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

**Troy S. Westphal,**  
Plaintiff,

v.

Case No.: **CV 02-75**

**Ho-Chunk Nation, Ho-Chunk Casino and  
Bally Gaming, Inc.**  
Defendants.

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**ORDER  
(Dismissal)**

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**INTRODUCTION**

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The Court must determine whether to dismiss the instant case against the defendants with or without prejudice. The Court reviews the applicable procedural rules for purposes of rendering this decision. The analysis of the Court follows below.

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**PROCEDURAL HISTORY**

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The plaintiff, Troy S. Westphal, by and through Attorney William J. Grogan, initiated the current action by filing a *Complaint* with the Court on July 24, 2002.<sup>1</sup> Consequently, the Court issued a *Summons* accompanied by the above-mentioned *Complaint* on July 24, 2002, and

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<sup>1</sup> Administrative staff processed the initial pleading despite the lack of a proper signatory. *See Ho-Chunk Nation Rules of Civil Procedure* (hereinafter *HCN R. Civ. P.*), Rule 16. Pursuant to past practice, the Court should have afforded the plaintiff the ability to correct the mistake, but Attorney William J. Grogan's later actions effectively remedied the omission. *See e.g., HCN Dep't of Hous., Home Ownership Program v. Mick Boardman d/b/a T & Son's Gen. Contractors*, CV 99-107 (HCN Tr. Ct., Sept. 1, 2000).

1 delivered the documents by personal service to the defendants' representative, Ho-Chunk Nation  
2 Department of Justice (hereinafter DOJ).<sup>2</sup> The *Summons* informed the defendants of the right to  
3 file an *Answer* within twenty (20) days of the issuance of the *Summons* pursuant to *HCN R. Civ.*  
4 *P. 5(A)(2)*. The *Summons* also cautioned the defendants that a *default judgment* could result  
5 from failure to file within the prescribed time period.  
6

7 The defendants, by and through DOJ Attorney Michael P. Murphy, timely filed its  
8 *Answer* on August 13, 2002. The Court reacted by mailing *Notice(s) of Hearing* to the parties on  
9 August 29, 2002, informing them of the date, time and location of the *Scheduling Conference*.  
10 The Court convened the *Scheduling Conference* on October 8, 2002 at 1:30 p.m. CDT. The  
11 following parties appeared at the *Conference*: DOJ Attorney Michael P. Murphy, defendants'  
12 counsel. The following party failed to make an appearance, and did not inform the Court of an  
13 inability to attend the hearing: Troy S. Westphal, plaintiff. The Court postponed the *Scheduling*  
14 *Conference* due to his absence as permitted by *HCN R. Civ. P. 44(C)*, and memorialized this  
15 decision in its October 11, 2002 *Order (Granting Plaintiff Leave to Reschedule)*.  
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18 On October 17, 2002, the plaintiff submitted the *Amended Complaint*, naming Bally  
19 Gaming, Inc. as a co-defendant. The Court, however, declined to accept the document since the  
20 plaintiff's counsel had neither sought admission with the Ho-Chunk Nation Bar nor the ability to  
21 make a special appearance. *See HCN R. Civ. P. 16(B)*; *see also Scheduling Conference (LPER*  
22 *at 1, Apr. 28, 2003, 02:42:18 CDT)*. Attorney William J. Grogan corrected this deficiency on  
23 October 28, 2002, when he filed the *Motion to Appear Pro Hac Vice*.  
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28 <sup>2</sup>The *HCN R. Civ. P.* permit the Court to serve the *Complaint* upon the DOJ when the plaintiff/petitioner names as a party either a unit of government or enterprise or an official or employee being sued in their official or individual capacity. *HCN R. Civ. P. 27(B)*.

1           Shortly thereafter, the Court mailed *Notice(s) of Hearing* to the parties on November 5  
2 2002, informing them of the date, time and location of the *Scheduling Conference*. The Court  
3 convened the *Scheduling Conference* on December 9, 2002 at 3:30 p.m. CST. The following  
4 parties appeared at the *Conference*: Attorney William J. Grogan, plaintiff's counsel (by  
5 telephone), and DOJ Attorney Michael P. Murphy, defendants' counsel. The Court entered the  
6 *Scheduling Order* on December 10, 2002, setting forth the applicable timeline of the instant case.  
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8           On March 31, 2003, the plaintiff filed a *Request to Admit* and a *Request for Production of*  
9 *Documents*.<sup>3</sup> The parties also requested an extension of certain timelines in the *Scheduling*  
10 *Order*. The Court entered its March 31, 2003 *Order* reflecting the parties' agreement.  
11

