded each item identified as Documents 1-11.
10 *Pl.'s Mot. I, Aff.*, Attach. I-R; *see also Pl.'s Mem. I* at 5.

12 18. In relation to the disclosed documents, the defendant asserts that Documents 1-4 and 6-11
13 are conditionally privileged since "prepared in anticipation of litigation or for trial by or for the
14 Bank, its representatives or its attorney." *Def.'s Resp. I* at 14 (citing N.Y. C.P.L.R. 3101(d)(2)).
15 In addition, the defendant asserts that Documents 3-5 and 11 are entitled to attorney-client
16 privilege since "compris[ing] communications among representatives of the Bank for the purpose
17 of disseminating legal advice from corporate counsel." *Id.* at 14 -15 (citing *Charter One Bank,*
18 *F.S.B. v. Midtown Rochester, L.L.C.*, 191 Misc. 2d 154, 165-66 (N.Y. Sup. Ct. 2002)).

20 19. The defendant concedes that legal counsel did not prepare any of the identified
21 documents, *id.* at 15, 20, but maintains that Documents 3-5 and 11 contain "communications
22 among corporate employees for the purpose of disseminating legal advice from corporate
23 counsel." *Id.* at 21 (citing *Charter One Bank*, 191 Misc. 2d at 165-66).

25 20. On June 22, 2004, the parties conferred regarding the unresolved discovery issues, and
26 plaintiff's counsel agreed to narrow Interrogatory/Request for Documents (b) by proposing two
27

1 (2) alternatives, which defendant's counsel characterized as follows in a June 29, 2004
2 correspondence:

3 First that the request be limited to trades where the payment stream on the
4 notional amount was computed using a fixed interest rate vs. a variable
5 interest rate. . . .

6 Second, that the discovery request be a subset that somehow addresses
7 either trades structured on an amortizing or a non-amortizing notional
8 amount. Your though [*sic*] was that perhaps reviewing trades with one of
these characteristics might meet your objectives.

9 *Pl.'s Mot. I, Aff.*, Attach. F at 2; *see also id.*, Attach. G at 1. Defendant's counsel rejected the first
10 alternative on the following basis: "As I mentioned to you I do not view this as a meaningful
11 limitation. Since all interest rate swaps by definition have that fixed vs. variable interest rate
12 characteristic, this suggestion does not in any way limit your prior request." *Pl.'s Mot. I, Aff.*
13 Attach. F at 2. Defendant's counsel rejected the second alternative on the following basis:

14 I do not believe that this limitation creates any manageable subset or
15 alleviates the problems associated with the breadth of your request. I have
16 determined from the Bank the following information on the number of
17 currently existing trades on the books of the Bank:

18 Non-amortizing - 34,229 trades for a total notional amount of
19 \$4,609,129,360,289
20 Amortizing - 5,842 trades for a total amount of \$120,032,609,381.

21 This reflects only a snapshot of the total amount of information requested.
22 Since such trades are created, expire or are reversed on a daily basis, if we
23 would attempt to look at all of the transactions which existed between June
1, 1999 and the date of our discovery answers, the actual volume of data
requested would be multiple times these figures.

24 Needless to say we are talking hundreds of thousands of transactions with
25 notional amounts well over one hundred trillion dollars. Any attempt to
26 produce, let alone analyze, this staggering amount of data would in
27 additional [*sic*] to creating all of the problems previously raised by my
objections, create a burden so extreme as to be unmanageable by either
party.

28 *Id.* at 2-3.

1 21. On July 6, 2004, plaintiff's counsel disputed the above characterization, and clarified that
2 the plaintiff's proposal required "the Bank to produce information regarding any swap
3 agreements by the Bank that have an underlying self-reducing credit facility similar to the
4 reducing revolving credit facility entered into between the Bank and the Nation." *Id.*, Attach. G
5 at 2. Plaintiff's counsel continued:
6

7 First, it seems clear that if other swap agreements with underlying
8 reducing credit facilities entered into by your client have notional amounts
9 that decrease in parity with the underlying credit facility, then it is more
10 likely than not that the swap between your client and the Nation was
11 intended to and/or should have similarly decreased in parity with the
12 reducing revolving credit facility. Second, your client has given no
13 suggestions as to how this request may be narrowed. I ask that your client
14 produce documents and information regarding other swap agreements as
15 narrowed.

13 *Id.*

14 22. On July 20, 2004, defendant's counsel offered this response to the preceding clarification:
15

16 I would repeat that this request is overly broad I have struggled with
17 the concept of narrowing the request, but the practical problem is that
18 every swap is unique because it is based on the individual circumstances
19 of the persons or entity entering into the swap and that person or entities
20 [*sic*] tolerance for interest rate risk.

19 *Id.*, Attach. H at 1. Defendant's counsel proposed "hold[ing] this issue in abeyance" pending
20 retention of an expert who might suggest an even narrower production of statistical evidence.
21

22 *Id.*; *see also* LPER at 2, 10:18:16 CDT.

23 23. On August 31, 2004, plaintiff's counsel informed the Court that on August 30, 2004, he
24 contacted defendant's counsel and

25 suggested that the Bank provide the Nation, instead of with the actual
26 documents and information regarding similar swaps, that they would
27 provide us with sort of statistical information that would allow us to
28 discover for the swaps that are similar to ours, if any, how many of them
decreased and how many of them didn't decrease.

