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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

JOAN WILSON and PAUL FRANKE, M.D., Plaintiffs, v. ALASKA NATIVE TRIBAL HEALTH CONSORTIUM; ANDREW TEUBER; and ROALD HELGESEN, Defendants.	**DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS [Dkt.50]** Case No. 3:16-cv-00195-TMB

Defendants move to dismiss at Docket 50 on four grounds:

(1) Count I, retaliatory discharge under the False Claims Act (FCA), 31 U.S.C. § 3730(h), fails to state a claim against defendants Andrew Teuber and Roald Helgesen because the FCA does not provide a cause of action for retaliation against individuals;

(2) Count I similarly fails to state a claim for FCA retaliatory discharge against defendant Alaska Native Tribal Health Consortium (ANTHC) because ANTHC is not a "person" subject to the FCA;

(3) Count II, a tort claim, should be dismissed because plaintiffs' exclusive remedy for tort claims lies with the Federal Tort Claims Act and, alternatively, because plaintiffs do not identify a recognized Alaska tort cause of action; and

(4) Count III, plaintiffs' bad faith contract claim, together with any remaining claims against ANTHC or the individual defendants, should be dismissed for lack of subject matter jurisdiction due to ANTHC's tribal sovereign immunity.

Plaintiffs' *Opposition* at Docket 73 effectively concedes that the claims against the individuals and the tort claim (1 and 3 above) should be dismissed. We briefly address those issues before discussing why ANTHC's tribal status is a bar to plaintiffs' claims for FCA retaliatory discharge and bad faith breach of their employment contracts (2 and 4 above).

A. Count I: Individual Defendants. Count I is plaintiffs' only claim against the two individual defendants.[1] Count I asserts a 31 U.S.C. § 3730(h) cause of action for FCA retaliatory discharge against the individuals. But, § 3730(h) only creates a cause of action against employers, not against individuals. Plaintiffs concede the case law is

[1] *Second Amended Complaint*, Docket 49 at 18–19 ¶¶ 44–49; Docket 73 at 23.

uniformly against them.[2] They do not address the majority rule set out in *Aryai* or the other cases discussed by defendants in Docket 51,[3] instead arguing that in *Winter v. Gardens Regional Hospital* "the district court stated that [under § 3730(h)] certain employers may be liable under a theory that they 'exercised dominion and control' over an employee."[4] This "theory of liability" was plaintiff's argument, *not* the court's holding. The court rejected plaintiff's argument: allegations that the individual defendants "may have participated in the decision to terminate [the employee] merely because of the individuals' corporate positions . . . *are not sufficient* to show that [the employee] had the required employment relationship with these defendants."[5]

The employer/employee relationship is key. Only employers—not individual managers or other employees—can be sued under 31 U.S.C. § 3730(h).[6] Count I should be dismissed as to the individual defendants under Rule 12(b)(6), with prejudice, because amendment would be futile.[7]

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[2] Docket 73 at 23 ("While there is an undisputed line of cases that address whether an individual can be liable under 31 U.S.C. § 3730(h)(1), the Ninth Circuit has not definitively ruled on the issue.").

[3] Docket 51 at 7–11 (discussing, *inter alia*, *Aryai v. Forfeiture Support Assocs.*, 25 F. Supp. 3d 376, 385–87 (S.D.N.Y. 2012)); *id*. at 9 n.35 (collecting Ninth Circuit District Court cases following *Aryai*).

[4] Docket 73 at 23 (citing *U.S. ex rel. Winter v. Gardens Reg'l Hosp. & Med. Ctr., Inc*., No. CV 14-08850-JFW (Ex), 2017 WL 8793222, at *9 (C.D. Cal. Dec. 29, 2017)).

[5] *Winter*, 2017 WL 8793222, at *9 (emphasis added).

[6] ANTHC, not the individual defendants, undeniably was plaintiffs' employer. *See*, *e.g*., Docket 49 at 2-3 ¶¶ 3–4 and 6–7.