12           On April 15, 2003, the Court granted the special appearances of the following legal  
13 counsel on behalf of Bally Gaming: Attorneys Steven L. Nelson, Jeffrey J. Conta and Lee M.  
14 Seese. Due to several unresolved matters, the Court determined to schedule a *Status Hearing*.  
15 The Court mailed *Notice(s) of Hearing* to the parties, including Bally Gaming, on April 15,  
16 2003, informing them of the date, time and location of the *Hearing*.  
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18           Prior to convening the *Status Hearing*, the defendants filed the *Motion to Dismiss* and  
19 accompanying *Brief in Support of Defendants' Motion to Dismiss* on April 17, 2003. The Court  
20 reacted by entering its April 18, 2003 *Order (Motion Hearing)* in which the Court related its  
21 intention of entertaining the recently filed motion at the *Status Hearing*. Consequently, the  
22 plaintiff submitted a *Motion for Extension of Time* on April 24, 2003, but failed to note proper  
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25 <sup>3</sup> The plaintiff's accompanying *Affidavit of Service* indicated that he had personally served the original *Summons and*  
26 *Complaint* and an *Amended Summons and Complaint* upon a registered agent of Bally Gaming and Systems  
27 (hereinafter Bally Gaming) on March 21, 2003. The plaintiff did not file copies of these documents with the Court.  
28 The *HCN R. Civ. P.* do not require a summons for an amended pleading, but consider such filings as motions in an  
existing case. *HCN R. Civ. P.* 5(B), 20. Regardless, the *HCN R. Civ. P.* require that each party be served with a  
copy of the original pleading, but only the Clerk of Court maintains the authority to facilitate the service of  
summons. *Id.*, Rule 5(A)(2). This fact may explain the absence of a responsive pleading from the defendant, Bally  
Gaming. See *Correspondence from Att'y Steven L. Nelson* (Apr. 11, 2003).

1 service upon the defendants. *See Notice of Deficiency* re: Certificate of Service (Apr. 25, 2003);  
2 *see also HCN R. Civ. P. 5(B)*. The plaintiff attempted to correct this defect in its April 28, 2003  
3 *Affidavit of Mailing*, but only indicated service of process upon the Court. This filing likewise  
4 prompted a *Notice of Deficiency*.

5  
6 The Court convened the *Status Hearing* on April 28, 2003 at 2:30 p.m. CDT. The  
7 following parties appeared at the *Hearing*: Attorney William J. Grogan, plaintiff's counsel (by  
8 telephone), and DOJ Attorney Michael P. Murphy, defendants' counsel. Attorney Steven L.  
9 Nelson also made an appearance on behalf of Bally Gaming. In the presence of the Court, the  
10 plaintiff served Bally Gaming with a copy of the *Amended Complaint*, and none of the parties  
11 objected to the Court's decision to afford the newly named defendant twenty (20) days to file its  
12 answer. *Status Hr'g* (LPER at 1, Apr. 28, 2003, 02:42:18 CDT). The parties, however, later  
13 stipulated to resolving the *Motion to Dismiss* prior to requiring a responsive pleading. *Id.* at 2,  
14 02:52:00 CDT.

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17 The Court accordingly granted the plaintiff's oral motion for an extension of time to  
18 respond to the pending motion. *Id.*, 02:48:53 CDT. By agreement of the parties, the Court  
19 scheduled a *Motion Hearing* for May 16, 2003 at 1:30 p.m. CDT. *Id.*, 02:53:44 CDT. Bally  
20 Gaming joined its co-defendants' *Motion to Dismiss* through correspondence submitted on May  
21 7, 2003. It formally filed its *Brief in Support of Defendants Ho-Chunk Nation's and Ho-Chunk*  
22 *Casino's Motion to Dismiss* on May 14, 2003. This filing followed the plaintiff's *Motion for*  
23 *Voluntary Dismissal* in which he requested "the Court to dismiss the complaint and amended  
24 complaint of plaintiff without prejudice pursuant to Rule 56(A) of the [Ho-Chunk Nation] Rules  
25 of Civil Procedure." *Mot. for Voluntary Dismissal* (May 12, 2003).  
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1 On May 20, 2003, the defendants, Ho-Chunk Nation (hereinafter HCN or Nation) and  
2 Ho-Chunk Casino, filed an objection in letterform to the plaintiff's *Motion for Voluntary*  
3 *Dismissal*. The defendant, Bally Gaming, submitted a similar correspondence on May 27, 2003.  
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5 In response, the Court scheduled a *Motion Hearing*, and mailed *Notice(s) of Hearing* to the  
6 parties on June 2, 2003. The Court convened the *Motion Hearing* on July 8, 2003 at 1:30 p.m.  
7 CDT. The following parties appeared at the *Hearing*: Attorney William J. Grogan, plaintiff's  
8 counsel (by telephone); DOJ Attorney Michael P. Murphy, defendants' counsel; and Attorney  
9 Steven L. Nelson, defendant's counsel.  
10