1 *Id.* at 1, 10:12:18 CDT. The plaintiff hoped that this most recent narrowing of Interrogatory/
2 Request for Documents (b) would placate the defendant's confidentiality and breadth of request
3 concerns. Defendant's counsel asked that the Court withhold a ruling on this issue pending
4 discussion with his client, but neither party has presented any subsequent stipulation. *Id.* at 7,
5 11:02:27 CDT.
6

7 24. On September 2, 2004, the plaintiff took the deposition of Constance Scholfield, an
8 employee of defendant's counsel, Moss & Barnett, after having provided notice on August 6,
9 2004. *See HCN R. Civ. P. 33. The Notice of Taking Deposition of Defendant Bank of America*
10 *Corporation, N.A.* stated, in relevant part, the following: "Defendant shall designate and make
11 available for deposition . . . other persons who consent to testify on its behalf concerning . . .
12 Defendant's efforts to locate and produce documents, and the origin of document B0A00142."
13 *Pl.'s Mot. II, Aff.*, Attach. A. One day earlier, defendant's counsel informed plaintiff's counsel
14 that Ms. Scholfield would appear "solely to convey information provided by Bank of America in
15 response to the [above item within] the deposition notice and for no other purpose." *Id.*, Attach.
16 B at 2. Defendant's counsel also noted that "the Bank intends to produce another witness on
17 Friday, September 10, 2004 to respond to the other portions of the deposition notice."⁵ *Id.*
18
19

20 25. On September 10, 2004, the plaintiff took the deposition of Mr. Tonies, and sought
21 testimony concerning the April 2002 meeting, which is the subject of *Finding of Fact No. 9*.
22 Plaintiff's counsel engaged the deponent in the following line of questioning:
23

24 Pl.'s Att'y: How did you -- what were the circumstances that led up to
25 you taking part in this conference with Mike Fitzpatrick in
26 April of 2002?

27 ⁵ In a September 1, 2004 written response, plaintiff's counsel emphasized that "during yesterday's hearing
28 [defendant's counsel] indicated on the record that the Bank's custodian of records would be made available for [the
September 2, 2004] deposition." *Pl.'s Mot. II, Aff.*, Attach. C. Defendant's counsel, however, only remarked that he
would be "willing to produce someone to talk about the efforts that were undertaken to produce the documents."
LPER at 12, 11:42:15 CDT; *see also id.* at 13-14, 11:44:06, 11:48:58 CDT.

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Deponent: Jim Baka asked me to attend the meeting at Virchow Krause's offices in Milwaukee with Michael Fitzpatrick and another name that escapes me from the firm to discuss the interest rate swap. . . .

Pl.'s Att'y: And what was discussed at the meeting?

Deponent: That Virchow Krause had been hired to do a financial overview for the Ho-Chunk Nation, that it included among other things an analysis of their debt and hedging instrument. In Virchow Krause's opinion the hedge that had been provided was inappropriate and not consistent with the members of the tribe that they had spoken with and their understanding.

Pl.'s Att'y: Okay. And after you attended this meeting in April 2002 was -- was Jim Baka present?

Deponent: He was. . . .

Pl.'s Att'y: And after you attended this meeting did you begin an internal investigation into the circumstances surrounding the execution of the swap?

Deponent: I did immediately.

Pl.'s Att'y: And how did you start that?

Deponent: By contacting my manager Jeff McNeill.

Pl.'s Att'y: And what did you talk to Mr. McNeill about?

Deponent: The nature of their complaint and threats.

Pl.'s Att'y: And did they make any threats at the meeting?

Deponent: Yes. That the Nation expected to be made whole and was very adamant about pursuing this whether it be through settlement or litigation sort.

Pl.'s Att'y: And who represented that?

Deponent: Either Michael Fitzpatrick or the other individual from that firm.

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Pl.'s Att'y: And at that time did they say that the Nation would be -- would pursue this into litigation if it was necessary?

Deponent: Yes. It was certainly part of the conversation that this was a very serious matter that they intended to see through through one means or the other. . . .

Pl.'s Att'y: Did they seem threatening to you or was it a matter of fact statement that this was a serious matter?

Deponent: Clearly threatening.

Pl.'s Att'y: Thank you. Now, when you contacted Mr. McNeill regarding the complaint that had been raised by the Ho-Chunk Nation did he give you any instructions?

Deponent: Yes. That we needed to research the documentation that we had regarding the trade, that we needed to speak with Kerry Jordan and Jim Baka regarding circumstances around the trade, and that we should notify our in-house legal counsel who at the time was Bob Lendino.

Pl.'s Att'y: And did you accomplish each of these tasks?

Deponent: I did.

Dep. of Craig R. Tonies, CV 02-93 (Sept. 10, 2004) at 138-40.

26. On September 16, 2004, the plaintiff requested that the Court impose monetary sanctions upon the defendant for its designation of a deponent, Ms. Scholfield, who "had virtually no knowledge of the Bank's efforts to locate and produce responsive documents," and whose "total preparation for [the] deposition on this subject consisted of a fifteen minute telephone conversation with representatives of the Bank the day before her deposition." *Pl.'s Mem. II* at 1; *see also HCN R. Civ. P. 37.*

27. On September 21, 2004, the defendant objected to the plaintiff's request, citing reliance upon the Court's recent decision wherein it stated that "[t]he plaintiff's *Notice of Taking Deposition* does provide sufficient guidance to the defendant as to what individual

1 representatives of the corporate entity should be made available for deposition." *Def.'s Resp. II*
2 at 2 (quoting *Order (Denying Mot. for Protective Order)* at 2). The defendant claimed objective
3 compliance with the deposition notice, and blamed any resulting frustration upon "the lack of
4 precision in the Notice and not a lack of production by the Bank." *Id.* at 5.

