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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

SOUTHCENTRAL FOUNDATION, Plaintiff and Counterclaim Defendant, v. ALASKA NATIVE TRIBAL HEALTH CONSORTIUM, Defendant and Counterclaimant.	Case No.: 3:17-cv-00018-TMB ALASKA NATIVE TRIBAL HEALTH CONSORTIUM'S MOTION FOR SUMMARY JUDGMENT **(REDACTED)**

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I. INTRODUCTION

The Alaska Native Tribal Health Consortium (ANTHC or Consortium) moves for summary judgment to resolve a critical issue involving its corporate governance. Southcentral Foundation (SCF) asserts that ANTHC Directors owe ANTHC a different, more limited duty of loyalty than other board directors owe the entities they serve. It asserts that ANTHC's Directors' duty of loyalty to ANTHC is subordinate to Directors' duty of loyalty to the entity that selected them to serve on ANTHC's Board. In short, SCF wants this Court to rule that the person it selects to serve on ANTHC's Board can and should – in the course of serving on ANTHC's Board – put SCF's interests ahead of ANTHC's interests.

In response, ANTHC asks this Court to declare that ANTHC's relevant governing documents and Board decisions are consistent with corporate and federal law and well within the Board's business judgment. Specifically, ANTHC asks the Court to (1) declare that ANTHC's Directors, including specifically its Director selected by SCF, owe ANTHC an undivided duty of loyalty undiminished by any duties the Director may owe to other corporations including SCF; (2) declare that the disputed provisions in ANTHC's governing documents comply with federal and state law; and (3) dismiss SCF's Complaint and award ANTHC its fees and costs.

II. FACTUAL BACKGROUND

ANTHC is the most comprehensive tribal health organization in the United States.[1] ANTHC was created to provide a vehicle for Alaska's tribes and tribal health organizations to collectively administer statewide programs that benefit over 158,000 Alaska Natives and American Indians across Alaska, and that support regional, subregional, and local tribal health programs. Currently, ANTHC provides (1) all the statewide services offered by the Indian Health Service's Alaska Area Office, the Office of Environmental Health and Engineering, and the Alaska Native Medical Center (ANMC) at the time ANTHC was formed in 1997, and (2) new and expanded programs developed since then. In partnership with the tribal health organizations of the Alaska Tribal Health System (ATHS), it provides: comprehensive medical services at ANMC; specialty field clinics; telehealth; epidemiology and wellness programs; public, community, and environmental health programs; disease research and prevention; training for

[1] *See* ANTHC, https://anthc.org/who-we-are/overview (last visited Aug. 15, 2017).

providers and health professionals; construction and maintenance of rural water and sanitation systems and other public health infrastructure; and a wide range of technical, logistical, consultative, and other support for ATHS participants.[2]

A. ANTHC Was Created to Coordinate Providing Statewide Health Services in Alaska and to Ensure Statewide Control of Services.

Congress passed the Indian Self-Determination and Education Assistance Act (ISDEAA)[3] in 1975 to promote "the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services."[4] Through a negotiated agreement, the federal government transfers funding, facilities, equipment, and other resources to a tribe or tribal organization, which assumes responsibility for planning, redesigning, conducting, and administering the federal programs, services, functions, and activities (PSFAs or, collectively, programs) that the federal government otherwise would have administered directly.[5] Under ISDEAA, tribes may authorize "tribal organizations" and "inter-tribal consortia" to enter into agreements and perform the PSFAs on their behalf, generally by adopting a resolution to "affiliate" with the tribal organization or inter-tribal consortium. To meet the definition of a "tribal organization" under ISDEAA, a tribal entity must be authorized by all of the tribes that will be served under the agreement.[6] Under Title V of ISDEAA, "tribal organizations" and "inter-tribal consortia" are defined to be "tribes" with the same rights and responsibilities as tribes.[7]

Many tribes and tribal organizations in Alaska had assumed direct responsibility under ISDEAA for administering regional and local health programs by the mid-1990s.[8] The tribes and

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[2] *See generally* ANTHC, https://anthc.org (last visited Aug. 15, 2017).
[3] 25 U.S.C. § 5301, *et seq.*
[4] 25 U.S.C. § 5302(b).
[5] 25 U.S.C. §§ 5385-5388.
[6] 25 U.S.C. § 5304(*l*).
[7] 25 U.S.C. § 5381(b) (defining tribal organizations and inter-tribal consortia like ANTHC to be "Indian tribe[s]").
[8] Alaska Native Health Bd., Alaska Tribal Health Compact (Oct. 1, 1994), http://www.anhb.org/tribal-resources/alaska-tribal-health-compact/.

tribal organizations had entered into the Alaska Tribal Health Compact with each other and the federal government. They were exploring options to collectively administer all statewide programs.[9] But the requirement that *all* tribes in Alaska had to authorize a tribal organization to enter an ISDEAA agreement to provide services to their respective populations impeded ISDEAA's implementation in Alaska because the federal government recognized hundreds of tribal entities as having some governing authority.[10] As the Senate Committee on Appropriations said in 1997, "in over 2 years of negotiations among Alaska Native entities, the existence of over 200 recognized tribes, regional entities, and various other concerned organizations, has made consensus around a particular governing structure [for an organization to administer statewide services] exceptionally difficult to achieve."[11] This was because under the Indian Health Service policy a single tribal entity could prevent the remainder from moving forward.[12]

In response to those challenges and concerns about ensuring that "scarce" health care funds would be managed to "provide the maximum amount of high quality health services to Alaska Natives,"[13] Congress passed Section 325 of Pub. L. No. 105-83, 111 Stat. 1543 (Section 325). It substantially altered the rights of tribes in Alaska to enter agreements under ISDEAA.[14] Section 325 authorized the formation of ANTHC, eliminated the requirement for authorization by all the individual tribal entities, and directed that (except for primary cares services) only ANTHC may provide "statewide health services," including all PSFAs previously administered

[9] *Id.*; S. Rep. No. 105-56 (July 22, 1997).

[10] In 1997, the Department of the Interior recognized over 220 Alaska Native entities, primarily Alaska Native villages and communities that are legally distinct from the Alaska Native Claims Settlement Act regional and village corporations. Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 62 Fed. Reg. 55270, 55274-75 (Oct. 23, 1997); *see also* 42 C.F.R. §§ 36.205-.206; Alaska Area Guidelines for Tribal Clearances for Indian Self-Determination Act Contracts, 46 Fed. Reg. 27178-02 (May 18, 1981) (describing priority of types of tribal entities that the Indian Health Service would recognize for the purposes of authorizing an ISDEAA agreement with a tribal organization).

[11] S. Rep. No. 105-56 at 110.

[12] *See* 42 C.F.R. §§ 36.205-.206; 46 Fed. Reg. at 27179 (Because "ANMC also provides certain specialized health services and programs for all of the villages in the Alaska Area [. . . the potential] contractor must show evidence of support for contracting from each village throughout the State.").

[13] S. Rep. No. 105-56 at 110.

[14] *See* Declaration of Sarah Langberg (Aug. 16, 2017) ("Langberg Decl.") at Ex. A (full text of Sections 325 and 326), filed contemporaneously herewith.

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by the Indian Health Service in the Alaska Area Office, the Office of Environmental Health and Engineering, and ANMC.

The Senate Committee's Report explained the intent of Section 325 as follows:

> The Committee intends in this section to lay out a framework for Alaska Native governance of the Alaska Native Medical Center and for the Alaska area office, including the Office of Environmental Health and Engineering. To draw on the existing expertise of the Alaska Native regional health entities now managing extensive regional health networks in Alaska, the Committee bill calls for formation of a new consortium made up of representatives of each of Alaska's regional Native health entities, the Metlakatla Indian Community, and representatives from villages and subregional health organizations, and governed by a board of directors.[15]

The Senate Committee explicitly stated its intention that statewide services would be "managed by the new consortium [ANTHC], with the exception of primary care services," which were to be managed by Southcentral Foundation.[16]

> The Committee further intends, by these provisions, to keep the statewide services of the Alaska Native Medical Center and the Alaska area office intact in Anchorage and managed by the new consortium, with the exception of primary care services. The Committee bill directs Cook Inlet Region, Inc., through Southcentral Foundation, or any lawfully designated health care entity of Cook Inlet Region, Inc., to enter into a funding agreement with the Indian health service to provide all primary health care services . . . .[17]

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[15] S. Rep. No. 105-56 at 110.

[16] SCF was incorporated in 1982 as an Alaska nonprofit corporation under the authority of Cook Inlet Region, Inc.. *See* SCF, https://www.southcentralfoundation.com/about-us/history/ (last visited Aug. 15, 2017). SCF's current primary care programs serve the nearly 65,000 Alaska Native and American Indian people who live in Anchorage, the Matanuska-Susitna (Mat-Su) Valley, and communities that are located in the "Anchorage Service Unit" (ASU) and several other communities that have affiliated with SCF. *See id.* To note, some communities outside of Anchorage are part of the ASU, despite being affiliated with other regional organizations, because they rely on ANMC as their community hospital, in contrast to regions that have their own hospitals. *Id.*

[17] S. Rep. No. 105-56 at 110.

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Initially, there was fierce opposition to allowing SCF control over the new ANMC hospital and the other statewide programs and services that were located in Anchorage and in the Matanuska-Susitna Valley.[18] One concern was whether individual Alaska Natives and tribal entities from other regions would get their fair share of services and support.[19] Other concerns involved the rights of other tribal entities to be involved in managing resources for both regional and statewide services.[20] A number of tribes filed a lawsuit to prevent SCF from controlling all the federal programs and resources in Anchorage and surrounding areas without their permission.[21]

When Congress passed Section 325, it recognized the concerns about equitable delivery of services and included several provisions to resolve them.[22] In addition to authorizing the creation of ANTHC, it allowed SCF to administer certain programs without getting additional authorization from other tribal entities.[23] But Section 325(d) also required SCF to maintain certain minimum levels of services, prohibited SCF from discriminating against Alaska Natives living outside Anchorage, and required SCF to reach agreement with the rest of the tribes, acting through the new Consortium, about providing additional services at ANMC. The requirement in Section 325(d) that SCF reach agreement with ANTHC before providing additional services at ANMC protected the Consortium against SCF garnering too much control.[24]

B. ANTHC Was Established as a Nonprofit Corporation Under Alaska Law.

Section 325 does not dictate any specific entity form for ANTHC. It also does not address many other specific requirements related to ANTHC's governing structure. It does, however, include the following five requirements, with which ANTHC's governance model and documents all comply:

- The consortium "shall be governed by a 15-member Board of Directors."[25]

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[18] *See* Declaration of Lincoln A. Bean, Sr. (Aug. 16, 2017) ("Bean Decl.") at ¶ 18, filed contemporaneously herewith.
[19] *Id.*
[20] *Id.*
[21] *Id.* (citing *Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986 (9th Cir. 1999)).
[22] *See* S. Rep. No. 105-56.
[23] *See* Pub. L. No. 105-83, § 325(d).
[24] Bean Decl. ¶ 20.
[25] (Emphasis added.)