## 11 **APPLICABLE LAW**

### 12 **CONSTITUTION OF THE HO-CHUNK NATION**

#### 13 **Article VII - Judiciary**

##### 14 **Sec. 5. Jurisdiction of the Judiciary.**

15 (a) The Trial Court shall have original jurisdiction over all cases and controversies,  
16 both criminal and civil, in law or in equity, arising under the Constitution, laws, customs and  
17 traditions of the Ho-Chunk Nation, including cases in which the Ho-Chunk Nation, or its  
18 officials and employees, shall be a party. Any such case or controversy arising within the  
19 jurisdiction of the Ho-Chunk Nation shall be filed in the Trial Court before it is filed in any other  
20 court. This grant of jurisdiction by the General Council shall not be construed to be a waiver of  
21 the Nation's sovereign immunity.  
22

#### 23 **Article XII – Sovereign Immunity**

24 **Sec. 1. Immunity of Nation from Suit.** The Ho-Chunk Nation shall be immune from suit  
25 except to the extent that the Legislature expressly waives its sovereign immunity, and officials or  
26 employees of the Ho-Chunk Nation acting within the scope of their duties or authority shall be  
27 immune from suit.  
28

1 WISCONSIN WINNEBAGO TRIBE AND STATE OF WISCONSIN GAMING COMPACT  
2 OF 1992

3 Art. V - Conduct of Games; Generally

4 Sec. E. The Tribe shall provide and publish procedures for impartial resolution of a player  
5 dispute concerning the conduct of a game which shall be made available to customers upon  
6 request.

7 HO-CHUNK NATION AMENDED AND RESTATED GAMING ORDINANCE

8 Ch. 17 - Miscellaneous Provisions

9 Sec. 1709. Customer Disputes. Any person who has any dispute, disagreement or other  
10 grievance that involves currency, tokens, coins or other thing of value and is between the  
11 customer or player and the Gaming Facility, may raise such dispute with the following persons  
12 and in the following order: (a) a member of the staff of the Gaming Facility, (b) the supervisor  
in the area in which the dispute arose, (c) the General Manager of the Gaming Facility and (d)  
the Gaming Commission.

13 Sec. 1710. Customer Rights Regarding Disputes. At each level, the complainant has the  
14 right to explain his or her side of the dispute, and to present witnesses in connection with any  
15 factual allegation. At each level, if the dispute remains unresolved, the complainant shall be  
16 given a copy of the impartial dispute resolution procedures required under Sec. V.E. of the  
17 Compact, and informed of the right to take the dispute to the next higher level as set forth in  
18 Section 1709 Customer Disputes. Resolution of any dispute by staff of the Gaming Facility shall  
always involve two or more staff members. All disputes, whether resolved or not, shall be the  
subject of a detailed report by all staff involved to their supervisors, or, in the case of the General  
Manager, to the Gaming Commission.

19 Sec. 1711. Gaming Commission Action on Customer Disputes. All disputes which are  
20 submitted to the Gaming Commission shall be decided by the Commission based on information  
21 provided by the complainant, any witnesses for or documents provided by the complainant, or by  
22 the General Manager of the Gaming Facility or any other person who has relevant information to  
23 provide. The decision of the Commission shall be in writing, shall be issued within 14 days of  
submission of the matter to the Commission, and shall be provided to the General Manager of  
the Gaming Facility and the complainant.

24 HO-CHUNK NATION RULES OF CIVIL PROCEDURE (updated Feb. 11, 2002)

25 Rule 3. Complaints.

26 General. A civil action begins by filing a written *Complaint* with the clerk of court and paying  
27 the appropriate fees. The *Complaint* shall contain short, plain statements of the grounds upon  
28 which the Court's jurisdiction depends; the facts and circumstances giving rise to the action; and  
a demand for any and all relief that the party is seeking. Relief should include, but is not limited

1 to the dollar amount that the party is requesting. The *Complaint* must contain the full names and  
2 addresses of all parties and any counsel, as well as a telephone number at which the Complainant  
3 may be contacted. The *Complaint* shall be signed by the filing party or his/her counsel, if any.

4 Rule 5. Notice of Service of Process.

5 (A) Definitions.

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

12 (B) General. Any time a party files a document other than the Complaint with the Court in  
13 relation to a case, the filing party must serve copies on the other parties to the action and provide  
14 *Certificate of Service* to the Court. Any time the Court issues an *Order* or *Judgment* in the  
15 context of an active case, the Court must serve copies on all parties. Service of process can be  
16 accomplished as outlined in Section (C).

17 Rule 16. Signature of Parties and Counsel; Special Appearances.

18 (A) The *Complaint* and *Answer* shall be signed by the party or his/her counsel. The signature  
19 means the statements in the pleading are made in good faith, are believed to be true and accurate,  
20 and are based upon adequate research or investigation. The Court may impose sanctions if it  
21 finds statements in a pleading are not made in good faith, contain intentional misstatements, or  
22 are not based upon adequate research or investigation. This includes omitting material facts or  
23 law which the person knew, or should have reasonably known, was relevant to the action.  
24 Sanctions may include removing issues from consideration in the action, imposing costs and  
25 counsel fees, and any other relief which may be appropriate under the circumstances.