[7] *See U.S. ex rel. Dunlap v. Alaska Radiology Assocs., Inc.*, No. 3:14-cv-00143-TMB, slip. op. at 28 (D. Alaska Mar. 31, 2016) ("Because amendment would be futile, the dismissal is with prejudice."); *Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991) ("A district court does not err in denying leave to amend where the amendment would be futile, or

B. Count II: Tort Claims. Count II alleges "the tort of wrongful termination in violation of the public policy of the State of Alaska." Plaintiffs' exclusive remedy for tort claims lies under the Federal Tort Claims Act. Any tort claims they may have must be brought against the United States.[8] Plaintiffs effectively concede this cause of action by not responding to the FTCA argument.[9]

Alternatively, the Alaska Supreme Court has not recognized an applicable tort cause of action. Plaintiffs' opposition for the first time asserts that the Count II tort claims are based on the "strong public policy of preventing Medicaid fraud in Alaska."[10] As this Court has held,[11] it is doubtful the Alaska Supreme Court would recognize a tort when

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where the amended complaint would be subject to dismissal.") (citations omitted). Count I can also be dismissed against the individuals based on ANTHC's tribal sovereign immunity. *See* Section C, *infra*.

[8] Docket 51 at 17–19; Pub. L. No. 101-512, § 314, 104 Stat. 1959-60 (1990) ("§ 314"); *see D.L. by & through Junio v. Vassilev*, 858 F.3d 1242, 1244 (9th Cir. 2017) ("The FTCA's exhaustion requirement is jurisdictional and may not be waived.") (citation omitted); *cf.* 25 U.S.C. § 5321(d); 28 U.S.C §§ 2675(a), 2679; *Walker v. Chugachmiut*, 46 F. App'x 421, 424 (9th Cir. 2002); *Shirk v. U.S. ex rel. Dep't of Interior,* 773 F.3d 999, 1003 (9th Cir. 2014) (Congress extended the FTCA to claims "resulting from the performance of functions . . . under a contract, grant agreement, or cooperative agreement authorized by the [ISDEAA] of 1975, as amended.") (citation omitted).

[9] Plaintiffs' relevant argument, in its entirety: "The facts and law cited by ANTHC do not establish that it is entitled to judgment as a matter of law regarding Plaintiffs' employment claims. None of the cases cited addresses the factual arguments in the Second Amended Complaint, or the claims outlined therein." Docket 73 at 26.

[10] *Id.* at 25.

[11] *Dunlap*, slip op. at 28 n. 7 ("Because there exists an adequate federal legal alternative designed to protect Dunlap's status as a federal FCA relator, the Court believes that the Alaska Supreme Court would decline to find an additional implied state cause of action.") (citing *Reust v. Alaska Petroleum Contractors, Inc.*, 127 P.3d 807, 813 n.13 (Alaska 2005)).

False Claims Act whistleblowers have existing federal statutory remedies, which exist in 31 U.S.C. § 3730(h). Count II should be dismissed, also without leave to amend.

C. FCA "Person" Status and Sovereign Immunity. The two remaining issues are: (1) whether Count I states a viable retaliatory discharge claim against ANTHC, since ANTHC is not a "person" under the FCA, and (2) whether tribal sovereign immunity applies to Count III, plaintiffs' State law bad faith contract claim, as well as to any other remaining claims against ANTHC and the individual defendants. Plaintiffs argue that ANTHC is not a federally recognized tribe or an arm of the tribe and thus not "entitled to sovereign immunity."[12]

1. ANTHC is not subject to the FCA retaliatory discharge provision because it is not a "person." An FCA retaliatory discharge claim requires that "'the plaintiff must be investigating matters which are calculated, or reasonably could lead, to a viable FCA action.'"[13] Plaintiffs do not have a "viable FCA action" here because the FCA only applies to "persons,"[14] and the FCA's definition of "person" does not include "sovereigns," including the United States, States, Indian tribes and tribal organizations that are "arms of tribes."[15]