7 DECISION

8
9 The Court established the bases for its exercise of subject matter jurisdiction within the
10 May 19, 2003 *Order (Denying Motion to Dismiss)*. The Court now offers further clarification of
11 its jurisdictional authority as it relates to the issue of governing law. The CONSTITUTION sets
12 forth the parameters of the Court's limited jurisdiction, namely: "over all cases and controversies
13 . . . arising under the Constitution, laws, customs and traditions of the Ho-Chunk Nation."
14 CONST., ART. VII, § 5(a); *see also* HCN JUDICIARY ESTABLISHMENT & ORG. ACT (hereinafter
15 JUDICIARY ACT), 1 HCC § 1.4; *Ho-Chunk Nation v. Harry Steindorf et al.*, CV 99-82 (HCN Tr.
16 Ct., Feb. 11, 2000), *aff'd*, SU 00-04 (HCN S. Ct., Sept. 29, 2000). Consequently, when the Court
17 confronts a contractual dispute, it must be capable of identifying a fount of law from which the
18 cause of action flows. In this regard, the Court has previously indicated that the Legislature may
19 create law in conjunction with and as a consequence of its constitutional authority to enter into a
20 contract or agreement. *Ho-Chunk Nation v. B & K Builders, Inc. et al.*, CV 00-91 (HCN Tr. Ct.,
21 June 20, 2001) at 10-11; *see also* CONST., ART. V, § 2(a), (i).

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24 In the instant case, the Legislature entered into the *Agreement*, thereby elevating its terms
25 and conditions to the status of substantive law, including the incorporation of the "laws of the
26 State of New York." *Def.'s Mot. I*, Attach. C at 6. The Court accordingly derived its subject
27 matter jurisdiction over the cause of action by virtue of the logical interplay of constitutional
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1 provisions.⁶ The Legislature pronounced law, and the plaintiff brought its suit under the
2 provisions of such law. The Court accepted this filing without question since "[a]ny such case
3 or controversy arising within the jurisdiction of the Ho-Chunk Nation shall be filed in the Trial
4 Court before it is filed in any other court."⁷ CONST., ART. VII, § 5(a).

5
6 The CONSTITUTION provides the overarching law in each and every action arising within
7 the jurisdiction of this Court. No branch of government may permissibly remove constitutional
8 law from a contractual arrangement. CONST., ARTS. I, § 1-2, III, § 4. The defendant should have
9 reasonably acquainted itself with the fundamental prevailing law of the Nation. *See Marx Adver.*
10 *Agency, Inc. v. Ho-Chunk Nation et al.*, CV 04-16 (HCN Tr. Ct., Sept. 10, 2004) at 9, *aff'd*, SU
11 04-07 (HCN S. Ct., Apr. 29, 2005). Any individual can view the full text of the CONSTITUTION
12 at the Nation's official website, and may obtain copies from numerous sources within the Nation.
13 <http://www.ho-chunknation.com/government/constitution.htm> (last visited Jan. 26, 2006) (on file
14 with MIS Dep't).

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16
17 In the same respect that no governmental branch can act outside constitutional confines,
18 no branch may exercise the constitutional authority delegated to a co-equal branch of
19 government by the HCN General Council, *i.e.*, the People of the Nation. CONST., ARTS. III, § 3,
20 IV, §§ 1-2. While the Legislature may promulgate law, the Legislature cannot enact judicial
21 procedural rules. *Id.*, ARTS. V, § 2(a), VII, § 7(b); *see also* JUDICIARY ACT, § 1.5c. The
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24 ⁶ The primacy of the constitutional analysis, in part, precluded the Court from examining the former LONG ARM
25 STATUTE. The Legislature re-codified this statute on July 20, 2005, and it presently appears as 2 HCC § 15 within
26 the Ho-Chunk Code. Individuals can obtain a copy of applicable laws by contacting the Ho-Chunk Nation
Legislature at (715) 284-9343 or (800) 294-9343 or visiting the legislative website at www.ho-chunknation.com/government/legis/code/INDEX2.html.

27 ⁷ The Court appropriately scrutinizes each pleading's jurisdictional statement. *HCN R. Civ. P.* 3(A). For example,
28 the Court retains discretion to grant default judgments by virtue of the permissive wording of the relevant rule. *Id.*,
Rule 54(A). The Court, therefore, maintains an obvious policy of declining to enter default judgments due to
unresolved jurisdictional issues. *See, e.g., Citizens Cmty. Fed. v. Neperud*, CV 04-18 (HCN Tr. Ct., Apr. 26, 2004);
Scholze Ace Home Ctr., Inc. v. Perry, CV 00-92 (HCN Tr. Ct., Oct. 26, 2000).

1 defendant fittingly questioned "whether New York procedural law or Ho-Chunk procedural law
2 applies to this litigation." *Def.'s Resp. I* at 3 n.2. The Court is constitutionally obligated to
3 apply the procedural rules adopted by the Supreme Court "in all actions and proceedings." *HCN*
4 *R. Civ. P.* 1; *see also* JUDICIARY ACT, § 1.5d. Legislative attempts to adopt purely procedural
5 rules have resulted in determinations of unconstitutionality. *Bonnie Smith v. Ho-Chunk Nation*
6 *Gaming Comm'n*, CV 01-02 (HCN Tr. Ct., Feb. 14, 2001), *aff'd*, SU 01-02 (HCN S. Ct., June
7 15, 2001).