26 (B) Counsel not admitted to practice before the Ho-Chunk Nation Courts may be permitted to  
27 appear on behalf of a client by *Special Appearance* in an action. In order to be permitted to  
28 make a special appearance, counsel must file a motion to allow the special appearance; a  
proposed *Order*; and an affidavit containing the oath or affirmation for admission to practice,  
stating that they are admitted to practice in another state, federal or tribal jurisdiction, and stating  
they have been in actual practice for two or more years. They must also submit a processing fee  
for the special appearance of \$35.00.

29 Rule 21. Amendments to Pleadings.

30 Parties may amend a *Complaint* or *Answer* one time without leave of the Court prior to the filing  
of a responsive pleading, or if no responsive pleading is permitted, at any time within twenty  
(20) days of the original filing date. Subsequent amendments to *Complaints* or *Answers* may  
only be made upon leave of the Court and a showing of good cause, or with the consent of the

1 opposing party. All amendments to the *Complaint* or *Answer* must be filed at least thirty (30)  
2 calendar days prior to trial or as otherwise directed by the Court. When an *Amended Complaint*  
3 or *Answer* is filed, the opposing party shall have ten (10) calendar days, or the time remaining in  
4 their original response period, whichever is greater, in which to file an amended responsive  
5 pleading.

6 Rule 27. The Nation as a Party.

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

14 Rule 44. Presence of Parties and Witnesses.

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

18 Rule 56. Dismissal of Actions.

19 (A) Voluntary Dismissal. A plaintiff may file a *Notice of Dismissal* any time prior to the filing  
20 of an *Answer*. The *Complaint* will be dismissed without prejudice.

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

28 Rule 58. Amendment to or Relief from Judgment or Order.

(A) Relief from Judgment. A *Motion to Amend* or for relief from judgment, including a request  
for a new trial shall be made within ten (10) calendar days of the filing of judgment. The *Motion*  
must be based on an error or irregularity which prevented a party from receiving a fair trial or a  
substantial legal error which affected the outcome of the action.

(B) Motion for Reconsideration. Upon motion of the Court or by motion of a party made not  
later than ten (10) calendar days after entry of judgment, the Court may amend its findings or  
conclusions or make additional findings or conclusions, amending the judgment accordingly.  
The motion may be made with a motion for a new trial. If the Court amends the judgment, the

1 time for initiating an appeal commences upon entry of the amended judgment. If the Court  
2 denies a motion filed under this rule, the time for initiating an appeal from the judgment  
3 commences when the Court denies the motion on the record or when an order denying the  
4 motion is entered, whichever occurs first. If within thirty (30) days after the filing of such  
5 motion, and the Court does not decide a motion under this Rule or the judge does not sign an  
6 order denying the motion, the motion is considered denied. The time for initiating an appeal from  
7 judgment commences in accordance with the Rules of Appellate Procedure.

8 (C) Motion to Modify. After the time period in which to file a *Motion to Amend* or a *Motion for*  
9 *Reconsideration* has elapsed, a party may file a *Motion to Modify* with the Court. The *Motion*  
10 must be based upon new information that has come to the party's attention that, if true, could  
11 have the effect of altering or modifying the judgment. Upon such motion, the Court may modify  
12 the judgment accordingly. If the Court modifies the judgment, the time for initiating an appeal  
13 commences when the Court denies the motion on the record or when an order denying the  
14 motion is entered, whichever occurs first. If within thirty (30) calendar days after the filing of  
15 such motion, and the Court does not decide the motion or the judge does not sign an order  
16 denying the motion, the motion is considered denied. The time for initiating an appeal from  
17 judgment commences in accordance with the Rules of Appellate Procedure.

18 (D) Erratum Order or Reissuance of Judgment. Clerical errors in a court record, including the  
19 *Judgment* or *Order*, may be corrected by the Court at any time.

20 (E) Grounds for Relief. The Court may grant relief from judgments or orders on motion of a  
21 party made within a reasonable time for the following reasons: (1) newly discovered evidence  
22 which could not reasonably have been discovered in time to request a new trial; or (2) fraud,  
23 misrepresentation or serious misconduct of another party to the action; or (3) good cause if the  
24 requesting party was not personally served in accordance with Rule 5(c)(1)(a)(i) or (); did not  
25 have proper service and did not appear in the action; or (4) the judgment has been satisfied,  
26 released, discharged or is without effect due to a judgment earlier in time.

27 Rule 61. Appeals.

28 Any final *Judgment* or *Order* of the Trial Court may be appealed to the Ho-Chunk Nation  
Supreme Court. The *Appeal* must comply with the Ho-Chunk Nation *Rules of Appellate*  
*Procedure*, specifically *Rules of Appellate Procedure*, Rule 7, Right of Appeal. All subsequent  
actions of a final *Judgment* or Trial Court *Order* must follow the HCN *Rules of Appellate*  
*Procedure*.