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[12] Docket 73 at 4.
[13] *Moore v. Cal. Inst. of Tech. Jet Propulsion Lab.*, 275 F.3d 838, 845 (9th Cir. 2002) (quoting *U.S. ex rel. Hopper v. Anton*, 91 F.3d 1261, 1269 (9th Cir. 1996)).
[14] 31 U.S.C. § 3729(a)(1).
[15] *U.S. ex rel. Cain v. Salish Kootenai Coll., Inc.*, 862 F.3d 939, 942–43 (9th Cir. 2017), *remanded to* No. CV-12-181-M-BMM, 2018 WL 2272792, at *4 (D. Mont. May 17, 2018) (tribal college is "an arm of the Tribe" and not subject to the FCA); *United States v. Menominee Tribal Enterprises*, 601 F. Supp. 2d 1061, 1068 (E.D. Wis. 2009) (tribal corporate enterprise not "person" under FCA).

Congress in ISDEAA provided Indian tribes with the authority to administer programs, services, functions, and activities that the federal government has a duty to provide to Native Alaskans and American Indians, including healthcare.[16] To accomplish these purposes, Congress provided that Indian tribes and tribal organizations may form "inter-tribal consorti[a]," *i.e.*, "coalition[s] of two [or] more separate Indian tribes that join together for the purpose of participating in self-governance, including tribal organizations."[17] Congress included inter-tribal consortia, such as ANTHC, in the statutory definition of "Indian tribe."[18] By defining inter-tribal consortia operating ISDEAA programs as "Indian tribes," which "have the rights and responsibilities" of their constituent tribes, Congress determined that ANTHC and other inter-tribal consortia are not "persons" under the FCA.[19]

Although plaintiffs acknowledge that ANTHC was formed by "13 specified regional tribal health entities . . . pursuant to § 325," they argue that none of these entities conferred sovereign immunity onto ANTHC.[20] But ANTHC's authorizing entities include the Metlakatla Indian Community—which plaintiffs cannot dispute possesses tribal sovereign immunity—and the regional tribal organizations that "plan for or carry out" ISDEAA activities on their tribes' behalf.[21] As an authorized inter-tribal consortium,

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[16] 25 U.S.C. § 5321.
[17] *Id.* §§ 5381, 5304(l), 5321(a); *see also Maniilaq Ass'n v. Burwell*, 170 F. Supp. 3d 243, 244 (D.D.C. 2016).
[18] 25 U.S.C. § 5381(b).
[19] Docket 51 at 13 (quoting 25 U.S.C. §5381(b)).
[20] Docket 73 at 9.
[21] 25 U.S.C. § 5381(b).

ANTHC is an "arm of Alaska's tribes," as the cases discussed below uniformly hold.[22] In that regard, Section 325(a) does not state that ANTHC may perform ISDEAA functions *without* tribal authorization; rather, it states that it may perform those functions without *further* tribal resolutions.[23] This reflects Congress' determination that the already existing tribal resolutions authorizing the regional tribal health organizations were sufficient tribal authorization for ANTHC to compact with the Secretary of Health and Human Services in an ISDEAA government-to-government relationship.

As ANTHC is not a "person" under the FCA, plaintiffs do not have a viable FCA claim against it. Without a viable FCA claim, plaintiffs cannot maintain an FCA retaliatory discharge claim against ANTHC or, for that matter, against the individuals. This is dispositive of plaintiffs' Count I retaliatory discharge claim.

2. ANTHC also has common law tribal sovereign immunity. Plaintiffs effectively concede that ANTHC is an arm of its constituent tribes by correctly describing

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[22] Plaintiffs also argue that "[w]hile ANTHC entered into the Compact, it did not do so as a 'Tribal Co-Signer' or on a government to government basis." Docket 73 at 15. The first point reflects only that §325(a) exempts ANTHC from obtaining further authorizing resolutions and IHS's recognition that the ANTHC Board of Directors is ANTHC's "governing body." While ANTHC is not a "Tribal Co-Signer" under the Compact's definition, Docket 52-2 at 7, the Compact expressly states that ANTHC "is a tribal organization and Inter-tribal consortium, as defined in section 501(a)(5) of [ISDEAA] Title V, [and] was organized and is controlled by the Alaska Native tribes and tribal organizations which are represented on its Board of Directors." *Id*. Plaintiffs' second point is wrong. ANTHC is a qualified ISDEAA Title V tribal organization and compacts on a government-to-government basis with the United States. *Id.*; *see*, 25 U.S.C. § 5321(a).