8
9 As a result, the Court will interpret and apply New York substantive law, *i.e.*, laws of the
10 Nation, in resolving certain issues presented within the pending motions. *See* CONST., ART. IV, §
11 2. New York statutory law in effect upon the execution of the *Agreement*, including any final
12 judicial interpretations of such law by the New York Court of Appeals, comprises the applicable
13 substantive law. The Court shall deem all other lower foreign court decisions as persuasive
14 authority since the Legislature could not act to supersede either this Court's or the Supreme
15 Court's interpretations of the law with those not entitled to *stare decisis* effect in the other
16 jurisdiction. As warranted, the Court shall apply the *HCN R. Civ. P.* or FED. R. EVID. to other
17 issues presented within the pending motions. The Court shall now separately address and
18 resolve the four (4) distinct issues before it.
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22 **I. Does the defendant properly assert qualified immunity**
23 **pursuant to N.Y. C.P.L.R. 3101(d)(2) in response to plaintiff's**
24 **Interrogatory/Request for Documents (a) for the purpose of**
25 **avoiding full disclosure of Documents 1-4 and 6-11?**

26 The Court refers to New York statutory law on this issue, but notes, in general, that "[i]t
27 is the policy of the Court to favor open discovery of relevant material as a way of fostering full
28 knowledge of the facts relevant to a case by all parties." *HCN R. Civ. P.*, Ch. V, Intro. In

1 particular, the Supreme Court has not identified the assertion of such privilege as within the
2 bounds of judicial procedure.⁸ The applicable law provides:

3 materials otherwise discoverable . . . and prepared in anticipation of
4 litigation or for trial by or for another party . . . may be obtained only upon
5 a showing that the party seeking discovery has substantial need of the
6 materials in the preparation of the case and is unable without undue
7 hardship to obtain the substantial equivalent of the materials by other
8 means.

9 N.Y. C.P.L.R. 3101(d)(2). The Court, therefore, must offer an interpretation of the phrase,
10 "prepared in anticipation of litigation." The defendant cannot assert that it prepared any of the
11 documents "for trial" since the plaintiff filed its initial pleading after their creation.

12 Each party draws the Court's attention to a number of New York judgments that attempt
13 to elucidate the meaning of the above provision. The Court shall provide an overview of the
14 relevant case law, which the parties largely agree upon in their respective memoranda.⁹ The
15 Court will adopt the reasoning within the cited cases to effectuate the reasonable intentions of the
16 parties by inclusion of the governing law clause. To begin, "the burden of establishing any right
17 to protection is on the party asserting it; the protection claimed must be narrowly construed; and
18 its application must be consistent with the purposes underlying the immunity." *Spectrum Sys.*

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22 ⁸ The FED. R. EVID. references the Supreme Court's reserved authority to promulgate rules affecting privilege. FED.
23 R. EVID. 501. The Supreme Court indeed possesses "exclusive authority and responsibility to . . . establish written
24 rules and procedures governing the use and operation of the Courts." JUDICIARY ACT, § 1.5c. However, the
25 Supreme Court has neither adopted any rules pertaining to the asserted qualified immunity at issue nor designated
26 such as purely procedural as opposed to quasi-procedural or purely legal. Also, the Nation maintains no common
27 law of privileges. The HCN Traditional Court reveals *hocqk* tradition and custom through formal pronouncements,
28 and these articulations form the basis of the Nation's common law. See CONST., ART. VII, § 5(a); see also *Ho-
Chunk Nation v. B & K Builders, Inc. et al.*, CV 00-91 (HCN Tr. Ct., June 20, 2001) at 15-16. The Court recognizes
that FED. R. EVID. 501 does not readily integrate with the tribal context, but the Supreme Court chose to adopt
foreign rules by incorporation as opposed to drafting a tribal equivalent. In 1999, the Supreme Court adopted the
FED R. EVID. pending "full adoption of the Ho-Chunk Nation Rules of Evidence." *In re Adoption of Fed. R. Evid.*
(HCN S. Ct., June 5, 1999).

⁹ The defendant principally relies upon an unpublished slip opinion that analyzes the work product rule embedded
within FED. R. CIV. P. 26(b)(3). *Royal Indem. Co. v. Salomon Smith Barney, Inc.*, 2004 N.Y. Misc. LEXIS 1052, at
*8-9 (N.Y. Sup. Ct. June 29, 2004). The Court accordingly declines to discuss this opinion.

1 *Int'l Corp. v. Chem. Bank*, 78 N.Y.2d 371, 377 (N.Y. 1991). Specifically in regards to a claim of
2 qualified immunity, "[t]he burden is upon the . . . party opposing discovery[] to demonstrate that
3 the reports and documents are nondiscoverable."¹⁰ *Crow-Crimmins-Wolf & Munier v. County of*
4 *Westchester*, 123 A.D.2d 813, 814 (N.Y. App. Div. 1986).

6 "[U]nder New York law, 'material prepared by non-attorneys in anticipation of litigation .
7 . . is immune from discovery only where the material is prepared exclusively and in specific
8 response to imminent litigation.'" *Calabro v. Stone*, 225 F.R.D. 96, 99 n.1 (E.D.N.Y. 2004)
9 (quoting *Willis v. Westin Hotel Co.*, 1987 U.S. Dist. LEXIS 524, at *1 (S.D.N.Y. Jan. 30, 1987)).
10 Furthermore, "although the prospect of litigation may have been cogent at the time, . . . 'multi-
11 motivated reports do not warrant the immunity if litigation is but one of the motives.'" *Stenovich v.*
12 *Wachtell, Lipton, Rosen & Katz*, 195 Misc. 2d 99, 116 (N.Y. Sup. Ct. 2003) (quoting *Chemical*
13 *Bank v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 70 A.D.2d 837, 838 (N.Y. Sup. Ct. 1979)).
14

16 [A]s a general matter, the work-product rule applies only to documents
17 prepared principally or exclusively to assist in anticipated or ongoing
18 litigation. It follows, then, that if a party prepares a document in the
19 ordinary course of its business, it will not be protected even if the party is
20 aware that the document may also be useful in the event of litigation.