- The Board shall be composed of one representative of each of the regional health entities and two representatives of the other tribal providers who are not affiliated with a regional health entity.[26]
- Each Director shall be entitled to cast one vote.
- The Board of Directors shall establish at its first meeting its rules of procedure, which shall be published and made available to all Directors.
- Decisions of the Board of Directors shall be made by consensus whenever possible, and by majority vote in the event that no consensus can be reached.

Allowing decisions to be made by a majority of Directors instead of requiring consensus on every issue is critical because it protects the ability of the majority of tribal entities to act through the Consortium even over the objections of the minority.[27] It also protects them, through the Consortium, from potential efforts of a single region or tribe to exact concessions from the rest through its ability to thwart consensus.

1. Articles and Bylaws.

ANTHC was incorporated as a non-member Alaska nonprofit corporation on December 2, 1997.[28] ANTHC's Articles of Incorporation (Articles) provide that ANTHC is organized exclusively for charitable purposes, including carrying out the purposes of Section 325. Article V of ANTHC's Articles specifies that the Consortium is organized under the meaning of Section 501(c)(3) of the Internal Revenue Code, confirming its nonprofit status.[29] Article II states that "[t]he corporation shall have no members."[30] And Article IX of the Articles provides that "management of the corporation will be vested in a board of no more than 15 directors, and such

[26] This includes tribes and subregional providers which operate health programs and which are not affiliated with a regional health entity (*i.e.*, have not authorized a regional health entity to provide PSFAs on their behalf to the people in their communities). It also includes tribes that do not receive services from any tribal, regional, or subregional health provider.
[27] *Id.*
[28] *See* Langberg Decl., Ex. B (1997 Articles of Incorporation).
[29] *Id.* at 2 (ANTHC_000055).
[30] *Id.* at 1 (ANTHC_000054).

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officers and committees as the board of directors may appoint in conformity with these Articles and with the Bylaws of the Corporation."[31]

[redacted].[32] Article II of ANTHC's Bylaws state that "ANTHC shall have no members."[33] Consistent with Section 325, Article III of the Bylaws requires the Board to have 15 persons, 13 of whom are selected by tribal "Regional Health Organizations"[34] and two of whom are selected by the "Unaffiliated Alaska Native Tribal Health Committee."[35] Under ANTHC's Bylaws, the regional health organizations may each select an alternate to the primary director they select.[36] Directors' representative function is described in Article XIV of the Bylaws:

> While ANTHC Directors serve as a representative of a Regional Health Organization or the UANTHC, that does not diminish the fiduciary duty each Director owes to ANTHC to exercise his or her powers to fulfill his or her obligations to ANTHC in good faith and to make decisions that the director reasonably believes to be in the best interests of ANTHC. Directors shall exercise the level of care an ordinarily prudent person in a like position would exercise under similar circumstances and follow codes of conduct, rules, regulations, policies, procedures and resolutions adopted by the

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[31] *Id.* at 4 (ANTHC_000057). The Articles have been amended, but the provisions related to the number of directors and their duties have remained unchanged. *Compare* Langberg Decl., Ex. C at 3 (ANTHC_000065) (2001 Articles of Incorporation) *and* Ex. D, at 3 (ANTHC_000074) (2012 Articles of Incorporation), *with* Ex. B, at 4 (ANTHC_000057).

[32] *See* Bean Decl., Ex. 2 (ANTHC, Board of Director Meeting Minutes, Jan. 8-9, 1998); *see also id.*, Langberg Decl., Ex. E, at 17 (ANTHC_001590) (ANTHC Bylaws, Article XIII, "Robert's Rules of Order," addressing the applicable rules of procedure). [redacted] *See* Bean Decl., Ex. 2 at 7 (ANTHC_007870).

[33] *See* Langberg Decl., Ex. E, at 2 (ANTHC_001575) The substance of this provision has been the same since 1998 when the Bylaws were first adopted.

[34] The "Regional Health Organizations" listed in Article III(A) of the Bylaws are identical to the "Regional health entities" listed in Section 325.

[35] Langberg Decl., Ex. E at 2-3 (ANTHC_001575-1576). The Unaffiliated Alaska Native Tribal Health Committee includes the tribal providers who are not affiliated with a regional health entity. It provides a forum for them to select two directors for the ANTHC Board of Directors and to coordinate on issues of mutual concern.

[36] *See id.*

> ANTHC Board of Directors and Committee(s) on which they serve.[37]

The Bylaws also address Section 325's consensus and voting requirements. Under Article IV(A) of the Bylaws, each director "shall have one vote on all matters . . . . Decisions of the Board of Directors shall be made by consensus, or by a majority vote of the Directors present at a meeting at which a quorum is present in the event that no consensus is reached[.]"[38] The Bylaws also require a majority of the entire Board (in contrast to a majority of those present) to approve changes to certain documents, including the Articles and Bylaws.[39] The Bylaws are routinely included in the Board packet for meetings and are available to Directors on request.[40]

2. The Board's Code of Conduct and Disclosure Policy.

The ANTHC Board of Directors elected to address Directors' potential and actual conflicts of interest by adopting a Code of Conduct to clarify Directors' duties of loyalty and confidentiality and to provide a procedure for Directors to follow if they have a conflict of interest.[41] The Board also adopted a Disclosure Policy to govern the disclosure of confidential information to individuals and entities outside the ANTHC Board.

The Board initially developed the Code of Conduct in 2012 to provide additional guidance to Directors about their duties and responsibilities, which were then addressed in the Bylaws.[42] Among other things, it expanded and refined the provisions regarding how to recognize and manage different kinds of conflicts of interest that might arise. It also clarified that Directors' duty of loyalty to ANTHC takes precedence over the Directors' representative

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[37] Langberg Decl., Ex. E at 17 (ANTHC_001590).
[38] *Id.* at 7 (ANTHC_001580).
[39] *Id.* Although the Board of Directors has modified the Bylaws a number of times since 1998, the provisions related to voting and who may select directors have remained substantially the same since ANTHC's inception.
[40] Under ANTHC's Disclosure Policy, copies of governing documents also are available to regional health entities and other tribal co-signers of the Alaska Tribal Health Compact, as well as to individual beneficiaries. *See* Langberg Decl., Ex. F at 1 (ANTHC_001608) (ANTHC Disclosure Policy).
[41] *See* Declaration of Andy Teuber (in support of Defendant's Motion for Summary Judgment) (Aug. 16, 2017) ("Teuber Decl.") ¶ 31.
[42] *Id.* ¶ 32.

obligations.[43] The Board approved amendments to the Code of Conduct in June 2016, September 2016, and June 2017 to clarify expectations and processes regarding handling conflicts of interest and confidential information.[44] The changes also provided additional options to facilitate sharing confidential information, subject to appropriate safeguards, with other tribes and tribal health organizations in the Alaska Tribal Health System.

Consistent with the duty of loyalty and care prescribed in corporate law, the Code of Conduct states at Section A, *inter alia*:

> Each Director has a duty of loyalty to ANTHC and must exercise his or her powers in good faith and in the best interests of ANTHC and all of the people it serves. Each Director must disclose and resolve personal, professional and organizational conflicts of interest in accordance with the Board's Bylaws, codes of conduct, rules, regulations, policies, procedures and resolutions.[45]

Other sections of the Code of Conduct address Directors' duties to ANTHC, including Section (A)(3)(b), regarding organizational conflicts of interest; Section (A)(3)(f), regarding "Competing Duties"; Section (A)(4), regarding the duty of confidentiality; Section (B)(2), which addresses the duty of representation; Section (B)(4), conveying the expectation that due consideration be given to concerns brought to the Board by the entities that select directors, as well as the impact potential decisions may have on them; and Section (C), describing a duty of respect that includes recognition of differing circumstances and views of the tribal health organizations and entities served by ANTHC and the expectation that their concerns be conveyed and considered by the directors.[46]

Section (A)(4)(d) of the Code of Conduct addresses the duty of confidentiality:

> So long as the Director complies with his or her duty of loyalty and any applicable limitations, safeguards and legal requirements, any Director who would like to convey confidential or sensitive information to the entity that selected him or her may do so to the extent authorized by the Board, including on a case by case basis, as provided in a policy approved by the Board, or as provided in a

[43] Langberg Decl., Ex. G (2012 Code of Conduct).
[44] *Id.*; *see also* Langberg Decl., Exs. H (2016 Code of Conduct) and I (2017 Code of Conduct).
[45] Langberg Decl., Ex. I at 1 (ANTHC_001595).
[46] *Id.* at 3 (ANTHC_001597) and 5-9 (ANTHC_001599-1603).