HO-CHUNK NATION RULES OF CIVIL PROCEDURE (adopted Feb. 22, 1997)

Rule 56. Dismissal of Actions.

(A) Voluntary Dismissal. A party filing a *Complaint* may file a *Notice of Dismissal* any time  
prior to the filing of a *Response* and the *Complaint* will be deemed dismissed without prejudice.

1 (B) Involuntary Dismissal. At any other time in the action, a party must file a *Motion to Dismiss*.  
2 A *Motion to Dismiss* may be granted (1) if there has been no *Order* or other action in a case for  
3 six (6) months, or, (2) if a party substantially fails to comply with these rules, or, (3) if a party  
4 substantially fails to comply with an order of the Court, or, (4) if a party fails to establish the  
5 right to relief following presentation of all evidence at trial. An *Order* to dismiss a claim is a  
6 dismissal with prejudice.

## 7 FINDINGS OF FACT

- 8
- 9 1. The parties received proper notice of the July 8, 2003 *Motion Hearing*.
  - 10 2. The plaintiff, Troy S. Westphal, is a non-member, and resides at W2707 County Road H,  
11 Pine River, WI 54965.
  - 12 3. The defendant, HCN, is a federally recognized Indian tribe with principal offices located  
13 on trust lands at the HCN Headquarters, W9814 Airport Road, P.O. Box 667, Black River Falls,  
14 WI. The defendant, Ho-Chunk Casino, is a wholly owned governmental entity of the Nation  
15 located on trust lands at S3214 Highway 12, Baraboo, WI 53913.
  - 16 4. The defendant, Bally Gaming, is a subsidiary of Alliance Gaming Corporation with  
17 corporate headquarters located at 6601 South Bermuda Road, Las Vegas, NV 89119.
  - 18 5. On January 27, 2002, the plaintiff patronized the Ho-Chunk Casino, and proceeded to  
19 play a Class III gaming device allegedly manufactured by Bally Gaming. *Defs.' Answer* at 1-2;  
20 *Compl.* at 1-2. The plaintiff disputed the amount and/or receipt of a jackpot, and immediately  
21 filed a Patron Dispute Resolution Form at Level 1, which did not result in a favorable decision  
22 for the plaintiff. *Id.*; *see also* HCN AMENDED AND RESTATED GAMING ORDINANCE (hereinafter  
23 GAMING ORDINANCE), § 1709.
  - 24 6. On or about July 24, 2002, the plaintiff filed his Level 4 customer dispute with the HCN  
25 Gaming Commission. *Mot. Hr'g* (LPER at 1, July 8, 2003, 01:37:23 CDT); *Br. in Supp. of Defs.*

1 *Mot. to Dismiss* at 3; *see also* GAMING ORDINANCE, § 1709. The HCN Gaming Commission has  
2 neither conducted a hearing nor rendered a decision on the dispute. *Mot. Hr'g* (LPER at 1,  
3 01:37:23 CDT); *see also* GAMING ORDINANCE, §§ 1710-11.

4  
5 7. On July 24, 2002, the plaintiff filed the *Complaint*. The plaintiff appears to allege two  
6 (2) potential bases for the exercise of subject matter jurisdiction. *Compl.* at 2-3. First, the  
7 plaintiff asserts that he "entered into an enforceable contract under the gaming laws of the Ho-  
8 Chunk Nation and the State of Wisconsin." *Id.* at 2. The plaintiff, however, makes no reference  
9 to any particular law of the Nation. Second, the plaintiff argues "[t]he breach of [a] duty [of  
10 care] and negligence on the part of the defendant[s]." *Id.* at 3. Yet, the plaintiff again fails to  
11 reference any law of the Nation regarding his apparent tort claims.  
12

13 8. On August 13, 2002, the Nation and Ho-Chunk Casino filed the *Defendants' Answer*,  
14 contending that the Court lacked subject matter jurisdiction. *Defs.' Answer* at 3-4.

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16 9. On March 31, 2003, the Court granted the parties' request to amend the December 10,  
17 2002 *Scheduling Order*. The modification extended the deadlines to file amendments to  
18 pleadings and dispositive motions to June 2, 2003. *Stipulation & Order to Amend Scheduling*  
19 *Order* at 1.

20  
21 10. On April 17, 2003, the Nation and Ho-Chunk Casino filed its *Motion to Dismiss*, arguing,  
22 in part, that the Court lacked subject matter jurisdiction. *Br. in Supp. of Defs.' Mot. to Dismiss* at  
23 4-6.

24 11. On April 18, 2003, the Court scheduled a *Motion Hearing* to occur in conjunction with  
25 the April 28, 2003 *Status Hearing*. *Order (Mot. Hr'g)*.

1 12. On April 28, 2003, the plaintiff timely filed an amended pleading, naming Bally Gaming  
2 as a party. The plaintiff made absolutely no modifications to the jurisdictional statements  
3 contained within the cause of action sections of the pleading. *Am. Compl.* at 2-3.