21 *Stenovich*, 195 Misc. 2d. at 116 (quoting *Martin v. Valley Natl. Bank of Arizona*, 140 F.R.D. 291,
22 304 (S.D.N.Y. 1991) (citations omitted)).
23

24 ¹⁰ The plaintiff objects to the defendant's filing of a deposition excerpt after the August 31, 2004 *Motion Hearing* in
25 order to establish the point in time at which the defendant perceived the threat of litigation. The plaintiff faults the
26 defendant for failing to satisfy its burden at the *Hearing*, and claims that the defendant should have supported its
27 motion response with affidavits. The applicable rule, however, does not impose such a requirement. *HCN R. Civ.*
28 *P.* 19(B). The Court would have informed the non-movant of any extra-procedural requirements imposed by the
case law as it does when confronting summary judgment motions. *Aleksandra Cichowski v. Four Winds Ins.*
Agency, LLC, CV 01-90 (HCN Tr. Ct., Dec. 15, 2003) at 15-18, *aff'd*, SU 04-01 (HCN S. Ct., Aug. 20, 2004). The
Court did not do so since it had not yet informed the parties of whether New York or Ho-Chunk law governed the
issue. As a final note, the Court shall require parties represented by counsel to place requests in formal motions to
the Court instead of in letter form. See *HCN R. Civ. P.* 18; see also *In re: Casimir T. Ostrowski*, SU 05-01 (HCN S.
Ct., Feb. 21, 2005) at 2 n.1.

1 In the instant case, the Court cannot discern whether the partially or wholly redacted
2 documents satisfy the foregoing tests without viewing the original documents. The defendant,
3 however, questioned the propriety of the presiding judge conducting an *in camera* inspection
4 since the parties will be participating in a bench trial. LPER at 7, 11:00:00 CDT. In order to
5 avoid claims of prejudice, the Court has appointed a *pro tempore* judge to view the documents *in*
6 *camera*.
7

8 The defendant must submit copies of the unaltered documents to *Pro Tempore* Judge
9 Kimberly Vele at N8725 Silver Creek Road, Bowler, WI 54416,¹¹ within fifteen (15) calendar
10 days of the issuance of this judgment. Along with this decision, the Court will forward a copy of
11 the *Defendant's Privilege Log* and accompanying documents to Judge Vele for purposes of
12 comparison. Judge Vele shall make a single copy of the unaltered documents upon receipt, and
13 subsequently render a written determination as to the permissible extent of their production
14 within thirty (30) days. Along with this determination, which the *pro tempore* judge shall submit
15 to the Clerk of Court for filing, Judge Vele shall provide the documents bearing her redactions to
16 the defendant.
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19 The defendant shall then have ten (10) calendar days after the entry of such interlocutory
20 order to file a petition for permission to appeal with the Supreme Court. *HCN R. App. P. 8*. The
21 defendant shall also seek a stay of the judgment from this Court in the event it files an
22 interlocutory appeal. *HCN R. Civ. P. 68*. Judge Vele shall neither deliver copies of her
23 redactions nor the written decision to the plaintiff until after affording the defendant the
24 opportunity to request the foregoing relief. The Clerk of Court shall release a copy of the
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27
28 ¹¹ Attorney Kimberly Vele presently serves as an Associate Judge of the Sac & Fox Tribe of the Mississippi in Iowa
and the Stockbridge Munsee Community in Wisconsin.

1 decision to the plaintiff in the absence of an appeal, and at no time prior shall she reveal the
2 decision to the presiding judge or other individuals. Judge Vele shall transmit the reserved
3 plaintiff's copies to the Clerk of Court for filing and delivery to the plaintiff in the absence of an
4 appeal.
5

6 Judge Vele must remain cognizant that "the mere assertion that [the disputed records]
7 constitute an attorney's work product or material prepared for litigation will not suffice."
8 *Zimmerman v. Nassau Hosp.*, 76 A.D.2d 921, 921 (N.Y. App. Div. 1980). The *pro tempore*
9 judge must thoughtfully and deliberately apply the above tests. The Court is confident that Judge
10 Vele will diligently and carefully perform this task, and appreciates her assistance in this regard.
11

12 In the event that the plaintiff disagrees with the results of the *in camera* inspection, it may
13 still seek full or greater production of the documents by establishing "substantial need of the
14 materials in the preparation of [its] case and [that it] is unable without undue hardship to obtain
15 the substantial equivalent of the materials by other means." N.Y. C.P.L.R. 3101(d)(2). The
16 plaintiff may file a motion for this purpose within thirty (30) days after the conclusion of the
17 discovery period. The parties shall inform the Court of the date for the anticipated close of
18 discovery within sixty (60) days of the entrance of this decision.
19

20 **II. Does the defendant properly assert attorney work product**
21 **privilege pursuant to N.Y. C.P.L.R. 3101(c) in response to**
22 **plaintiff's Interrogatory/Request for Documents (a) for the**
23 **purpose of avoiding full disclosure of Documents 3-5 and 11?**

24 The Court shall not reiterate its statements concerning the extent and application of Ho-
25 Chunk procedural rules to the present question. The Court will note that the Supreme Court
26 adopted the State of Wisconsin *Rules of Professional Conduct for Attorneys* on August 31,
27
28

1 1996.¹² The professional rules do not directly address attorney-client privilege, but the Ho-
2 Chunk Oath or Affirmation includes the promise that legal counsel "will maintain the confidence
3 and preserve inviolate the secrets of [their] client." *Rules for Admission to Practice*, Rule IX.
4 This provision is not directly implicated in this case since defendant's counsel seeks to bar
5 disclosure of corporate counsel's statements, which purportedly other corporate employees
6 communicated amongst one another.
7

8 The applicable law provides that "[t]he work product of an attorney shall not be
9 obtainable." N.Y. C.P.L.R. 3101(c). By implicit reference, the work product in question may
10 also include the following proscription related to attorney-client privilege: "Unless the client
11 waives the privilege, an attorney . . . shall not disclose, or be allowed to disclose such
12 communication, nor shall the client be compelled to disclose such communication, in any action .
13 . . ." ¹³ N.Y. C.P.L.R. 4503(a)(1). The law appears rather straightforward, but the Court shall
14 offer the below overview of New York case law to address the unique situation at hand. The
15 state courts often combine the two (2) analyses, and any subsequent convergence in the
16 discussion is a result of this fact.
17
18