[23] *Accord* Compact, Docket 52-2 at 11 ("ANTHC may participate in this Compact and the applicable Funding Agreement upon receipt of an authorizing resolution of the Board of Directors of the ANTHC.").

ANTHC as "a Tribal Organization and inter-Tribal consortium of federally recognized Alaska Tribes and Tribal Organizations."[24] Plaintiffs now attempt to walk back this concession, but it is in fact entirely accurate, and they do not seriously contend otherwise. The corollary is that ANTHC has sovereign immunity from unconsented suit, as this Court recently and unequivocally held in *Barron v. ANTHC*.[25]

[24] *See, e.g., Second Amended Complaint*, Docket 49 at 3 ¶ 5.

[25] ___ F.Supp.3d ___, 2019 WL 80889, at *1 and *3–6 (D. Alaska 2019) (citing and analyzing *Allen v. Gold Country Casino*, 464 F.3d 1044, 1045–47 (9th Cir. 2006); *Marceau v. Blackfeet Housing Authority*, 455 F.3d 974, 978 (9th Cir. 2006); *White v. Univ. of Cal.*, 765 F.3d 1010, 1018–25 (9th Cir. 2014)). *Barron* is correct both legally and factually, and it accords with other decisions concerning tribal organizations and inter-tribal consortia by this Court, by other federal courts, and by the Alaska courts. *See also Alaska Native Tribal Health Consortium v. Premera Blue Cross*, Nos. 3:12-CV-0065-HRH, 3:12-cv-0165-HRH, 2015 WL 12159388, at *1 (D. Alaska July 2, 2015) ("ANTHC is a tribal organization that provides health care services to Alaska Natives, American Indians, and other eligible individuals pursuant to Titles I and V of the Indian Self-Determination and Education Assistance Act, the Alaska Tribal Health Compact; and [a] Funding Agreement with the Secretary of Health and Human Services.") (citations omitted); *Barnes v. Bristol Bay Area Health Corp.*, No. A92-459 CIV (D. Alaska Apr. 20, 1993) (Order on Motion for Summary Judgment) (available at Docket 51-4 at 4–5); *Montella v. Chugachmiut*, 283 F. Supp. 3d 774, 778–79 (D. Alaska 2017) (describing one of ANTHC's constituent inter-tribal consortia as "a consortium organization controlled by its member tribes and operated to benefit those tribes."); *Beversdorf v. Tanana Chiefs Conference, Inc.*, No. 4FA-17-01911 CI (Alaska Superior Ct. Sept. 27, 2017) (Order Regarding Motion to Dismiss) (available at Docket 51-6); *Bekkum v. Samuel Simmonds Memorial Hospital*, 2BA-15-97 CI (Alaska Superior Ct. June 19, 2015) (Order on Motion to Dismiss) (available at Docket 51-7); *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1187–88 (9th Cir. 1998); *Dille v. Council of Energy Resource Tribes*, 801 F.2d 373, 374 (10th Cir. 1986); *EEOC v. Karuk Tribe Housing Authority*, 260 F.3d 1071, 1074, 1080 (9th Cir. 2001); *Menominee Tribal Enterprises*, 601 F. Supp. at 1068; *J.L. Ward Assocs., Inc. v. Great Plains Tribal Chairmen's Health Bd.*, 842 F. Supp. 2d 1163, 1176–77 (D.S.D. 2012); *U.S. ex rel. Cain*, 862 F.3d at 942–43 (9th Cir. 2017) *and after remand,* 2018 WL 2272792, at *4 (D. Mont. May 17, 2018) (tribal college is "an arm of the Tribe" not subject to the False Claims Act).