4  
5 13. On April 28, 2003, the Court granted the plaintiff's request for an extension of time to  
6 respond to the *Motion to Dismiss. Status Hr'g* (LPER at 1, 02:48:53 CDT). The Court extended  
7 the response deadline to May 12, 2003, and scheduled a *Motion Hearing* for May 16, 2003. *Id.*  
8 at 2, 02:56:10 CDT.

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10 14. On May 7, 2003, Bally Gaming submitted a letter to the Court, indicating the following:

11 [b]ecause the [C]ourt did not accept the plaintiff's amended pleading until  
12 April 28, 2003, Bally will answer any discovery previously served using  
13 April 28<sup>th</sup> as the date of service. I have spoken to [Attorney] Grogan who  
14 agrees with this approach. [Attorney] Grogan's requests seek responses  
within thirty days, and therefore Bally will serve its discovery responses if  
necessary on or before May 28, 2003."

15 Bally Gaming correspondence.

16 15. On May 12, 2003, the plaintiff filed a timely response to the motion in which he  
17 requested "the Court to dismiss the complaint and amended complaint of plaintiff without  
18 prejudice pursuant to Rule 56(A) of the [Ho-Chunk Nation] Rules of Civil Procedure." *Mot. for*  
19 *Voluntary Dismissal*.

20  
21 16. Bally Gaming has never filed an answer to the April 28, 2003 *Amended Complaint* due to  
22 the parties' desire to first resolve the April 17, 2003 *Motion to Dismiss. Status Hr'g* (LPER at 2,  
23 02:52:00 CDT). The responsive pleading timeframe would have otherwise lapsed on May 19,  
24 2003, seven (7) days after the plaintiff's filing of the *Motion for Voluntary Dismissal*. *See HCN*  
25 *R. Civ. P. 5(A)(2)*.

1 **DECISION**

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3 The present dispute centers around whether the Court should grant a dismissal of the case  
4 with or without prejudice. The Court properly consults the *HCN R. Civ. P.* to make this  
5 determination. In particular, the Court directs its attention to Rule 56, examining both the  
6 current and former versions of the text.  
7

8 The Court shall first address the requested dismissal with regard to the defendant, Bally  
9 Gaming. The plaintiff requested a voluntary dismissal on May 12, 2003, fourteen (14) days after  
10 the Court accepted the filing of the *Amended Complaint*, which named Bally Gaming as a party.  
11 Up to that point, Bally Gaming legal counsel had sought to appear *pro hac vice* and had  
12 physically appeared at a single half hour hearing. Also, Bally Gaming had submitted only one  
13 (1) filing in the form of a two (2)-paragraph letter on May 7, 2003. Bally Gaming had neither  
14 responded to any discovery requests nor had been requested by the Court to participate in a  
15 scheduling conference. Most importantly, Bally Gaming had not yet filed an answer to the  
16 *Amended Complaint*.  
17  
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19 The applicable procedural provision indicates that "[a] plaintiff may file a *Notice of*  
20 *Dismissal* any time prior to the filing of an *Answer*. The *Complaint will be* dismissed without  
21 prejudice." *HCN R. Civ. P. 56(A)* (emphasis added). In the instant case, the plaintiff requested a  
22 voluntary dismissal prior to the filing of an answer by Bally Gaming. These facts are  
23 undisputed. Therefore, the Court follows the clear direction of the preceding rule, and dismisses  
24 the case against Bally Gaming without prejudice.  
25

26 The Court cannot apply the same rule against the remaining defendants since the Nation  
27 and Ho-Chunk Casino answered the initial pleading nearly nine (9) months before the voluntary  
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1 dismissal request. The plaintiff's request also occurred after the defendants' April 17, 2003  
2 motion for dismissal with prejudice. Consequently, the Court must apply the second provision of  
3 Rule 56, which reads in relevant part: "[a]fter an *Answer* has been filed, a party must file a  
4 *Motion to Dismiss*. A *Motion to Dismiss* will be granted at the discretion of the Court. A *Motion*  
5 *to Dismiss* may be granted for a lack of jurisdiction . . . or[ ] if the plaintiff so requests." *Id.*,  
6 Rule 56(B).  
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8 The above rule differs in two (2) key respects from the former version of the involuntary  
9 dismissal provision. First, the previous rule stated that the resulting "*Order to dismiss a claim is*  
10 *a dismissal with prejudice.*" *HCN R. Civ. P. 56(B)* (adopted Feb. 22, 1997) (emphasis added).  
11 The Ho-Chunk Nation Supreme Court (hereinafter Supreme Court) omitted this sentence from  
12 the revised rule. Second, the previous rule did not specifically provide an opportunity for the  
13 plaintiff to request a dismissal after the filing of an answer. *Id.*  
14