19 The defendant contends that the identified documents reveal either corporate counsel
20 work product or privileged communications or both. The plaintiff counters that former corporate
21 counsel did not create the documents, but authorship does not prove dispositive.
22

23 Legal advice to a corporate client inherently involves dispersing the advice
24 to corporate representatives. Specifically when the communication is from
25 the attorney to the client, the communications "must be made for the
26 purposes of facilitating the rendition of legal advice or services, in the

27 ¹² Similar to its adoption of the FED. R. EVID., the Supreme Court adopted the Wisconsin *Rules of Professional*
28 *Conduct for Attorneys*, SCR 20 pending "full adoption of the Ho-Chunk Nation *Rules of Professional Conduct for*
Attorneys." *In re Adoption of Rules of Prof'l Conduct for Att'ys* (HCN S. Ct., Aug. 31, 1996).

¹³ Although possessing attributes of substance and procedure, confidential attorney communications predating
litigation "are deemed substantive in nature for conflict of law purposes." *Brandman v. Cross & Brown Co. of Fla.,*
Inc., 125 Misc. 2d 185, 186 (N.Y. Sup. Ct. 1984) (citing N.Y. C.P.L.R. 4503).

1 course of a professional relationship." *Rossi v. Blue Cross & Blue Shield*,
2 73 N.Y.2d 588, 593 (N.Y. 1989). The United States District Court for the
3 Southern District of New York sets forth general principles related to the
4 application of the privilege to advice rendered by the attorney to a
5 corporate client.

6 "The privilege protects from disclosure communications among corporate
7 employees that reflect advice rendered by counsel to the corporation. 'A
8 privileged communication should not lose its protection if an executive
9 relays legal advice to another who shares responsibility for the subject
10 matter underlying the consultation.' *SCM Corp. v. Xerox Corp.*, 70 F.R.D.
11 508, 518 (D. Conn. 1976), *appeal dismissed*, 534 F.2d 1031, 1032 (2d Cir.
12 1976). This follows from the recognition that since the decision-making
13 power of the corporate client may be diffused among several employees,
14 the dissemination of confidential communications to such persons does not
15 defeat the privilege." *Bank Brussels Lambert v Credit Lyonnais (Suisse),*
16 S.A., 160 FRD 437, 442 (S.D.N.Y. 1995) (citations omitted).

17 The inquiry, when there is an attorney-corporate client relationship, as to
18 whether a document is privileged is fact specific with an appraisal being
19 made as to whether it is protected legal communications or just
20 unprotected business communications. *Rossi*, 73 N.Y.2d at 593. The
21 proponent of the privilege has the burden of establishing that the
22 information was a communication between client and counsel, that it was
23 intended to be and was kept confidential, and it was made in order to assist
24 in obtaining or providing legal advice or services to the client.

25 *Charter One Bank*, 191 Misc. 2d at 165-66.

26 A court must discern the role occupied by corporate counsel when scrutinizing particular
27 statements.

28 [U]nlike the situation where a client individually engages a lawyer in a
particular matter, staff attorneys may serve as company officers, with
mixed business-legal responsibility; whether or not officers, their day-to-
day involvement in their employers' affairs may blur the line between legal
and nonlegal communications; and their advice may originate not in
response to the client's consultation about a particular problem but with
them, as part of an ongoing, permanent relationship with the organization.
In that the privilege obstructs the truth-finding process and its scope is
limited to that which is necessary to achieve its purpose the need to apply
it cautiously and narrowly is heightened in the case of corporate staff
counsel, lest the mere participation of an attorney be used to seal off
disclosure.

1 *Rossi*, 73 N.Y.2d at 592-93. Furthermore, unlike the qualified immunity imparted by N.Y.
2 C.P.L.R. 3101(d)(2), an assertion of either attorney work product or privileged communication
3 does not necessarily falter if the proponent's actions were not undertaken in anticipation of
4 litigation. A court's focus, instead, must remain upon the character of the conduct in question,
5 *i.e.*, whether in or in conjunction with the performance of one's professional responsibility as an
6 attorney.
7

8 Pertaining to attorney-client privilege, "[t]he communication must be made for the
9 purpose of obtaining legal advice and directed to an attorney who has been consulted for that
10 purpose. Conversely, one who seeks out an attorney for business or personal advice may not
11 assert a privilege as to those communications." *In re Bekins Record Storage Co.*, 62 N.Y.2d 324,
12 329 (N.Y. 1984) (citations omitted). In this respect, the prospect of litigation may shed some
13 light upon the motivations of counsel.¹⁴ For example, if an attorney produces documents
14 significantly in advance of litigation, then the documents may "concern both the business and
15 legal aspects of a defendant[']s ongoing negotiations with [a] plaintiff with respect to [a] business
16 transaction out of which [an] underlying lawsuit ultimately ar[ises]." *Cooper-Rutter Assoc., Inc.*
17 *v. Anchor Nat'l Life Ins. Co.*, 168 A.D.2d 663, 663 (N.Y. App. Div. 1990). When confronted
18 with such a situation, a court may deem that documents do not possess a "primar[y] . . . legal
19 character, but express[] substantial non-legal concerns." *Id.*
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26 ¹⁴ The defendant seizes upon the apparent threshold evidenced by the phrase, "prospect of litigation," when
27 determining whether documents merit qualified immunity protection pursuant to N.Y. C.P.L.R. 3101(d)(2). LPER
28 at 5, 10:46:29 CDT; *see also Def.'s Resp. I* at 16-17. The New York Court of Appeals used this phrase when
drawing a distinction between the immunities at issue here, stating "[t]he prospect of litigation may be relevant to
the subject of work product and trial preparation materials, but the attorney-client privilege is not tied to the
contemplation of litigation." *Spectrum Sys.*, 78 N.Y.2d at 380. The Court did not intend to erect a more lenient test
that that included in Part I of this decision, but rather referred to the analysis in general terms.