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> confidentiality agreement or other agreement authorizing the disclosure.[47]

Consistent with this Section, ANTHC adopted a policy on the Disclosure of Records and Information (Disclosure Policy) "[t]o facilitate the appropriate disclosure and use of Consortium information and provide for adequate safeguards for sensitive, confidential, proprietary and privileged information."[48] The Disclosure Policy formalized a number of longstanding policies and practices and provided additional guidance to ANTHC staff regarding what information can be routinely shared with tribal health organizations and beneficiaries.[49] When first approved in 2016, the Disclosure Policy also addressed information requests from Directors because that had been an area of recent concern.[50] The Board deleted those provisions in 2017 to accommodate concerns expressed by the Directors selected by SCF.[51]

The Disclosure Policy as amended in April 2017 provides a description of materials that may be shared with regional health entities (and other Tribal Co-Signers of the Alaska Tribal Health Compact) and specifies that they may also access materials "they may have legitimate interest in, if they provide adequate assurances that information will be safeguarded from re-disclosure and improper use."[52] Specifically, "[c]onfidential, proprietary and other sensitive information" may be provided "in appropriate cases if adequate safeguards are in place to protect the integrity, confidentiality and use of the information, such as a data-use agreement, a confidentiality or non-disclosure agreement, or a common interest or joint defense agreement."[53]

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[47] *Id*. at 6 (ANTHC_001600). Similar provisions appeared in prior versions of the Code of Conduct. *See* Langberg Decl., Ex. H, at 6-7 (ANTHC_000825-826). A provision allowing for the disclosure of confidential or sensitive information pursuant to a confidentiality agreement authorizing the disclosure was included in the June 2016 and the June 2017 versions of the Code of Conduct. Similarly, both also contain a provision that allows the Chair of the Board or the Chair of the Ethics, Compliance, Quality, and Safety Committee to authorize such disclosures between meetings. *See* Langberg Decl., Ex. I at 6 (ANTHC_001600) and Ex. H at 7 (ANTHC_000826).

[48] Langberg Decl., Ex. F at 1 (ANTHC_001608).

[49] Teuber Decl. ¶ 33.

[50] *Id.*

[51] *Id.*

[52] Langberg Decl., Ex. F at 2 (ANTHC_001609).

[53] *Id.*

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C. ANTHC and SCF's Relationship Includes Both Cooperation and Competition.

1. ANTHC and SCF cooperate in co-managing ANMC.

ANTHC and SCF have successfully co-managed ANMC for almost 20 years. ANMC includes a 150+ bed inpatient hospital that provides comprehensive medical services to Alaska Native and American Indian people. As contemplated by Section 325 and its legislative history, ANTHC and SCF co-manage ANMC programs, with ANTHC generally focusing on inpatient hospital, outpatient surgery, specialty, ancillary, emergency, and administrative services, and SCF generally focusing on primary care services.[54]

Because ANMC is not a separate legal entity, ANTHC and SCF have established a Joint Operating Board (JOB) to oversee its integrated medical staff, monitor quality of services, and address other key issues.[55] ANTHC selects five of the voting directors on the JOB and SCF selects four voting directors.[56] The JOB is subordinate to both the ANTHC and SCF Boards.[57]

ANTHC and SCF use ANMC operating teams and a variety of agreements, including the Assurances[58] and a joint defense/common interest agreement, to enable collaboration and coordination of activities to co-manage the ANMC campus.[59] Through this complex set of inter-relationships, arrangements, and agreements, both the ANTHC and SCF Boards are able to access confidential ANMC information and provide oversight over ANMC PSFAs.[60] While ANTHC and SCF also collaborate on other programs and initiatives, they have not established a similar framework to allow for this level of exchange as a matter of course outside the ANMC context.

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[54] *See* Declaration of Garvin Federenko at ¶ 3 (Aug. 16, 2017), filed contemporaneously herewith ("Federenko Decl.").
[55] *See* Declaration of Roald Helgesen (in support of Defendant's Motion for Summary Judgment) at ¶ 4-5 ("Helgesen Decl."), filed contemporaneously herewith.
[56] *Id.* ¶ 5.
[57] *Id.* ¶ 6.
[58] *See* Dkt. 17-2 and 17-3.
[59] Helgesen Decl. ¶ 4.
[60] *See id.*at ¶ 6.

2. SCF competes with ANTHC in multiple ways.

Competition is endemic in SCF's relationship with ANTHC.[61] ANTHC has far more competition, and resulting conflicts of interest, with SCF than with any other regional health entity, mostly because of their geographic overlap in the Anchorage area.[62] In recent years, SCF has conveyed its interest in becoming sole manager and assuming complete control over ANMC.[63] Despite efforts to address competition between ANTHC and SCF in Section 325 and the Assurances, which first became effective in 1998 for SCF and 2000 for ANTHC,[64] the competition remains. It helps explain why [redacted],[65] as it again tries to do in this lawsuit. It also helps explain why preserving that duty undiminished is so important to the health of ANTHC.

a. SCF competes with ANTHC for real estate.

ANTHC and SCF share ANMC's physical campus (Campus) in Anchorage. It spans numerous city blocks and includes land and facilities owned by ANTHC, SCF, and the federal government.[66] ANTHC and SCF's competition for space on this Campus is one facet of the many conflicts of interest that exist between ANTHC and SCF.

Just one example of the competition between ANTHC and SCF for real estate is the Diplomacy Building at the corner of Tudor and Tudor Centre Drive that used to be owned by the University of Alaska.[67] [redacted].[68] [redacted][69]

[61] Teuber Decl. ¶ 11.
[62] *Id.*
[63] *Id.* ¶ 13.
[64] Dkt. 17-2 and 17-3.
[65] *See* Bean Decl. ¶ 15 & Ex. 1, at 9 (ANTHC_007864-7880); *see also* discussion at II.E, *infra*.
[66] Helgesen Decl. ¶ 7 & Ex. 3 (ANTHC_007883).
[67] *Id.* ¶ 9.
[68] *Id.* ¶ 10 & Ex. 4 (ANTHC_001951-1952).
[69] *Id.* ¶ 11 & Ex. 5 (ANTHC_006003).

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[redacted][70]. [redacted][71]. [redacted][72] Her failure to differentiate between her role as the President and CEO of SCF and her role as an ANTHC Director, *inter alia*, made other Directors uncomfortable.[73]

[redacted][74] [redacted][75].

Another example of SCF's competition with ANTHC over real estate – additional examples exist[76] – involves the "Lake Tract," which is adjacent to other ANTHC property and is currently owned by the Tudor Centre Trust (TCT). Acquiring the Lake Tract would have enabled

[70] *Id.* ¶ 12 & Ex. 6 (ANTHC_006002).
[71] *Id.* ¶ 13 & Ex. 7 (ANTHC_007313, 7316-7317).
[72] *Id.* & Ex. 8 (ANTHC_005996).
[73] Declaration of Andrew Jimmie (in support of Defendant's Motion for Summary Judgment) at ¶ 14 (Aug. 16, 2017) (Jimmie Decl.), filed contemporaneously herewith.
[74] Helgesen Decl. ¶ 14 & Ex. 9 (SCF_000360-361).
[75] *Id.* & Ex. 10 (SCF_000362).
[76] [redacted] Federenko Decl. ¶ 11. [redacted] *Id.* [redacted] *Id.* & Ex. 9 (ANTHC_001946-1948) and Ex. 10 (ANTHC_001953-1954). [redacted] *Id.* & Ex. 11 (ANTHC_007311-7312). In 2015, an SCF subsidiary partnered with a developer to purchase the ASI building. *Id.*; *see also* Dkt. 24 ¶ 24.

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ANTHC to increase the size of a building it planned to construct.[77] Accordingly, [redacted][78] The TCT is managed by a Board of Trustees that is composed of five Trustees who serve staggered three-year terms upon election by TCT "members" who are the record owners of each lot or tract within the Tudor Centre Subdivision.[79] Members are allocated a number of votes equal to the number of square feet of land they own that are subject to the Declaration of Covenants and Restrictions.[80] As of 2011, [redacted], which allowed SCF to essentially select a majority of the Trustees, as well as the Trust's Chair and President.[81] SCF could also exert significant control over decisions requiring approval by the TCT "members."[82]

[redacted][83] [redacted][84] [redacted][85] [redacted][86] [redacted]

[77] Federenko Decl. ¶ 5.
[78] *Id*.
[79] *Id.* ¶ 6 & Ex. 3, at 7 (ANTHC_007663).
[80] *Id.*, Ex. 3, at 2 (ANTHC_007658).
[81] *Id.* at Ex. 3 at 2, 7 (ANTHC_007658, 7663).
[82] *Id.*
[83] *Id.* ¶ 5 & Ex. 1 (ANTHC_007468).
[84] *Id.* ¶ 7& Ex. 2 (ANTHC_007469-7471).
[85] *Id.* ¶ 8 & Ex. 4 (ANTHC_0007679).
[86] *Id.* ¶ 9 & Ex. 5 (ANTHC_007616) and Ex. 6 (ANTHC_007560_7601).

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[redacted][87], [redacted]
[redacted][88]. [redacted]
[redacted]
[redacted][89].

b. SCF competes with ANTHC for health care resources and personnel.

SCF also competes with ANTHC for health care resources, including nurses and other hard-to-recruit medical and administrative professionals.[90] Qualified nurses are in short supply both in Alaska and throughout the nation. ANTHC must frequently recruit and relocate nurses from the lower 48.[91] [redacted]
[redacted][92]. [redacted]
[redacted]
[redacted][93].
[redacted]
[redacted]
[redacted][94].

ANTHC and SCF also compete for other employees, consultants, and vendors.[95] The organizations often recruit the same executives, information technology and compliance staff, and other highly trained staff.[96] For example, ANTHC had difficulty recruiting high-level financial staff a number of years ago and tried to recruit SCF's CFO.[97] One of ANTHC's current Vice Presidents worked at SCF in a similar position immediately before being hired at

[87] *Id.* ¶ 10 & Ex. 7 (ANTHC_007605).
[88] *Id.* & Ex. 8 (ANTHC_007602-7604).
[89] *Id.*
[90] Helgesen Decl. ¶ 18.
[91] *Id.* ¶ 19.
[92] *Id.* & Ex. 14 (ANTHC_002036).
[93] *Id.*
[94] *Id.* ¶ 20 & Ex. 15 (ANTHC_007697-7698).
[95] *Id.* ¶ 21.
[96] *Id.*
[97] *Id.*

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ANTHC.[98] In recent years, many highly trained professionals have moved from SCF to ANTHC or vice versa, including pharmacists, certified medical assistants, and laboratory, imaging, information technology, and compliance staff.[99] During a recent recruitment for in-house counsel, two of ANTHC's top candidates indicated that they were also interviewed for an open attorney position at SCF.[100] A high-ranking SCF employee has applied for ANTHC's top three positions at every opportunity since 2008.[101]

c. SCF competes with ANTHC in providing health care services.