15 The Court must weigh the significance of the February 11, 2002 revisions. The Supreme  
16 Court's decision to omit the above-sentence serves to impart to this Court the discretion to grant  
17 involuntary dismissals with or without prejudice. In this respect, the Court maintains an  
18 equivalent discretionary authority with that exercised by its federal judicial counterparts.  
19 However, the Court's use of such discretion will not necessarily resemble a federal district court's  
20 resolution of a similarly filed motion to dismiss. The potential variation in results derives from  
21 the difference in the language of the respective rules and the underlying reason(s) for such  
22 difference.  
23

24 The relevant federal rule enables a court to enter an involuntary dismissal "[f]or failure of  
25 the plaintiff to prosecute . . . an action or . . . any claim against the defendant. Unless the court in  
26 its order for dismissal otherwise specifies, a dismissal under this subdivision . . . , other than a  
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1 dismissal for lack of jurisdiction . . . operates as an adjudication upon the merits." FED. R. CIV.  
2 P. 41(b). In other words, a dismissal for lack of subject matter jurisdiction would be rendered  
3 without prejudice in a federal forum. *See e.g., Leaf v. Supreme Ct. of the State of Wis.*, 979 F.2d  
4 589, 595 (7th Cir. 1992). This practice finds its origin in the common law where "dismissal on a  
5 ground not going to the merits was not ordinarily a bar to a subsequent action on the same  
6 claim." *Costello v. United States*, 365 U.S. 265, 285 (1961). In particular, "[i]f the first suit was  
7 dismissed for . . . the want of jurisdiction . . . , the judgment rendered w[ould] prove no bar to  
8 another suit." *Id.* at 286 (quoting *Hughes v. United States*, 71 U.S. 232, 237 (1866)).  
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11           However, the Court cannot simply adopt the Anglo common law tradition. Rather, the  
12 Court develops its common law through the gradual incorporation of traditional and customary  
13 precepts as enunciated by the Ho-Chunk Nation Traditional Court. *See e.g., Ho-Chunk Nation v.*  
14 *Harry Steindorf et al.*, CV 99-82 (HCN Tr. Ct., Feb. 11, 2000), *aff'd*, SU 00-04 (HCN S. Ct.,  
15 Sept. 29, 2000); *see also* CONSTITUTION OF THE HO-CHUNK NATION (hereinafter CONST.), ART.  
16 VII, § 5(a). The history of *HCN R. Civ. P. 56(B)* exposes the dissimilarity between it and FED.  
17 R. Civ. P. 41(b). Former Rule 56(B) directed the Court to dismiss causes of action with  
18 prejudice regardless of whether the Court reached the merits of the claim(s). The Nation  
19 previously fell victim to this rule in a case where it failed to properly allege the presence of  
20 subject matter jurisdiction. *Steindorf*, CV 99-82 at 1.  
21  
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23           The Court now possesses a degree of discretion in determining the effect of an  
24 involuntary dismissal, but the Court simply has no basis for applying foreign common law  
25 concepts, which never informed the earlier version of the rule. Furthermore, while the Supreme  
26 Court amended the *HCN R. Civ. P.* after its affirmance of the *Steindorf* decision, it did not except  
27 jurisdictional dismissals from the application of the rule. Instead, the Supreme Court may have  
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1 intended that its deletion of the impact provision correspond only with its additional allowance  
2 for a plaintiff to request a post-responsive pleading dismissal. That is to say, the Supreme Court  
3 sanctioned the practice of permitting dismissals without prejudice upon a plaintiff's unchallenged  
4 request. Even more likely, the Supreme Court also recognized the wisdom of granting dismissals  
5 without prejudice prior to the amendment to pleadings deadline. If the Court received a motion  
6 to dismiss prior to the amendment to pleadings deadline set forth in a scheduling order, then the  
7 Court would logically decline to dismiss an action with prejudice for want of subject matter  
8 jurisdiction since the plaintiff could shortly thereafter modify his or her jurisdictional assertion.  
9  
10  
11 *See HCN R. Civ. P. 21.*

12 In the instant case, the plaintiff filed his *Motion for Voluntary Dismissal* prior to the  
13 amendment to pleadings deadline, but on the final day to respond to the defendants' *Motion to*  
14 *Dismiss*. The defendants' motion attacked the sufficiency of the initial pleading as concerns the  
15 jurisdictional statement. Over eight (8) months earlier, the defendants' *Answer* levied the same  
16 attack. The plaintiff, however, made no modifications to the jurisdictional statement within the  
17 *Amended Complaint*, and as of July 8, 2003, conceded that he could neither find an applicable  
18 waiver of sovereign immunity nor "any legislative act in the Ho-Chunk Nation that permits this  
19 type of lawsuit." *Mot. Hr'g* (LPER at 4, 01:57:43 CDT); *see also* CONST., ART. XII, § 1.  
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22 Quite simply, the plaintiff failed to state proper "grounds upon which the Court's  
23 jurisdiction depends" in his *Complaint*. *HCN R. Civ. P. 3*. The Court has assisted the public  
24 through its creation of boilerplate initial pleading forms, which clearly indicate that jurisdictional  
25 allegations need to conform to constitutional requirements. *See* [http://ho-chunknation.com/](http://ho-chunknation.com/government/judicial/forms.htm)  
26 [government/judicial/forms.htm](http://ho-chunknation.com/government/judicial/forms.htm) (last visited Nov. 19, 2003) (on file with HCN Judiciary).  
27  
28 The Court has also provided the plaintiff ample opportunity to cure the lingering defect, but the