This is not new ground. The courts have long recognized that tribally controlled entities that carry out core governmental functions or promote self-governance are protected by sovereign immunity.[26] But despite the uniform weight of authority against their position, plaintiffs argue that four of the five non-exclusive *White v. University of California* factors for determining whether an organization is an "arm of the tribe" cut against ANTHC's immunity.[27] Notably, plaintiffs do not even mention the second *White* factor, ANTHC's "purpose,"[28] and they misconstrue the Ninth Circuit's *Allen* decision which, along with *White* and *Marceau*,[29] provided the precedential framework for *Barron*'s determination that "ANTHC is an arm of Alaska's tribes that is entitled to sovereign immunity."[30]

a. *Allen*, *Marceau* and *White* factor two. In *Allen*, a compact creating a tribal casino provided that the casino would "enable the Tribe to develop self-sufficiency, promote tribal economic development, and generate jobs and revenues to support the Tribe's government and governmental services and programs."[31] In light of these stated purposes and the tribe's ownership and control of the casino's operations, the Ninth Circuit held that there could "be little doubt that the Casino functions as an arm of the Tribe."[32] In

[26] Docket 51 at 13-15.
[27] Docket 73 at 13–19 (citing *White*, 765 F.3d at 1025).
[28] *Id.* at 14–19 (discussing only "White Factors 1 and 4" and "White Factors 3 and 5"); *id.* at 15 (referencing *Allen*, 464 F.3d at 1046–47).
[29] *Marceau*, 455 F.3d at 978 .
[30] *Barron*, 2019 WL 80889, at *3–5.
[31] *Allen*, 464 F.3d at 1046–47.
[32] *Id.* at 1047.

Marceau, the Circuit noted that "[t]ribal immunity extends to both the corporate and governmental activities of the tribe. It extends to agencies and subdivisions of the tribe. . . ."[33] Subsequently, in *White* the Circuit held that "the whole purpose of the [Tribal] Repatriation Committee, to recover remains and educate the public, [was] 'core to the notion of sovereignty.' Indeed, 'preservation of tribal cultural autonomy [and] preservation of tribal self-determination,' are some of the central policies underlying the doctrine of tribal sovereign immunity."[34] In these cases the purposes of the tribal organization were held to be strong indicia that the organization was an "arm of tribes" protected by tribal sovereign immunity.

Similarly, ANTHC's purpose under ISDEAA and the Indian Health Care Improvement Act is to provide statewide health services for the more than 174,000 Alaska Natives, American Indians, and others eligible for federal health benefits. ANTHC "provides a wide range of medical health, community health and other services for Alaska Natives that were formerly provided by the IHS's Alaska Office."[35] ANTHC's purpose is straight-forwardly expressed in § 325(a): "to provide all statewide health services provided by the Indian Health Service."[36]

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[33] 455 F.3d at 977 (internal citation omitted).
[34] 765 F.3d 1010, 1025 (9th Cir. 2014) (citation omitted).
[35] *Barron*, 2019 WL 80889, at *4 (citation and internal quotations omitted).
[36] Pub. L. No. 105-83, Title III, § 325(a), 111 Stat. 1597 (1997). ANTHC's purpose is reflected in its corporate bylaws, Docket 52-1 at 1 ("[T]o secure Alaska Native peoples, Tribes and tribal organizations an organized voice and participation in decisions, developments and implementation of Alaska Native management of the Alaska Native Medical Center and the Alaska Area Office of the Indian Health Service and to carry out the purposes of Section 325 of Public Law 105-83.") and in the Alaska Tribal Health

Similar to the casino in *Allen*, ANTHC "is no ordinary business."[37] As noted in *Barron*, like the *Allen* casino, "ANTHC's creation was authorized pursuant to a federal law intended to promote tribal self-sufficiency. And like the [Blackfeet Housing Authority in *Marceau*], ANTHC receives federal funding to conduct activities that benefit tribe members."[38] Alaska's tribes and tribal organizations appoint representatives to ANTHC's Board of Directors; all ANTHC directors must be Alaska Natives or American Indians[39]; ANTHC co-manages the Alaska Native Medical Center, a largest federal hospital for Alaska Natives and American Indians; and ANTHC provides statewide health and environmental services under the government-to-government Title V the Alaska Tribal Health Compact with the Secretary of Health and Human Services. ANTHC provides these services "at the direction of ANTHC's constituent tribes and regional health consortia."[40] "The statewide health services (including any programs, functions, services and activities provided as part of such services) of the Alaska Native Medical Center and the Alaska Area Office may only be provided by" ANTHC.[41] ANTHC's overarching "purpose—entering