ANTHC and SCF compete in providing health care services in multiple ways, including the use of electronic health record (EHR), data for planning, non-emergent care, and competing care venues. For example, ANTHC purchased an EHR system and support service from the Cerner company for ANMC.[102] ANTHC's agreement with Cerner included options to sublicense the EHR system to SCF and other tribal health partners to allow for integration of health records at ANMC, and potentially throughout the Alaska Tribal Health System.[103]

[redacted][104][redacted][105][redacted][106]

[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] Bean Decl. ¶ 21.
[102] Helgesen Decl. ¶ 23.
[103] *Id.*
[104] *Id.* ¶ 25 & Ex. 16 (ANTHC_002069-2073).
[105] *Id.*
[106] *Id.* ¶ 26 & Ex. 17 (ANTHC_002088-2094).

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[redacted][107]

[redacted][108] At least one ANTHC Director expressed concern about how the data might be used and about patients and providers jeopardizing patient care by keeping relevant sensitive information out of the patient health records to protect patient privacy.[109] Additionally, SCF's proposed sale of population health analysis and planning to other tribal health entities would compete with the population health, planning, and related functions that ANTHC provides through its longstanding Epidemiology Center and other community health programs.[110]

ANTHC and SCF also have competing goals in providing non-emergency care through the Emergency Department at ANMC because SCF also provides primary care at its separate clinics.[111] One example of this is the "Fast Track" approach to care.

Most departments at ANMC are managed by either ANTHC or SCF. For a few, management functions are shared. The Emergency Department is one such.[112] Patients who come to the Emergency Department in need of various primary care services are generally seen by SCF-managed staff in the "Fast Track."[113] The Fast Track is designed to quickly treat patients who do not have severe illness or injuries requiring emergency care.[114] Historically, different parts of the Emergency Department had different outlooks on the importance of minimizing the wait time of non-emergency patients.[115] ANTHC has advocated minimizing the "door-to-provider" time – how long a patient waits from entering the Department to seeing a provider – for all patients to improve patient care and to meet federal standards.[116] But SCF generally has

[107] *Id.* & Ex. 16 (ANTHC_002069-2073).
[108] *Id.* ¶ 27; Jimmie Decl. ¶ 11.
[109] Jimmie Decl. ¶ 11.
[110] Helgesen Decl. ¶ 27.
[111] *Id.* ¶ 28.
[112] *Id.* ¶ 29.
[113] *Id.*
[114] *Id.* ¶ 30.
[115] *Id.*
[116] *Id.*

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appeared reluctant to encourage patients to seek care through the Fast Track instead of in a primary care setting.[117]

While the Fast Track had the potential to significantly reduce the average door-to-provider time, in fact the average door-to-provider time for Fast Track patients has been nearly twice as long as the rest of the Emergency Department.[118] One explanation for this outcome is that, as SCF staff have told ANMC management, SCF was not interested in improving the door-to-provider times for Fast Track patients because SCF did not want Fast Track to become a more attractive option for patients than SCF's primary care facilities.[119]

Recently, ANTHC and SCF have made significant progress in reconciling their approaches.[120] However, the fact that it has taken years to get to this point illustrates the degree to which their differing goals and perspectives bring SCF and ANTHC into competition, even in a shared department.

Beyond conflicts related to Fast Track, SCF's large clinic in the Mat-Su area also directly competes with ANMC for patients who need primary and certain ancillary services.[121] ANTHC learned from a concerned patient at a recent community meeting that SCF is directing patients to seek primary care there instead of the ANMC Campus.[122] One reason for SCF to do this is that the revenue sharing agreement between ANTHC and SCF that applies to ANMC does not apply to services provided off-Campus, which increases SCF's profit at ANTHC's expense.[123]

3. SCF also competes with the other regional health entities that select directors for the ANTHC Board.

SCF also competes with the other regional health entities identified in Section 325. This matters because of the sensitivity of issues discussed by the Board. It underscores the importance to ANTHC and all of its Board members of keeping information provided to the Board in confidence.

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[117] *Id.*
[118] *Id.* ¶ 31.
[119] *Id.*
[120] *Id.* ¶ 32.
[121] *Id.* ¶ 33.
[122] *Id.*
[123] *Id.*

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At the same time that Congress enacted Section 325, it also enacted Section 326,[124] which restricted the use of Indian Health Service funds for "new" tribal contracts to help protect the viability of the existing regional health entities.[125] This in effect established a moratorium in Alaska on new ISDEAA contracts and compacts that would shift funding from existing regional health entities to other Alaska Native corporations and villages. This moratorium helps the regional health entities in Section 325 and other tribal health providers take advantage of economies of scale by preventing very limited resources from being divided into such small portions that the funds cannot be used effectively for health services.[126] Subject to certain exceptions, the moratorium has been extended several times and is in effect through 2018.[127]

Although the Section 326 moratorium prevented the federal government from subdividing the scarce healthcare resources in Alaska further between existing tribal health programs and potential new ones, it did not prohibit tribes from changing their affiliation from one of the regional health entities identified in Section 325 to another. This promoted some degree of self-determination despite the moratorium.[128]

Each tribe is allocated a certain amount of funds and resources from the Indian Health Service. When a tribe leaves one regional health entity, like the Bristol Bay Area Health Corporation (BBAHC), for another, like SCF, funding associated with that tribe transfers too. [redacted][129] Again, the regional health entities often depend on economies of scale. When a tribe changes regional health entity affiliations, some services can be too expensive to maintain for the smaller population remaining at the regional health entity it left.[130]

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[124] Pub. L. 105-83 § 326 (1997).
[125] Teuber Decl. ¶ 16.
[126] *Id.*
[127] *Id.*
[128] *See* Bean Decl. ¶ 6.
[129] Teuber Decl. ¶ 18 & Ex. 2 (ANTHC_007699-7701) and Ex. 3 (ANTHC_007702-7708) (showing [redacted].
Bean Decl. ¶ 6.

In recent years, it appears SCF has intensified its recruiting efforts.[131] SCF has been "embolden[ed]" to "'recruit' tribes at the expense of other tribes within regional organizations," such as the Aleutian Pribilof Islands Association (APIA) – another regional health entity – as described in a letter to Senator Lisa Murkowski, Senator Mark Begich, and Representative Don Young.[132]

a. SCF competes with the Aleutian Pribilof Islands Association.

The impacts that one tribe's shift can have on others in a region is exemplified [redacted].[133] St. George is a tribe that administers its own sub-regional clinic, while relying on APIA for higher levels of health care.[134] [redacted].[135]

Because so much of APIA's service population lived in St. Paul, its withdrawal involved almost half of the resources that had been available to APIA and so had a very significant impact.[136] Also, APIA had invested considerable resources in St. Paul's local infrastructure because it is a sub-regional hub, serving others in the region as well as those living in St. Paul.[137] As a result of St. Paul's withdrawal from APIA, SCF acquired not only St. Paul's resources, but

[131] Teuber Decl. ¶ 20.
[132] *Id.* & Ex. 4 (ANTHC_007331-7335). In fact, in a discovery response, SCF identified 10 tribal entities, formerly associated with other regional health entities, ANTHC, or the Alaska Native Health Board, that it admitted it has considered, or been asked to consider, providing services or support to, including: the Native Village of Karluk, the Aleut Community of St. Paul Island, the Village of Iliamna, Igiugig Village, Kokhanok Village, Newhalen Village, Nondalton Village, Pedro Bay Village, Yakutat Tlingit Tribe, and the Qawalangin Tribe of Unalaska. *See* Langberg Decl., Ex. J at 11 (SCF's Responses to ANTHC's Second Discovery Requests).
[133] Teuber Decl.¶ 25, Ex. 7 (ANTHC_007881-7882).
[134] *Id.* ¶ 26.
[135] *Id.* & Ex. 7 at 1 (ANTHC_007881).
[136] *Id.* ¶ 27.
[137] *Id.*

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also resources that other villages had shared with St. Paul anticipating a continuing and mutually supportive relationship that enhanced care for all of the people in the region.[138]

In a letter to Senators Murkowski and Begich and Representative Young, APIA described the "fiscal fallout" associated with this transfer as "overwhelming."[139] APIA noted that the deep concern it had "about the drastic reduction in APIA's funding, and consequent irreversible reduction in economies of scale, prompts this request for immediate corrective action by Congress.[140] Without funds to replace the amount being transferred to Southcentral Foundation, we have no choice but to make immediate deep cuts in APIA's Tribal Clinics and sub-regional health centers."[141]

b. SCF competes with the Kodiak Area Native Association.

The Kodiak Area Native Association (KANA) is another of the regional health entities identified in Section 325. It relies on ANTHC for "statewide services," including specialty and tertiary medical services at ANMC.[142] KANA is located in the Anchorage Service Unit because it relies on ANMC to be its primary community hospital and referral center, provide medical professionals to staff local "field clinics," and provide other technical assistance and support.[143]

In 2011, SCF began recruiting the Native Village of Karluk, which is one of seven communities served by KANA.[144] Karluk manages many of its health programs at a local level.[145] Even so, Karluk's potential withdrawal from KANA would necessarily increase the challenges confronting KANA and decrease the services available to other communities KANA serves.[146]

When SCF began recruiting Karluk again in 2014, [redacted]

[138] *Id.*
[139] *Id.* ¶ 28 & Ex. 4 (ANTHC_007331-7335).
[140] *Id.*
[141] *Id.*
[142] *Id.* ¶ 15.
[143] *Id.*
[144] *Id.* ¶ 19.
[145] *Id.*
[146] *Id.*

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[redacted][147][redacted]„[148][redacted][149][redacted][150][redacted]„[151][redacted]„[152]

c. SCF competes with Chugachmiut.

The Board of Directors for Chugachmiut, another regional health entity identified in Section 325, passed a similar resolution admonishing SCF in 2014.[153] The Chugachmiut resolution characterized SCF's efforts as improper because "members of the Alaska Tribal Health Compact demonstrate respect for each other by purposefully and vigilantly keeping away from the business of and boundaries outside its own unless invited in."[154]

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[147] *Id.* ¶ 21 & Ex. 5 (ANTHC_007861-7863).
[148] *Id.*, Ex. 5 at 1 (ANTHC_007861).
[149] *Id.*
[150] *Id.* ¶ 22, Ex. 5 at 2 (ANTHC_007862).
[151] *Id.* ¶ 23.
[152] *Id.*
[153] *Id.* ¶ 24, Ex. 6 (ANTHC_007328-7330).
[154] *Id.*

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d. SCF competes with the Southeast Alaska Regional Health Consortium.