1 plaintiff has instead revealed an inability to do so. Despite this fact, the plaintiff has subjected  
2 the defendants to an already protracted period of litigation, during which the defendants have  
3 made numerous filings and appearances in court.  
4

5 The plaintiff did suggest the possibility that the Court might need to conduct a review of  
6 a future HCN Gaming Commission decision. *Mot. Hr'g* (LPER at 1, 01:37:23 CDT). However,  
7 the HCN Gaming Commission should have entered such a decision within fourteen (14) days  
8 after the filing of the July 24, 2002 Level 4 customer dispute. GAMING ORDINANCE, § 1711. The  
9 HCN Gaming Commission has entered no decision, but the plaintiff has not amended his suit to  
10 name this agency for the purpose of securing any type of injunctive relief.  
11

12 The Court has expended much time and effort throughout this proceeding, and the  
13 defendants have suffered great inconvenience in defending this suit. Therefore, the Court, in its  
14 discretion, dismisses the case with prejudice against the Nation and Ho-Chunk Casino in light of  
15 the above-noted factors. As stated earlier, the Court dismisses the case without prejudice against  
16 Bally Gaming.  
17

18 The parties retain the right to file a timely post judgment motion with this Court in  
19 accordance with *HCN R. Civ. P. 58*, Amendment to or Relief from Judgment or Order.  
20 Otherwise, “[a]ny final *Judgment* or *Order* of the Trial Court may be appealed to the Ho-Chunk  
21 Nation Supreme Court.<sup>4</sup> The *Appeal* must comply with the Ho-Chunk Nation *Rules of Appellate*  
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24 <sup>4</sup> The Supreme Court earlier emphasized that it “is not bound by the federal or state laws as to standards of review.”  
25 *Louella A. Kelty v. Jonette Pettibone et al.*, SU 99-02 (HCN S. Ct., Sept. 24, 1999) at 2. The Supreme Court,  
26 therefore, initially adopted an abuse of discretion standard “to determine if an error of law was made by the lower  
27 court.” *Daniel Youngthunder, Sr. v. Jonette Pettibone et al.*, SU 00-05 (HCN S. Ct., July 28, 2000) at 2; *see also*  
28 *Coalition for a Fair Gov’t v. Chloris A. Lowe, Jr. et al.*, SU 96-02 (HCN S. Ct., July 1, 1996) at 7-8; *JoAnn Jones v.*  
*HCN Election Bd. et al.*, CV 95-05 (HCN S. Ct., Aug. 15, 1995) at 3. The Supreme Court accepted the following  
definition of abuse of discretion: “any unreasonable, unconscionable and arbitrary action taken without proper  
consideration of facts and law pertaining to the matter submitted.” *Youngthunder, Sr.*, SU 00-05 at 2 (quoting  
BLACK’S LAW DICTIONARY 11 (6th ed. 1990)). More recently, the Supreme Court has asserted that “[o]n questions  
of law and Constitutional interpretation [it] applies the *de novo* standard of review.” *Robert A. Mudd v. HCN*  
*Legislature et al.*, SU 03-02 (HCN S. Ct., Apr. 8, 2003) at 4 (citing *Kelty*, SU 99-02). Regarding findings of fact,



1 *Procedure* [hereinafter *HCN R. App. P.*], specifically [*HCN R. App. P.*], Rule 7, Right of  
2 Appeal.” *HCN R. Civ. P.* 61. The appellant “shall within thirty (30) calendar days after the day  
3 such judgment or order was rendered, file with the [Supreme Court] Clerk of Court, a Notice of  
4 Appeal from such judgment or order, together with a filing fee of thirty-five dollars (\$35 U.S.).”  
5 *HCN R. App. P.* 7(b)(1). “All subsequent actions of a final *Judgment* or *Trial Court Order* must  
6 follow the [*HCN R. App. P.*].” *HCN R. Civ. P.* 61.

8 **IT IS SO ORDERED** this 19<sup>th</sup> day of November 2003, by the Ho-Chunk Nation Trial  
9 Court located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.

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12 \_\_\_\_\_  
13 Honorable Todd R. Matha  
14 Associate Trial Court Judge

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27 the Supreme Court has required an appellant to “demonstrate[ ] clear error with respect to the factual findings of the  
28 trial court.” *Coalition* , SU 96-02 at 8; *but see Anna Rae Funmaker v. Kathryn Doornbos*, SU 96-12 (HCN S. Ct.,  
Mar. 25, 1997) at 1-2.