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Compact, Docket 52-2 at 7 ("Tribes, Tribal Organizations and Inter-Tribal Consortia throughout Alaska are reliant on the services to be provided by the ANTHC" and ANTHC's participation in the Compact "promotes the commitment of Alaska Native Tribes, Tribal Organizations and Inter-Tribal Consortia to maintain the unique tribal cooperation that has developed in Alaska to assure that all Alaska Natives have access to a comprehensive, integrated, organized, tribally controlled health care delivery system").

[37] 464 F.3d at 1046.

[38] 2019 WL 80889, at *5 (citing 25 U.S.C. §§ 2702(1), 5301(a)).

[39] ANTHC Bylaws, Art. III, § D(1) (available at Docket 52-1, at 4-5); .

[40] *See generally*, Helgeson Aff., Docket 52, and the Alaska Tribal Health Compact (available at Docket 52-2).

[41] *Id.* § 325(c), 111 Stat. 1598.

into 'self-determination and self-governance agreements'—is 'core to the notion of sovereignty.'"[42]

Allen, *Marceau*, and the second *White* factor, followed in *Barron* but ignored by plaintiffs, show that ANTHC is entitled to sovereign immunity. The four other alternative *White* factors equally lead to this conclusion.

b. The first *White* factor: ANTHC's method of creation. Plaintiffs argue ANTHC was not formed by tribes because in § 325 "Congress created ANTHC."[43] This is not correct, as even plaintiffs admit elsewhere when they state that "regional tribal health entities . . . *formed* ANTHC pursuant to § 325."[44]

The plain text of § 325(a) states that Alaska's tribes and regional tribal organizations "*are authorized to form* a consortium . . . to provide all statewide health services" under ISDEAA "*without further resolutions* from the [tribal entities], tribes and/or villages which they represent."[45] Section 325(b) provided a mechanism for Alaska's tribes and tribal organizations to have representatives on ANTHC's Board of Directors. The tribes, acting

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[42] *Barron*, 2019 WL 80889, at *5 (quoting *White v. Univ. of Calif.*, 765 F.3d 1010, 1025 (9th Cir. 2014)); *accord J.L. Ward Assocs., Inc. v. Great Plains Tribal Chairmen's Health Bd.*, 842 F. Supp. 2d 1163, 1176–77 (D.S.D. 2012) ("Great Plains is the sort of tribal entity entitled to sovereign immunity. The purposes for which the sixteen tribes formed Great Plains—to act as a formal representative of the tribes to the federal government and to provide health care and related services to tribal members and member Indian tribes—are closer to the functions of a tribal government than a business.") (citations omitted).

[43] Docket 73 at 5.

[44] *Id.* at 9 (emphasis added).

[45] § 325(a) thus recognized the sufficiency of existing tribal authorizations by allowing "Regional Health Entities," *i.e.*, the Alaska tribes, tribal organizations and intertribal consortia that were already providing ISDEAA health care services under tribal authority, to form ANTHC "without further resolutions."

through authorized regional tribal health organizations, established ANTHC[46] and organized a Board of Directors in conformance with § 325(b).[47]

In short, Congress did not "create" ANTHC.[48] Alaska's tribes and tribal health organizations did.[49] The "method of creation" *White* factor weighs strongly in favor of sovereign immunity.