[redacted][155]. [redacted][156] [redacted][157] [redacted][158]. [redacted][159].

D. SCF's Position Discourages Candor and Undermines Good Governance.

The ANTHC Board instituted the Code of Conduct and Disclosure Policy not only to protect the sensitive information about ANTHC that is discussed during ANTHC Board meetings, but also to protect the confidential information that Directors share about the regional and tribal health entities they represent.[160] SCF Directors have in the past been unwilling to disclose conflicts of interest of their own accord and have resisted even when others identify a conflict on their behalf.[161] This resistance has been especially strong when the conflict involves

[155] *See* Bean Decl. ¶ 10 & Ex. 1 (ANTHC_007851-7852).
[156] *Id.*; Teuber Decl. ¶ 29 & Ex. 9 at 7 (ANTHC_007891) (Draft Meeting Minutes, Jun. 6-7, 2017).
[157] Bean Decl. ¶ 10; Teuber Decl. ¶ 29 & Ex. 9 at 7 (ANTHC_007891).
[158] Bean Decl. ¶ 10.
[159] *Id.* ¶ 11; Teuber Decl. ¶ 29 & Ex. 9 at 7 (ANTHC_007891).
[160] *Id.* ¶ 34.
[161] Bean Decl. ¶ 12.

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direct competition between SCF and ANTHC, or competition between SCF and another regional health entity represented on the Board.[162]

In response, there has been a chilling of the information that some Directors representing other regional health entities are willing to share with the ANTHC Board.[163] They simply do not trust that what they say is confidential if a Director selected by SCF is in the boardroom—even if the Board is in executive session—and worry that SCF will use information shared in the ANTHC boardroom to its own advantage.[164] Despite the Board's passage of the Code of Conduct and Disclosure Policy, ANTHC Board discussions in both open and executive sessions have been quelled because the Directors selected by SCF have openly challenged the policies and expressed their belief that they can use confidential information from ANTHC and other tribal health organizations for the benefit of the entity that selected them.[165]

This makes it difficult for the ANTHC Board to achieve its mission.[166] ANTHC, as the statewide service provider with responsibility to support each of the regional health entities listed in Section 325, should be aware of the issues and concerns each region may have.[167] But sometimes it is not appropriate for a regional health entity to share its concerns directly with SCF or other regional organizations.[168] That is why the existence of the Consortium as a safe space for candid and sometimes confidential collaboration is essential.

For example, because ANTHC often provides technical and logistical support to tribal organizations, specific organizations might seek assistance to correct deficiencies, improve patient care, maintain accreditation, or discuss a pilot project that might compete with other tribal

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[162] *Id.*
[163] Bean Decl. ¶ 13; *see also* Teuber Decl. ¶ 36.
[164] Bean Decl. ¶¶ 13-14; Jimmie Decl. ¶ 10.
[165] Teuber Decl. ¶ 36.
[166] Bean Decl. ¶ 13; *see also* Jimmie Decl. ¶ 10. With one exception, SCF has selected high-ranking operational staff to serve as its primary and alternate directors, increasing the difficulty of managing potential conflicts of interest. Currently, Katherine Gottlieb, SCF's President and CEO, is a Primary Director and Ileen Sylvester, SCF's Vice President of Executive and Tribal Services, is an alternate. Previously, SCF has selected its Chief Operating Officer, Charles Clement, and its General Counsel, Alex Cleghorn, to serve as ANTHC Primary or Alternate Directors.
[167] Jimmie Decl. ¶ 10.
[168] *Id.*

providers.[169] Regional health entities that consult ANTHC in this manner expect ANTHC to ensure the information is maintained in confidence.[170] If Directors are allowed instead to share and use the information for the advantage of the organization that selected him or her, this would undermine considerably the value of ANTHC's assistance.[171] Uncertainty about ANTHC's ability to maintain information confidentially thus interferes with ANTHC's ability to fulfill all of its responsibilities to Alaska Natives across the State.[172]

It would be far better for ANTHC's deliberative process, and governance generally, if all Directors could hear and discuss the full range of ideas and concerns.[173] While this is important for all governing boards, it is critical for ANTHC because there is so much diversity among the different regions and communities. Also, because ANTHC is a statewide healthcare provider, it has the only governing body in the tribal health system in Alaska where Directors are duty bound to do what is best statewide.[174]

E. SCF Has Tried Repeatedly to Change ANTHC's Governance Documents to Give SCF the Upper Hand.

Since ANTHC was established, SCF has tried to limit Directors' duty of loyalty to it. [redacted]."[175] [redacted]."[176] [redacted].[177]

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[169] Teuber Decl. ¶ 38.
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *Id.* ¶ 37.
[174] *Id.*
[175] Bean Decl. ¶ 15 & Ex. 2 at 9 (ANTHC_007864-7880).
[176] *Id.*
[177] *Id.*

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[redacted][178][redacted]

[redacted][179][redacted]

[redacted][180][redacted]

[redacted][181][redacted] show that SCF views Directors as having divided loyalties – to ANTHC but also to the entity that selected them – and that Directors are expected to give priority to their duty of loyalty to their "designating entity." [redacted]

SCF's present complaint is thus the latest volley in a long-standing attack on ANTHC's Directors' undivided duty of loyalty to ANTHC. In its complaint, SCF again asserts that its selected Director's duty of loyalty to ANTHC is subservient to, or diluted by, the Director's duty to SCF. It argues that the Directors it selects for ANTHC's Board have an absolute legal right to share all ANTHC information with SCF.[182] This position would allow SCF to access the sensitive, confidential, privileged, and other protected information that the Director they select for the ANTHC Board acquires through his or her role on ANTHC's Board. In fact, consistent with the Director's duty of loyalty to SCF, the Director would have an obligation to provide SCF any such information that would be beneficial to SCF.

This gets to the heart of the current governance dispute, which centers on Directors' access to ANTHC information and their ability to disseminate that information to the entity that

[178] *See id.*
[179] Langberg Decl., Ex. K (SCF_000253) (excerpt from SCF's proposed changes to ANTHC's Bylaws, June 2015).
[180] Langberg Decl., Ex. L at 1-2 (SCF_000336-337) (excerpt from SCF's proposed changes to ANTHC's Code of Conduct, June 2016).
[181] *Id.* at 3 (SCF_000338).
[182] Dkt. 2, at 9-10; *see also id.* at 17.

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selected them, especially when there is a potential conflict of interest between the entity and ANTHC with regard to the information at issue. The limitation of a Director's duties to ANTHC comes to the fore when competitive issues are in play. ANTHC has worked to alleviate the resulting conflicts of interest concerns by offering Directors access to information that their entities might have a conflict of interest regarding if they will sign a confidentiality agreement with ANTHC. SCF's selected directors have refused to do so.

The key ongoing issue for both ANTHC and other tribal health organizations is maintaining their ability to protect the confidentiality of information shared among Directors, which is all the more important because of SCF's competition with ANTHC and the other regional health entities.. While competition may be healthy and natural in a marketplace, it has no place in a boardroom. Any entity is entitled under the law to expect that its directors will have an unalloyed loyalty to it. By contrast, the directors and alternative directors selected by SCF appear intent on securing the right to leverage information they learn in ANTHC Board meetings for SCF's benefit, rather than recusing themselves from ANTHC Board discussions when there is a potential conflict of interest between SCF's and ANTHC's interests as ANTHC's current governing documents and their duty of loyalty to ANTHC require them to do.

III. SUMMARY JUDGMENT STANDARD

Under Fed. R. Civ. P. 56(a), "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." "Issues of fact do not preclude summary judgment unless they are material to the substantive claim at issue, that is, unless they 'might affect the outcome of the suit under the governing law.'"[183] "[T]he substantive law will identify which facts are material."[184] Where, as here, "[t]he parties appear not to dispute any material fact in this case; the only

[183] *Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030, 1039 (9th Cir. 2000) (quoting *Moreland v. Las Vegas Metro. Police Dep't*, 159 F.3d 365, 369 (9th Cir. 1998)).

[184] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.").

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question is which party is entitled to judgment as a matter of law in light of those undisputed facts."[185]

IV. ARGUMENT

A. ANTHC Directors Owe ANTHC an Undivided Duty of Loyalty That Is Not Subordinate to Any Duty They May Owe to Any Other Entity.

1. ANTHC Directors owe an undivided duty of loyalty to ANTHC.

Article VI of ANTHC's Articles of Incorporation confirms that its Directors have a duty of loyalty to ANTHC.[186] In addition, ANTHC is subject to the Alaska Nonprofit Corporation Act.[187] Alaska Statute 10.20.151(d) provides that a nonprofit corporation may eliminate or limit "the personal liability of a director to the corporation for monetary damages for the breach of fiduciary duty as a director. The articles of incorporation may not eliminate or limit the liability of a director for (1) *a breach of a director's duty of loyalty to the corporation*[.]"[188] Thus, the Nonprofit Corporation Act presumes that directors in an Alaska nonprofit corporation owe a duty of loyalty to the corporation.

In that respect, ANTHC's Directors are similar to directors in for-profit corporations as to the duties that they owe the corporation.[189] For example, the Alaska Corporations Code provides that "[a] director shall perform the duties of a director, including duties as a member of a committee of the board on which the director may serve, in good faith, in a manner the director reasonably believes to be in the best interests of the corporation, and with the care, including

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[185] *Whittaker v. Mallott*, No. 3:16-CV-00220-SLG, 2017 WL 1536392, at *2 (D. Alaska Apr. 27, 2017).

[186] Langberg Decl., Ex. D at 2 (ANTHC_000073) (noting that directors shall have no liability to the corporation for money damages for conduct as a director, except for conduct that, among other things, "constitutes a breach of the director's duty of loyalty to the corporation," which presupposes that directors owe a duty of loyalty to ANTHC).

[187] AS 10.20.005, *et seq*.

[188] (Emphasis added.)