1 An attorney's work product must similarly arise in the context of his or her professional
2 capacity as legal counsel. N.Y. C.P.L.R. 3101(c)

3 affords absolute immunity from disclosure of attorney's work product.
4 The work product of an attorney is reflected "in interviews, statements,
5 memoranda, correspondence, briefs, mental impressions, personal beliefs,
6 and countless other tangible and intangible ways." *Hickman v Taylor*, 329
7 US 495, 511 (1947). It is a generally recognized policy that for an
8 attorney to properly represent a client, the lawyer be allowed to "assemble
9 information, sift what he considers to be the relevant from the irrelevant
10 facts, prepare his legal theories and plan his strategy without undue and
11 needless interference." *Id.* A lawyer must work on a client's behalf "with
12 a certain degree of privacy, free from unnecessary intrusion by opposing
13 parties and their counsel [Otherwise,] much of what is now put down
14 in writing would remain unwritten."

15 *Charter One Bank*, 191 Misc. 2d at 159 (quoting *id.* at 510-11) (citations and footnote omitted).

16 However, "[n]ot every manifestation of a lawyer's labors enjoys the absolute immunity of work
17 product. The exemption should be limited to those materials which are uniquely the product of a
18 lawyer's learning and professional skills, such as materials which reflect his legal research,
19 analysis, conclusions, legal theory or strategy." *Hoffman v. Ro-San Manor*, 73 A.D.2d 207, 211
20 (N.Y. App. Div. 1980).

21 Despite the potential for a fact-finding dilemma, the preceding discussion, for our
22 purposes, distills to a single proposition: "[d]ocuments protected by the attorney-client privilege
23 are absolutely immune from discovery." *Charter One Bank*, 191 Misc. 2d at 158 (citing N.Y.
24 C.P.L.R. 3101(b)). The defendant in the case at bar contends that the redacted portions of
25 Documents 3-5 and 11 "relay legal advice rendered by the Bank's attorneys among
26 representatives of the Bank." *Def.'s Resp. I* at 21. However, if the representatives also sought
27 legal advice of counsel, "[f]or the privilege to apply when communications are made from client
28 to attorney, they 'must be made for the purpose of obtaining legal advice and directed to an

1 attorney who has been consulted for that purpose.'" *Rossi*, 73 N.Y.2d at 593 (quoting *In re*
2 *Bekins*, 62 N.Y.2d at 329).

3
4 In the instant case, the Court cannot discern whether the partially or wholly redacted
5 documents satisfy the foregoing tests without viewing the original documents. The defendant,
6 however, questioned the propriety of the presiding judge conducting an *in camera* inspection
7 since the parties will be participating in a bench trial. LPER at 7, 11:00:00 CDT. In order to
8 avoid claims of prejudice, the Court has appointed a *pro tempore* judge to view the documents *in*
9 *camera*.

10
11 The defendant must submit copies of the unaltered documents to *Pro Tempore* Judge
12 Kimberly Vele at N8725 Silver Creek Road, Bowler, WI 54416, within fifteen (15) calendar
13 days of the issuance of this judgment. Along with this decision, the Court will forward a copy of
14 the *Defendant's Privilege Log* and accompanying documents to Judge Vele for purposes of
15 comparison. Judge Vele shall make a single copy of the unaltered documents upon receipt, and
16 subsequently render a written determination as to the permissible extent of their production
17 within thirty (30) days. Along with this determination, which the *pro tempore* judge shall submit
18 to the Clerk of Court for filing, Judge Vele shall provide the documents bearing her redactions to
19 the defendant.

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21
22 The defendant shall then have ten (10) calendar days after the entry of such interlocutory
23 order to file a petition for permission to appeal with the Supreme Court. *HCN R. App. P. 8*. The
24 defendant shall also seek a stay of the judgment from this Court in the event it files an
25 interlocutory appeal. *HCN R. Civ. P. 68*. Judge Vele shall neither deliver copies of her
26 redactions nor the written decision to the plaintiff until after affording the defendant the
27 opportunity to request the foregoing relief. The Clerk of Court shall release a copy of the
28

1 decision to the plaintiff in the absence of an appeal, and at no time prior shall she reveal the
2 decision to the presiding judge or other individuals. Judge Vele shall transmit the reserved
3 plaintiff's copies to the Clerk of Court for filing and delivery to the plaintiff in the absence of an
4 appeal.
5

6 Judge Vele must remain cognizant that "the mere assertion that [the disputed records]
7 constitute an attorney's work product or material prepared for litigation will not suffice."
8 *Zimmerman*, 76 A.D.2d at 921. The *pro tempore* judge must thoughtfully and deliberately apply
9 the above tests. The Court is confident that Judge Vele will diligently and carefully perform this
10 task, and appreciates her assistance in this regard.
11

12 In contrast to the preceding section, the plaintiff cannot subsequently attempt to
13 overcome a successful assertion of attorney work product or attorney-client communication
14 privilege. N.Y. C.P.L.R. 3101 clearly distinguishes between these privileges and the above-
15 discussed qualified privilege. "The immunity which attaches to work product under subdivision
16 (c) is absolute, while the immunity conferred on litigation material under subdivision (d) is
17 conditional." *Hoffman*, 73 A.D.2d at 211.
18

19 **III. Does the defendant properly assert undue burden pursuant to**
20 ***HCN R. Civ. P. 36* in response to plaintiff's Interrogatory/**
21 **Request for Documents (b) for the purpose of avoiding full**
22 **disclosure of a voluminous amount of swap or hedging**
23 **agreements entered into during an established timeframe?**

24 The phrasing of the above question should reveal the Court's answer to this issue.
25 Despite the plaintiff's attempts to narrow the scope of its discovery request, the defendant
26 reasonably objects to the scope of the request as indicated in its responses set forth in *Findings of*
27 *Fact* Nos. 20 and 22. Additionally, the Court must refrain from acting as an instrumentality for
28

1 the inappropriate divulging of confidential banking information of individuals and entities not
2 parties to this suit.