c. The third *White* factor: ANTHC's structure, ownership, and management. Plaintiffs next argue that this Court erred in *Barron* by holding that "[t]he structure of ANTHC's board places control over the ANTHC's ownership and management in representatives of the Alaska Native tribes."[50] Instead, they argue, ANTHC's board of directors control ANTHC, not any tribe or tribal organization. Plaintiffs misconstrue the type of "control" needed for an entity to be an arm of the tribe for immunity purposes. They confuse the Board's day-to-day operational responsibility with the tribes' ultimate control over ANTHC through the tribes' power to appoint the fifteen tribal representatives on the Board.[51]

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[46] Articles of Incorporation of Alaska Native Tribal Health Consortium, Dec. 5, 1997, at 4-5 Art. IX, Sec. 2, *available at*: https://www.commerce.alaska.gov/cbp/main/Document/Corp/?r=41658&v=273269&d=126990.
[47] Pub. L. No. 105-83, § 325(b), 111 Stat. 1598 (1997); Docket 52-1 at 2–3.
[48] Pub. L. No. 105-83, § 325(a), 111 Stat. 1597 (1997).
[49] *Id.* § 325(b), 111 Stat. 1598; Docket 52-1 at 2–3; *see Barron v. Alaska Native Tribal Health Consortium*, No. 3:18-cv-00118-SLG, 2019 WL 80889, at *5 (D. Alaska Jan. 2, 2019) ("ANTHC was formed by Alaska Native tribes.").
[50] *Barron*, 2019 WL 80889, at *5.
[51] *Id.* at *4.

To bolster their argument, plaintiffs improperly attempt to incorporate "by reference" arguments made in *Southcentral Foundation* reflecting that ANTHC's Board of Directors owe "'a duty of undivided loyalty to ANTHC that is not subordinate to any duty owed to . . . any other entity.'"[52] It is entirely correct, as a matter of black-letter law, that "[d]irectors… owe fiduciary duties to their corporation."[53] But that has no bearing on the tribal structure, ownership, and management of ANTHC. Although a corporation's directors may "control and supervise the conduct of the business," those with the power to appoint or remove directors exercise ultimate control over the corporation.[54]

To accept plaintiffs' argument, one would have to conclude that Congress intended to mandate creation of an entity independent of all tribal control when it passed § 325(b). The text, the structure, and the legislative history of § 325 does not support that conclusion, nor does common sense.[55] Nothing indicates that by requiring ANTHC to be governed by a board of directors Congress intended a significant reversal of its decades-long goal to

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[52] Docket 73 at 17–18. Defendants object to plaintiffs' cursory attempt to incorporate wholesale pleadings from the *Southcentral* case. *See, e.g., Norfleet v. Walker*, 684 F.3d 688, 690–91 (7th Cir. 2012) (Posner, J.). This objection is discussed in more detail in Docket 78, *Defs' Opposition to Cross Motion for Discovery*.

[53] *Meidinger v. Koniag, Inc.*, 31 P.3d 77, 87 (Alaska 2001); *Grassmuek v. Barnett*, 281 F. Supp. 2d 1227, 1232 (W.D. Wash. 2003) ("In general, [a corporate director's] fiduciary duty comprises three sub-duties: the duty of loyalty, the duty of care, and the duty to act in good faith.").

[54] 2 Cox & Hazen, *Treatise on the Law of Corporations* § 9:12 (3d ed. 2018).

[55] *N.b.*, under § 325(a) the regional health entities are representing individual tribes that already authorized the regional entities to act on their behalf when they created ANTHC, and under § 325(b) ANTHC's board of directors is composed of "representatives" of Alaska's tribes and tribal organizations.

transfer responsibility for providing health care to Alaska Natives and American Indians from the federal government to tribes and tribal organizations.