[189] *See, e.g., Armenian Assembly of Am., Inc. v. Cafesjian*, 758 F.3d 265, 275 (D.C. Cir. 2014) ("Under District law, it is well settled that a nonprofit corporation's directors and officers owe fiduciary duties to the organization, just the same as with any corporation."); Thomas Lee Hazen & Lisa Love Hazen, *Punctilios and Nonprofit Corporate Governance—A Comprehensive Look at Nonprofit Directors' Fiduciary Duties*, 14 U. PA. J. BUS. L. 347, 355-56 (2012) ("Nonprofits board duties are generally described as a duty of care, a duty of loyalty, and a duty of good faith. . . . The duties of nonprofit directors to a large extent parallel the obligations of for-profit directors.").

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reasonable inquiry, that an ordinarily prudent person in a like position would use under similar circumstances."[190]

The duty of loyalty is central among a director's duties.[191] Although the Alaska Supreme Court has not considered the duty of loyalty in detail, the Delaware Supreme Court – which the Alaska Supreme Court has recognized as "the mother court of corporate law" and turns to for guidance on matters of corporate governance and duties that have not been addressed by Alaska courts[192] – described the fiduciary duty of loyalty in strict and unyielding terms in the seminal case *Guth v. Loft, Inc.*:

> A public policy, existing through the years, and derived from a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it, or to enable it to make in the reasonable and lawful exercise of its powers. The rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest.[193]

Consistent with *Guth*, the Delaware Supreme Court has stated that the duty of loyalty is "unremitting" and the "constant compass by which all director actions for the corporation and

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[190] AS 10.06.450(b).

[191] *See, e.g.*, 3 *Fletcher Cyclopedia of the Law of Corporations* § 837.50, Westlaw (database updated Sept. 2016) ("[A] director or officer of a corporation owes the corporation complete loyalty, honesty, and good faith. That duty is owed the corporation and its shareholders whenever the actions of the director or officer concern matters affecting the general well-being of the corporation. Thus, as a fiduciary in this sense, a director's or officer's first duty is to act in all things of trust wholly for the benefit of the corporation." (footnotes omitted)); Leo E. Strine, Jr. et al., *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629, 633 (2010) ("[T]he duty of loyalty has, for good reason, been central to Delaware's approach to corporate law.").

[192] *Jerue v. Millett*, 66 P.3d 736, 745 (Alaska 2003).

[193] 5 A.2d 503, 510 (Del. 1939).

interactions with its shareholders must be guided."[194] Thus, "[d]irectors should not take a seat at the board table prepared to offer only conditional loyalty, tolerable good faith, reasonable disinterest or formalistic candor."[195]

The duty of loyalty is also broader than simply avoiding circumstances when a director's personal financial interest is involved:

> The duty of loyalty requires a director's conduct to be in good faith and in the best interests of the corporation – and not in the director's own interest or in the interest of another person (such as a family member) or an organization with which the director is associated. There is a variety of situations in which a director's loyalty to the corporation can be questioned. These situations fall into two basic categories. The first involves situations in which a director's personal financial interest conflicts with that of the corporation. The second involves situations in which a director acts in a manner that is disloyal to the corporation for a reason other than a financial conflict of interest.[196]

Thus, it is indisputable that ANTHC's Directors owe a duty of loyalty to ANTHC, and their duty of loyalty "mandates that [they] not consider or represent interests other than the best interests of the corporation and its stockholders in making a business decision."[197]

An undivided duty of loyalty is particularly necessary and appropriate here due to the structural competition between SCF and ANTHC. The competition and conflicts of interest between the two organizations show the need for clear rules and the Court's intervention. However, the existence of the undivided duty of loyalty is neither dependent on nor affected by the absence or presence of competition or conflicts of interest. That is, although competition and conflicts of interest illustrate the need for clear confidentiality rules and information sharing

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[194] *Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998); *see also Pfeiffer v. Toll*, 989 A.2d 683, 707 (Del. Ch. 2010) ("The duty of loyalty has paramount importance under Delaware law," and "case law has consistently stressed the importance of the duty of loyalty.").

[195] *In re Tyson Foods, Inc.*, No. Civ.A. 1106-CC, 2007 WL 2351071, at *4 (Del. Ch. Aug. 15, 2007).

[196] American Bar Association, *Corporate Director's Guidebook* (5th ed. 2007), *reprinted in* 62 BUS. LAW. 1482 (2007).

[197] 1 R. Franklin Balotti & Jesse A. Finkelstein, *Delaware Law of Corporations and Business Organizations* § 4.16, at 4-130 (2016).

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restrictions, the Board's right to restrict the sharing of information outside the Board is not dependent on a specific conflict of interest being present.

2. Section 325 does not diminish ANTHC Directors' duty of loyalty to ANTHC.

Section 325 devotes only a paragraph – four sentences in Section 325(b) – to ANTHC's governance structure. The statute states:

> The Consortium shall be governed by a 15-member Board of Directors, which shall be composed of one representative of each regional health entity listed in subsection (a) above, and two additional persons who shall represent Indian tribes, as defined in 25 U.S.C. 450b(e) [§ 5301(e)], and sub-regional tribal organizations which operate health programs not affiliated with the regional health entities listed above and Indian tribes not receiving health services from any tribal, regional or sub-regional health provider.

The only other subject addressed in Section 325 was how the Board would vote and make decisions. Section 325(b) provides that each member of the Board would be "entitled to cast one vote." It also states that the decisions of the Board "shall be made by consensus whenever possible, and by majority vote in the event that no consensus can be reached." Beyond that, Section 325(b) defers to the Board regarding its governance. It specifically states that the Board is to "establish at its first meeting its rules of procedure, which shall be published and made available to all members."

Nothing in Section 325 alters or dilutes the fundamental duties that ANTHC Directors owe to ANTHC as a result of serving as members of its Board of Directors. This includes Section 325's directive that ANTHC's Board members will "represent" various other entities. Indeed, in this sense ANTHC's selected Directors are no different than directors of other boards who may represent certain shareholders, stakeholders, or constituencies. As the Delaware Court of Chancery has recognized, "[t]his is the essence of the duty of loyalty. The primary concern for directors, even if they are minority directors and significant shareholders, must be the best interests of the corporation rather than their own interests as shareholders" – and, by extension

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here, their interests as representatives of regional health entities.[198] This is axiomatic: "[D]irectors' fiduciary duty runs to the corporation and to the entire body of shareholders generally, as opposed to specific shareholders or shareholder subgroups."[199] Delaware courts consistently reject "the notion that a director appointed by a particular minority stockholder or a particular class or series of stock can or should serve the particular interests of the appointing entity."[200] Thus, the fact that a director represents, or is selected by, a different entity or stakeholder does not diminish or dilute the director's duty of loyalty to the corporation and *all* of its shareholders or members as a group. This conclusion applies with greater force with respect to a nonprofit corporation, for which there are no individual owners or shareholders whose interests may require special consideration.

This undivided duty of loyalty exists even if the Director acts in a fiduciary capacity with respect to another organization. In other words, if an ANTHC Director happens to be an officer or director for another entity, the ANTHC Director's duty of loyalty to ANTHC is in no way diminished by that fact. As the Delaware Chancery Court explained:

> Each [director] faced the dual fiduciary problem identified in *Weinberger v. UOP, Inc*., 457 A.2d 701, 710 (Del. 1983), where the Delaware Supreme Court held that there was "no dilution" of the duty of loyalty when a director "holds dual or multiple" fiduciary obligations. *Id*. If the interests of the beneficiaries to whom the dual fiduciary owes duties are aligned, then there is no conflict. *See, e.g., Van de Walle v. Unimation, Inc*., 1991 WL 29303, at *11 (Del.Ch. Mar. 7, 1991). But if the interests of the beneficiaries diverge, the fiduciary faces an inherent conflict of

[198] *Venoco, Inc. v. Eson*, No. CIV. A. 19506-NC, 2002 WL 1288703, at *7 (Del. Ch. June 7, 2002).

[199] *Gilbert v. El Paso Corp*., No. CIV. A. 7075 et al., 1988 WL 124325, at *9 (Del. Ch. Nov. 21, 1988); *see also Phillips v. Insituform of N. Am., Inc*., No. CIV. A. 9173, 1987 WL 16285, at *10 (Del. Ch. Aug. 27, 1987) ("[T]he law demands of directors . . . fidelity to the corporation and all of its shareholders and does not recognize a special duty on the part of directors elected by a special class to the class electing them . . . ."); R. Franklin Balotti & Jesse A. Finkelstein, *supra*, § 4.16, at 4-166 ("[T]he duties of directors designated by large stockholders are clear: under *Weinberger*, they still owe the corporation and its shareholders 'an uncompromising duty of loyalty."').

[200] *Klaassen v. Allegro Dev. Corp*., No. CA 8626-VCL, 2013 WL 5967028, at *12 (Del. Ch. Nov. 7, 2013).

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> interest. "There is no 'safe harbor' for such divided loyalties in Delaware." *Weinberger*, 457 A.2d at 710.[201]

By describing the Directors on the Consortium's board as "representatives," Section 325 ensures that the experience and viewpoints of the regional health entities are available to inform the decisions of the ANTHC Board. The result is that the Board is composed of persons who offer important expertise and perspective. It does not alter, however, the fundamental duties that those persons owe to ANTHC once they assume their positions as ANTHC directors.

That view is consistent with foundational principles of corporate law, as outlined above. The duty of loyalty exists to ensure that directors know which team they are on, and what the rules are. In the typical case involving a director seeking a personal benefit, the dividing line is clear. For example, a director cannot selfishly usurp a corporate opportunity or trade on inside information. In other circumstances, however, directors may need guidance—in the form of *ex ante* policies and procedures—to clarify their obligations. Selected directors may not only have positions with other organizations, but thoughts and perspectives about how they should act *vis-à-vis* the entity that selected them. Thus, they may not be aware of when business conflicts arise, and may feel obligated to serve the interests of other organizations to which they are responsible. Although not as self-serving as the situation involving the self-interested director, that perspective is no less wrong, as it assumes that the duty of loyalty may be divided and diluted. For that reason, it was precisely appropriate for the ANTHC Board to set the ground rules in advance by clarifying to whom Directors owed their duties and how Directors should conduct themselves once they become members of the Board.

3. SCF requires a similar duty of loyalty from its directors.

[redacted]

[redacted]

[201] *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 46-47 (Del. Ch. 2013) (citing *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983) ("Signal designated directors on UOP's board still owed UOP and its shareholders an uncompromising duty of loyalty.")); *see also McMullin v. Beran*, 765 A.2d 910, 923 (Del. 2000) ("The ARCO officers and designees on Chemical's board owed Chemical's minority shareholders 'an uncompromising duty of loyalty.' There is no dilution of that obligation in a parent subsidiary context for the individuals who acted in a dual capacity as officers or designees of ARCO and as directors of Chemical." (footnote omitted)).