3
4 However, the plaintiff is undeniably attempting to seek relevant information as defined
5 by the applicable evidentiary rule. As stated above, "the Court . . . favor[s] open discovery of
6 relevant material . . . ," and recognizes the obviously broad definition of "relevant evidence."¹⁵
7 *HCN R. Civ. P.*, Ch. V, Intro; see also *Ronald K. Kirkwood v. Francis Decorah et al.*, CV 04-33
8 (HCN Tr. Ct., Oct. 18, 2004) at 5 (noting the Court's need to liberally construe the discovery
9 rules as required by *HCN R. Civ. P.* 2). "'Relevant evidence' means evidence having any
10 tendency to make the existence of any fact that is of consequence to the determination of the
11 action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.
12

13 Therefore, the Court deems the defendant's objections on the bases of the plaintiff
14 allegedly seeking "irrelevant and immaterial information beyond the scope of the claims alleged"
15 or information "not reasonably designed to lead to the discovery of admissible evidence" as
16 either indefensible or premature. *Def.'s Am. Disc. Resp.* at 9. The plaintiff requested the
17 information in order to ascertain whether the defendant adheres to an industry or internal
18 standard regarding the composition of swap or hedging agreements, and whether the Bank's
19 agents that structured the *Agreement* knew or should have known of such standards. LPER at 2-
20 3, 10:20:21, 10:24:05 CDT. The Court accordingly holds that the defendant must provide the
21 plaintiff with the requested information, but in a manner that adequately addresses confidentiality
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27 ¹⁵ The Supreme Court has not analyzed the discovery rules, in general, or the definition of relevant in evidence, in
28 particular. The Supreme Court has clarified that "[w]hile the trial court should try to remain consistent in its
decisions, only decisions by th[e HCN Supreme Court] are limitations on the Trial Court." *Jacob LoneTree et al. v.*
Robert Funmaker et al., SU 00-16 (HCN S. Ct., Mar. 16, 2001) at 4.

1 concerns and appreciates the defendant's ability to reasonably perform redactions and/or
2 accumulate statistical data.

3
4 In order to accomplish the foregoing, the Court shall require the plaintiff to identify an
5 expert witness to modify the standing discovery request. The modified request shall seek
6 information in the form of statistical data. The plaintiff must narrow the standing request so as to
7 avoid presenting the defendant with a monumental and unmanageable task. The plaintiff's expert
8 witness shall present the discovery request within thirty (30) days of the entrance of this decision,
9 and the parties shall mutually agree upon the timeframe for a response. The Court shall waive
10 the responsive timeframe of twenty-five (25) days as articulated in *HCN R. Civ. P. 34*. If
11 necessary, the plaintiff may request additional time for presentation of the revised discovery
12 request in the form of a motion.
13

14
15 **IV. Does the plaintiff properly request attorney fees and costs**
16 **pursuant to *HCN R. Civ. P. 37* as a result of the defendant**
17 **designating a deponent who allegedly lacked knowledge of the**
18 **matters identified in the plaintiff's deposition notice?**

19 In its August 31, 2004 judgment, the Court noted that "[t]he plaintiff's *Notice of Taking*
20 *Deposition . . .* provide[s] sufficient guidance to the defendant as to what individual
21 representatives of the corporate entity should be made available for deposition." *Order (Denying*
22 *Mot. for Protective Order)* at 2. This ruling, however, did not entitle the plaintiff to a particular
23 deponent since not specifically identified in the deposition notice. The plaintiff may express
24 dissatisfaction with the extent of the deponent's knowledge, but the plaintiff should have crafted
25 its notice in such a manner so as to correspond with its expectations.

26 The deposition notice requested that the "Defendant . . . designate and make available for
27 deposition . . . other persons who consent to testify on its behalf concerning . . . Defendant's
28 efforts to locate and produce documents, and the origin of document B0A00142." *Pl.'s Mot. II,*

1 *Aff.*, Attach. A. The defendant presented a deponent who possessed this general knowledge, just
2 not to the degree anticipated by the plaintiff. The Court cannot grant the plaintiff's request for
3 sanctions due to the inarticulateness of the plaintiff, especially given the obvious need for
4 specificity in this case. Moreover, the Court notes its propensity to deny litigation expenses. *See*
5 *HCN Treas. Dep't et al. v. Shaunte Lowery-Roby*, CV 05-64 (HCN Tr. Ct., Oct. 13, 2005) at 7
6 n.3 (citing *Kristen K. White Eagle v. Ho-Chunk Casino et al.*, CV 04-97 (HCN Tr. Ct., Oct. 4,
7 2005) (denying litigation costs, including filing and mailing expenses); *Chloris Lowe, Jr. v. HCN*
8 *Legislature Members Elliot Garvin et al.*, CV 00-104 (HCN Tr. Ct., Mar. 22, 2004) (denying
9 attorney fees)).
10
11

12
13 **IT IS SO ORDERED** this 30th day of January 2006, by the Ho-Chunk Nation Trial
14 Court located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.
15

16
17 _____
18 Honorable Todd R. Matha
19 Chief Trial Court Judge
20

21
22 Attach.: *Pl.'s Mot. I, Aff.*, Attach. I-R
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