The plaintiff in *McCoy* made a nearly identical argument. Like ANTHC, the tribal college in *McCoy* was managed by a board of directors. Because the defendant's articles of incorporation did not give tribes direct control over the tribal college's operations, the plaintiff argued that the third *White* factor was not met. The district court rejected this argument, holding that "[s]eparate governance does not divest the [defendant tribal college] of its tribal character. . . . While the Board controls the operations of the College," the court held, "the Tribes control who is a Board member and review the Board actions. Thus, the College in this respect acts as an arm of the Tribes."[56]

Alaska's tribes control ANTHC in a similar manner. ANTHC "was organized and is controlled by Alaska Native tribes and tribal organizations which are represented on its Board of Directors."[57] While the Board of Directors is responsible for operational management, "[t]he regional tribal health consortia represented on ANTHC's Board of Directors are comprised of, and controlled by, the federally-recognized Alaska Native tribes from their respective regions. These Alaska Native tribes, through their elected or appointed regional board members, determine who represents them on ANTHC's Board of Directors, and by this method the Alaska Native tribes control ANTHC."[58] The third *White* factor is satisfied.

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[56] *McCoy v. Salish Kootenai Coll., Inc.*, 334 F. Supp. 3d 1116, 1122 (D. Mont. 2018).
[57] Compact, Docket 52-2 at 7.
[58] Helgesen Aff., Docket 52 at 4 ¶ 9.

d. The fourth *White* factor: Intent to share sovereign immunity. Plaintiffs effectively concede this factor. Although plaintiffs state in a heading that the fourth *White* factor "do[es] not favor ANTHC," plaintiffs do not explain how or why that is the case.[59] To the contrary, tribal intent to share sovereign immunity is evident from the formation of ANTHC as an ISDEAA Title V inter-tribal consortium, by which ANTHC's constituent tribes and tribal organizations shared with ANTHC their tribal "rights and responsibilities" to administer Alaska's statewide health programs for Alaska Natives and American Indians.[60] The fourth *White* factor weighs in favor of ANTHC's sovereign immunity.

e. The fifth *White* factor: Financial relationship between the tribes and ANTHC. Plaintiffs effectively concede this last *White* factor. Their only argument regarding this factor is an off-hand comment that "[e]ven with its for-profit revenue stream, ANTHC does not have any plan or make any promises regarding paying money back to the 229 federally-recognized Alaska Native tribes."[61] But, ANTHC is a non-profit corporation. Its purpose is not to make profits and it cannot distribute dividends. Federal law requires ANTHC to prudently invest program revenue. Distributing dividends is not permitted by its Articles of Incorporation and would be contrary to the Alaska Nonprofit Corporation Act and federal law.[62]

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[59] Docket 73 at 14–15.
[60] 25 U.S.C. §5381(b).
[61] Docket 73 at 16.
[62] 25 U.S.C. § 5388(h); Amended and Restated Articles of Incorporation of Alaska Native Tribal Health Consortium, Dec. 2, 2011, at 2 Art. V, Sec. 2(1), available at:

That said, ANTHC and Alaska's tribes have a close financial relationship. ANTHC receives federal funds that would otherwise go to individual Alaska tribes to provide federal programs, functions and services to tribal members and communities.[63] These include direct patient care, community health programs, and water and sanitation projects throughout rural Alaska, which financially and substantially benefit all of Alaska's tribes and their members. The tribal and federal funds that ANTHC administers benefit all tribal health programs and all tribal communities across the State.[64]

In sum, as this Court found in *Barron*, not only *Allen* but each of the *White* factors support ANTHC's tribal sovereign immunity. Whether analyzed under ISDEAA or the common law, plaintiffs' Counts I and III should be dismissed with prejudice, as amendment would be futile.[65]

D. Conclusion.

Defendants' motion to dismiss should be granted, without leave to amend, as amendment would be futile.

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https://www.commerce.alaska.gov/cbp/main/Document/Corp/?r=41658&v=610033&d=802132; AS 10.20.136; *see also* 25 U.S.C. § 5388(i), (j) (describing allowable uses for "carryover funds" and "program income").

[63] *See generally*, Helegson Aff., Docket 52, *and* Sherry, P., "Health care delivery for Alaska Natives: a brief overview," Docket 51-2.

[64] Docket 52 at 3 ¶ 5.

[65] *U.S. ex rel. Dunlap v. Alaska Radiology Assocs., Inc.*, No. 3:14-cv-00143-TMB, slip. op. at 28 (D. Alaska Mar. 31, 2016); *Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991).

DATED April 26, 2019, at Juneau, Alaska.

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