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[redacted][202][redacted][203].[redacted][204][redacted]

[202] Langberg Decl., Ex. M at 1 (SCF_000005) (SCF's Bylaws).
[203] Langberg Decl., Ex. N at 2 (SCF_000010) (SCF's Board of Directors and Officers Conflict of Interest Policy); *see also id.* at 4 (SCF_000012) ("Directors, Officers and Committee Members owe fiduciary duties of loyalty and care to SCF.").
[204] Langberg Decl., Ex. O at 2 (SCF_000061) (excerpt from SCF's *Code of Conduct & Ethics*, Jan. 2014) (emphasis added).

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4. SCF's unique position as a competitor of ANTHC requires a declaration clarifying Directors' duties to ANTHC.

Declaring ANTHC Directors' (including Directors selected by SCF) undivided duty of loyalty to ANTHC is particularly important here for two reasons. First, SCF is a competitor with ANTHC (and the tribal entities that rely on ANTHC). Not surprisingly, given that both organizations provide medical care in Alaska and share a physical campus, they compete in many arenas. [redacted].[205] [redacted].[206] ANTHC and SCF's competition extends to medical care, patients, ancillary services, and administrative services such as medical record management.[207]

SCF also competes for funding and shared resources, and actively has attempted to recruit tribes to change their affiliation to SCF. A change in affiliation results in the transfer of funds and resources to SCF.[208] In addition, SCF competes with other regional health entities that are represented on ANTHC's Board, which increases the sensitivity of Board discussions and decision-making.[209] In fact, SCF's competitive position *vis-à-vis* both ANTHC and the other regional health entities – and its position that its selected Director may subordinate ANTHC's interests to its own – has created a difficult dynamic within the Board, in which other Directors cannot be certain that SCF conflicts will be disclosed or that discussions about sensitive matters will remain confidential.[210]

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[205] Helgesen Decl. ¶¶ 8-16.
[206] *Id.* ¶¶ 18-21.
[207] *Id*. ¶¶ 22-33.
[208] Bean Decl. ¶ 8; Teuber Decl. ¶¶ 18.
[209] Bean Decl. ¶¶ 8, 14; Teuber Decl. ¶¶ 34.
[210] Bean Decl. ¶¶ 12-13; Jimmie Decl. ¶ 10.

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Section 325 was enacted in response to this structural competition. Concerns about fully implementing Section 325's solution prompted tribal providers to negotiate the Assurances.[211] Section 325's direction that all 15 Board members' votes will carry equal weight and its statement that the decisions of the Consortium must be by majority vote if consensus is not possible are consistent with ensuring that the Consortium has a robust governance structure that is less susceptible to being controlled by any one director. The ability of a single tribe to prevent the rest from managing statewide health services prompted Congress to enact Section 325 in the first place. When, as here, a Director is affiliated with a competitor, the Director must scrupulously observe his or her duty of loyalty to ANTHC given the potential for conflicts of interest in transactions or dealings with the corporation.

Second, under these circumstances, it is particularly alarming that SCF has filed its complaint for the express purpose of undermining and eroding the duty of loyalty owed by its selected director. SCF asserts that individuals selected by tribal entities to sit on ANTHC's Board have a legal obligation to those tribal entities that, in effect, supersedes their duty of loyalty to ANTHC and as such they may act contrary to their duty of loyalty to ANTHC.[212]

SCF's position is wrong now, just as it was when [redacted].[213] While each Director can and should bring his or her individual perspective or that of the organization that they represent to their work on ANTHC's Board, their purpose in doing so should be to help ANTHC thrive. Their dual status does not allow for any dilution of their fiduciary duties to ANTHC. To the extent they find their dual status puts them in a conflicted position, they need to recuse themselves from the work of one or both boards to avoid the conflict.

5. Regional health entities are not members of ANTHC's Board and thus are not entitled to the same information as ANTHC Directors.

ANTHC is an incorporated nonprofit corporation and is a separate entity from the regional health entities described in Section 325. As Section 325 directs, ANTHC is governed by a Board of Directors composed of "representatives" of other distinct entities, including the

[211] *See* Dkt. 17-2, 17-3.
[212] *See* Dkt. 2, at 17.
[213] *See* Bean Decl., Ex. 2 at 9 (ANTHC_007872).

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regional health entities. Although representatives of the regional health entities are expected to represent the interests of their respective organizations to the ANTHC Board, ANTHC Board members are not *equivalent to* the regional health entities themselves. Rather, ANTHC, the members of the ANTHC Board, and the regional health entities are all, as a matter of law, separate and distinct persons and entities. Indeed, since its creation, ANTHC's Board adopted minimum qualifications for Directors, including a lineal descendancy requirement and other requirements that only an individual person could meet.[214] Those requirements were based on the understanding that individual persons serve on the board of directors, not the regional organizations or other tribal entities.[215] Thus, it is simply incorrect – and antithetical to basic principles of corporate law and corporate entity status – to suggest that the regional health entities are themselves "members" of the ANTHC Board. Their selected representatives are ANTHC Board Directors; they are not.

That understanding is consistent with the intent of Section 325. ANTHC arose out of the fact that the multiplicity of different tribes, entities, and organizations "made consensus around a particular governing structure [for the ANMC] exceptionally difficult to achieve."[216] Section 325 was intended to cut that Gordian knot. It authorized the formation of a consortium, but also dictated that a Board would govern it. Doing so allowed regional health entities to have representatives on the governing Board, but did not involve the regional health entities themselves in ANTHC decision-making.

As a practical matter, it would be impossible to have a competing corporation serve as a Board member, given the competing corporation's legal imperative to always pursue its self-interest. For example, Company A could not appropriately recuse itself if its continued participation in Company B's (its competitor) governance could provide it with a competitive advantage over Company B.

Because the regional health entities are not themselves directors on the ANTHC Board, it is axiomatic that they are not entitled to all information to which ANTHC Board members are

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[214] Langberg Decl., Ex. V at 4-6 (ANTHC_000552-554) (2012 Bylaws Article III(D)) and Ex. E at 4-6 (ANTHC_001577-1579) (2017 Bylaws Article III(D)).
[215] Jimmie Decl. ¶ 6; Bean Decl. ¶ 15.
[216] S. Rep. No. 105-56 at 110.

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entitled.[217] Although SCF participates in the Consortium, that is not the same as being a member of ANTHC as a corporation or a director on the ANTHC Board of Directors.

B. ANTHC's Governance Documents Comply with Federal and State Law.

ANTHC's Articles of Incorporation and Bylaws comply with both federal and state law. First, the Articles – which broadly outline ANTHC's purpose and basic governance – are standard articles of incorporation and are consistent with the Alaska Nonprofit Corporation Act. To ANTHC's knowledge, SCF does not contend that ANTHC's Articles (which include a reference to Directors' duty of loyalty) violate federal or state law.

Similarly, ANTHC's current Bylaws are consistent with federal and state law. They outline the Board's method of selection, qualifications, and term of service. They prescribe procedures for voting, allow for officers of the Board, and permit the Board to establish committees. In addition, Article XII of the Bylaws puts all parties on notice that the Articles or Bylaws may be amended by affirmative vote of a majority of the Board.[218] Article XIV further provides that "Directors shall carry out their fiduciary obligations to ANTHC in good faith, including their duty of effectively representing the entities that designated them, and will follow codes of conduct, rules, regulations, policies, procedures and resolutions adopted by the Board or Committee on which they serve."[219] These provisions, and the remainder of the Bylaws, are well within the standard for corporate governance documents.

C. The Code of Conduct Is Lawful.

In addition to adhering to common law, ANTHC Directors chose to adopt a Code of Conduct outlining specific obligations related to the Directors' duties to the corporation. ANTHC's Code of Conduct addresses organizational conflicts of interest, duties of loyalty and representation, and related duties of care and respect.[220]

SCF takes issue with the Code of Conduct provision that limits the instances when a Director can share confidential and sensitive information learned through ANTHC with the

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[217] *Cf.* 25 U.S.C. §§ 5305(a) and (c) (requiring mature contractors to provide single annual audits, quarterly financial statements and a brief annual program report to "Indian people served or represented").
[218] Langberg Decl., Ex. E at 16 (ANTHC_001589).
[219] *Id*. at 17 (ANTHC_001590).
[220] Langberg Decl., Ex. I.

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entity that selected the Director.[221] SCF asserts that Directors should be able to share confidential information with the entity that selected them "provided the Designated Entities agree to maintain the confidentiality of any such ANTHC information and documents."[222] ANTHC has indeed agreed to share confidential information when appropriate safeguards are in place in individual cases. To provide SCF with some assurance in this regard, ANTHC amended its Code of Conduct in June 2017 to include a provision that allows Directors to disclose confidential or sensitive information learned through ANTHC to the entity that selected the Director pursuant to "a confidentiality agreement or other agreement authorizing the disclosures."[223] SCF's concerns in this regard are therefore moot. The refusal of both individual Directors and SCF to sign a confidentiality agreement does not revive this claim. SCF simply requested that its selected Directors be able to provide it with confidential information if SCF's Board of Directors "agree to maintain the confidentiality of such information and documents."[224] The amended Code of Conduct allows for exactly that, as is entirely consistent with governing law.

As with other decisions that occur in the ordinary course of business, the Board's decision to adopt the Code of Conduct and clarify the Directors' obligations to the corporation should be assessed under the longstanding Business Judgment Rule.[225] Under that doctrine, "[a]bsent bad faith, breach of a fiduciary duty, or acts contrary to public policy, [courts] will not interfere with the management decisions of the firm."[226]

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[221] *See* Dkt. 2, at 12-13.
[222] *Id.*
[223] Langberg Decl., Ex. I at 6 (ANTHC_001600), Section (A)(4)(d).
[224] Dkt. 2, at 17.
[225] *See Brooks v. Horner*, 344 P.3d 294, 301-02 (Alaska 2015) (recognizing that per the business judgment rule "courts are reluctant to substitute their judgment for that of the board of directors unless the board's decisions are unreasonable" (internal quotation marks omitted) (citing *Alaska Plastics, Inc. v. Coppock*, 621 P.2d 270, 278 (Alaska 1980))); *Betz v. Chena Hot Springs Grp.*, 657 P.2d 831, 835 (Alaska 1982) (noting that "[a]bsent bad faith, breach of a fiduciary duty, or acts contrary to public policy, we will not interfere with . . . management decisions"); *cf. Frantz Mfg. Co. v. EAC Indus.*, 501 A.2d 401, 408 (Del. 1985) ("The board of directors is given the statutory power to deal in its own stock along with the authority to make and amend bylaws and to manage the business of the corporation under the protection afforded by the business judgment rule.").
[226] *Betz*, 657 P.2d at 835; *see also Brazen v. Bell Atl. Corp.*, 695 A.2d 43, 49 (Del. 1997) ("Courts give deference to directors' decisions reached by a proper process, and do not apply an

Here, there is nothing to suggest that the Board's decision to adopt a Code of Conduct – a decision that involves the day-to-day governance of the corporation, not a change of control or a self-interested transaction – was the product of bad faith, a breach of fiduciary duty, or an act contrary to public policy. Indeed, the Code of Conduct reflects the Board's desire to ensure that Directors are aware of and follow appropriate rules of conduct to preserve and protect ANTHC. This type of corporate policy-setting is a quintessential board decision that should not be reevaluated.

Affirming the validity of the Code of Conduct is essential because some of the Board members selected by SCF have taken positions with respect to Board decision-making that may be contrary to the Code of Conduct. In addition, SCF and ANTHC compete extensively, which increases the possibility for conflicts of interest to arise. The ANTHC Board chose to detail in the Code of Conduct the actions Directors should take when faced with a potential conflict of interest. That business judgment decision should be left to the Board's sound discretion.

D. The Disclosure Policy Is a Valid Exercise of Business Judgment.

The ANTHC Board also chose to adopt a Disclosure Policy, which is similarly consistent with both state and federal law. The ANTHC Board implemented its Disclosure Policy to safeguard sensitive, confidential, proprietary, and privileged information.[227] The Disclosure Policy states that such information may be provided to Tribal Co-Signers of the Alaska Tribal Health Compact "in appropriate cases if adequate safeguards are in place to protect the integrity, confidentiality and use of the information, such as a data-use agreement, a confidentiality or non-disclosure agreement, or a common interest or joint defense agreement."[228] The Disclosure Policy does not impart a rigid mechanism to be used uniformly regardless of the nature of the sensitive information at issue, but rather provides flexibility for fashioning an appropriate method to safeguard certain information based on its specific character.

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objective reasonableness test in such a case to examine the wisdom of the decision itself."); *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1279 (Del. 1989) ("We have held that when a court reviews a board action, challenged as a breach of duty, it should decline to evaluate the wisdom and merits of a business decision unless sufficient facts are alleged with particularity or the record otherwise demonstrates, that the decision was not the product of an informed, disinterested, and independent board.").

[227] Langberg Decl., Ex. F.

[228] *Id.*

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"Delaware courts will uphold reasonable corporate confidentiality policies in order to 'safeguard the rights and legitimate interests of the corporation.'"[229] Here, like the Code of Conduct, the ANTHC Board's adoption of the Disclosure Policy involved an exercise of its business judgment. Whether and under what circumstances the Board chooses to identify certain documents and communications as confidential, and to restrict their dissemination, relates to the management of the business and should not be re-examined (or invalidated) by a court.

Furthermore, the Disclosure Policy is consistent with state law. Directors have a duty to maintain the confidentiality of the information they obtain by virtue or on account of their position on the board and they cannot use that information for their own interests.[230] The general rule with regard to a director's use of confidential corporate information provides:

> A fiduciary is subject to a duty to the beneficiary not to use on his own account information confidentially given him by the beneficiary or acquired by him during the course of or on account of the fiduciary relation or in violation of his duties as fiduciary, in competition with or to the injury of the beneficiary . . . unless the information is a matter of general knowledge.[231]

This rule makes sense. Disclosure of confidential company and board information risks harm to the company. Not only may material information be disclosed, but the mere risk of

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[229] *Stroud v. Grace*, No. CIV. A. 10719, 1990 WL 176803, at *22 (Del. Ch. Nov. 1, 1990) (quoting *CM & M Grp., Inc. v. Carroll*, 453 A.2d 788, 793 (Del. 1982), *aff'd in part, rev'd in part*, 606 A.2d 75 (Del. 1992)); *see also Disney v. Walt Disney Co.*, No. CIV.A. 234-N, 2005 WL 1538336, at *3 (Del. Ch. June 20, 2005) (prohibiting public disclosure and explaining that "[t]he confidential nature of these documents is evidenced by the Company's written confidentiality policy that bars present and former directors from disclosing information entrusted to them by reason of their positions, and includes a prohibition on the disclosure of 'non-public information about discussions and deliberations' of the board" (citation omitted)).

[230] *See Hollinger Int'l, Inc. v. Black*, 844 A.2d 1022, 1061 (Del. Ch. Feb. 26, 2004) (noting that defendant had violated his fiduciary duty of loyalty by improperly using plaintiff's confidential information to advance his own personal interests without authorization from fellow directors); *Agranoff v. Miller*, No. CIV A 16795, 1999 WL 219650, at *19-20 (Del. Ch. Apr. 12, 1999) (finding that a director breached his fiduciary duties by funneling confidential information to a sponsor when he shared with a sponsor confidential information in furtherance of his own interests over the company's); R. Franklin Balotti & Jesse A. Finkelstein, *supra*, § 4.16, at 4-131 ("[T]he duty of loyalty also requires that directors maintain the confidentiality of corporate information.").

[231] *Brophy v. Cities Serv. Co.*, 70 A.2d 5, 7-8 (Del. Ch. 1949) (internal quotation marks and citation omitted).

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disclosure of company information and board deliberations about that information may result in directors censoring their remarks or behavior for fear of disclosure of that information to third parties.[232] In addition, if Directors are permitted to disclose information to all regional health entities and others, such a wide dissemination of information to entities and their own boards increases the risk that confidential information will find its way into inappropriate hands. Not only is confidential information about ANTHC at issue here, but so too is confidential information about the different regional health entities that Board members may learn of in the course of ANTHC Board meetings. All such information must be kept confidential within the ANTHC Board.

The Disclosure Policy is also consistent with Section 325(b). That statute states that "[ANTHC] shall be governed by a 15-member Board of Directors," thus vesting in the Board the power to "govern" the corporation. Other than directing how the Board will be composed and how Board votes will be counted, Section 325 is silent as to the manner in which ANTHC's Board will govern the Consortium, including what policies and procedures the Board may adopt in its business judgment. By providing certain regional health entities with the opportunity to have a representative on the ANTHC Board, Congress did not expressly or impliedly authorize disclosure of confidential information, or prohibit the ANTHC Board from adopting a reasonable confidentiality policy.

In sum, the Board was entitled to adopt a reasonable confidentiality policy. Nothing suggests that the Disclosure Policy was the product of bad faith or requires a breach of fiduciary duty, nor is it contrary to any statute or legal principle. To the contrary, it is consistent with state law affirming that board members may be obligated to keep company information confidential, and it is not contrary to federal law. As a result, this Court should not disturb the ANTHC's Board's sound business judgment to ratify and enforce the Disclosure Policy.

E. Deference is also due to the decisions of ANTHC's Board as a tribal governing body.

The ANTHC Board's self-governance decisions are also entitled to deference because they are decisions made by a tribal governing body. Just as those decisions are protected by the

[232] Bean Decl. ¶ 14; Jimmie Decl. ¶ 10; Teuber Decl. ¶¶ 35-36.

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doctrine of sovereign immunity for a tribal organization that is a defendant,[233] they should be afforded deference as the policy determinations of a tribal governing body here.

V. CONCLUSION

ANTHC exists to fulfill the United States' promise to promote self-governance in enabling hundreds of tribes and tribal health organizations to effectively participate in collectively managing the Alaska Tribal Health System. All of those tribes and tribal health organizations are to be on equal footing with each other and with SCF, despite the advantages SCF enjoys as the regional organization with the greatest geographic proximity and access to ANTHC and ANMC. All of ANTHC's Directors must act in good faith to develop and grow ANTHC's programs in ways that enhance the system and improve ANTHC's ability to support other tribal health partners.

But SCF claims the right to a more than just an equal seat at ANTHC's table. As it has for almost 20 years, it is arguing that the Director it selects to represent it on ANTHC's Board should have the right – and responsibility – to take what the Director learns about ANTHC's plans and business, as well as the plans and businesses of the other regional health entities, back to SCF for SCF's information and use. This is contrary to law. It is contrary to the loyalty ANTHC has a right to expect from its Directors, and the trust ANTHC places in its Directors. It is contrary to the very purpose of the Consortium.

When ANTHC Directors sit at the boardroom table as Directors of the Consortium that serves *all* Alaska Natives in Alaska, their duty is to the Consortium. Their responsibility to represent the regions that selected them as Directors in no way limits their duty of loyalty to ANTHC. Directors must understand that when they sit at the ANTHC boardroom table, they are expected to do what is in the best interest of ANTHC.

Accordingly, this Court should declare that ANTHC Directors have a duty of loyalty to ANTHC that is not diluted by any duty they might have to the entity that selected them. Specifically, ANTHC asks the Court to (1) declare that ANTHC's Directors, including

[233] *See* ANTHC's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) (Sovereign Immunity), which is being filed simultaneously with this motion. To avoid duplication, this motion for summary judgment incorporates by reference ANTHC's arguments in its Sovereign Immunity motion.

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specifically its Director selected by SCF, owe ANTHC an undivided duty of loyalty undiminished by any duties the Director may owe to other corporations including SCF; (2) declare that the disputed provisions in ANTHC's governing documents comply with federal and state law; and (3) dismiss SCF's Complaint and award ANTHC its fees and costs.

DATED: August 16, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2017, I filed a true and correct copy of the foregoing document with the Clerk of the Court for the United States District Court – District of Alaska by using the CM/ECF system. Participants in this Case No. 3:17-cv-00018-TMB who are registered CM/ECF users, and who are listed below, will be served by the CM/ECF system.

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