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8
9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE DISTRICT OF ALASKA AT ANCHORAGE

11 JOAN WILSON and)
12 PAUL FRANKE, M.D.,)
13)
14 Plaintiffs,)
15 vs.)
16)
17 ALASKA NATIVE TRIBAL)
HEALTH CONSORTIUM; ANDREW)
18 TEUBER; and ROALD HELGESEN,)
19)
20 Defendants.)
21)
22)
23)
24)
25)
26)

Case No. 3:16-cv-00195-JWS

27 **PLAINTIFFS' REPLY IN SUPPORT OF**
28 **CROSS-MOTION FOR JURISDICTIONAL DISCOVERY**

29 ANTHC's opposition ignores the specific information identified in the Plaintiffs'
30 cross-motion for discovery, instead relying on string-cited cases that explain exactly why
31 jurisdictional discovery is necessary here. Plaintiffs requested discovery related to
32 ANTHC's claim that it is an arm of the tribe. The Plaintiffs explained and specifically

33 PLS.' REPLY IN SUPPORT OF CROSS-MOT. FOR JURISDICTIONAL DISC.

34 *Joan Wilson & Paul Franke, M.D. v. Alaska Native Tribal Health Consortium, et al.*

35 Case No. 3:16-cv-00195-TMB

36 Page 1 of 6

1 cited to information in the Southcentral Litigation case establishing that ANTHC operates
2 independently from its constituents. The Plaintiffs pointed to specific information in this
3 case (an affidavit by Roald Helgesen), describing ANTHC as an entity controlled by
4 Alaska Native tribes through “their elected or appointed regional board members.”¹
5 Plaintiffs pointed to specific statements in the Southcentral Litigation case, in which
6 ANTHC argued it is **not controlled by tribes**, and is instead an “independent entity”²
7 whose Board members have an “undivided loyalty to ANTHC that is not subordinate to
8 any duty owed to SCF or any other entity.”³ Plaintiffs (specifically) explained that
9 ANTHC’s description of itself in this case (in order to establish sovereign immunity) and
10 its description of itself in the Southcentral Litigation are contradictory, and further
11 explained that ANTHC possesses all the information necessary for discovery on this
12 issue, some of which it did indeed file in the Southcentral Litigation.
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16 The ANTHC opposition ignores why this information is important, brushing it off
17 as a “red herring”⁴ that bears no impact on the issue in its motion and memorandum to
18 dismiss, and in the recently filed reply. ANTHC’s arguments are the red herring. The
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22 ¹ Dkt. 52 at 4 ¶ 9.

23 ² “Southcentral Litigation” is *Southcentral Foundation v. ANTHC*, case no. 3:17-cv-
00018-TMB, at Dkt. 60 at 12.

24 ³ *Id.* at 14.

25 ⁴ Dkt. 78 at 4.

1 very issue for this Court is whether ANTHC has tribal sovereignty as a **tribe or an arm**
2 **of the tribe.**

3 All of ANTHC's pleadings rely on the same factors addressed in Plaintiffs'
4 opposition (the "White factors").⁵ In fact, ANTHC devotes most of its motion and reply
5 to the argument that it is an arm of the tribe under common law. The White factors and
6 ANTHC's argument that it is an arm of the tribe are at issue here because ANTHC is not
7 a federally recognized tribe,⁶ with sovereign immunity. In order to establish ANTHC is
8 an arm of the tribe, entitled to sovereign immunity, it must establish that a deep
9 connection exists between the tribe and the arm of the tribe. The cases cited by **both**
10 ANTHC and the Plaintiffs make this clear.⁷ While ANTHC may argue (without support
11 and/or with self-serving and contradictory affidavit testimony) that ANTHC satisfy the
12 standards in the cited case law, ANTHC's statements in the Southcentral Litigation
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18 ⁵ The White factors stem from *White v. University of California*, 765 F.3d 1010,
19 1025 (9th Cir. 2014). ANTHC cites to and addresses this case in its memorandum
(Dkt. 51 at 20 n.73) and in its reply (Dkt. 80 at 9).

20 ⁶ Dkt. 73 at 4-5.

21 ⁷ See *Pink v. Modoc Indian Health Project*, 157 F.3d 1185, 1188 (9th Cir. 1998)
22 (finding that non-profit corporations acting on behalf of multiple tribes served as an arm
23 of the tribe while providing services under federal statutes when they are more than a
24 mere business and are tribally controlled); *McCoy v. Salish Kootenai College*, 334
25 F. Supp. 1116, 1121 (9th Cir. 2018) (finding that a deep connection between the tribe and
a council provided the requisite connection to establish that the college acted as an arm of
the tribe); *Barron v. Alaska Native Tribal Health Consortium*, 2019 WL 80889,*13
(D. Alaska Jan. 2, 2019); *White*, 765 F.3d at 1025.

1 establish otherwise. The Plaintiffs provided this information in their opposition,
2 including:

- 3 1. ANTHC's own statements about conflicts of interest, and complaints by ANTHC
4 that allowing entities like Southcentral Foundation or other tribes to have a direct
5 hand in running ANTHC would make ANTHC's interests suffer;⁸
- 6 2. ANTHC's own statements that it cannot share information with other tribes (its
7 designating entities) because those entities are competitors;⁹ and
- 8 3. ANTHC's description of itself and its board of directors who have an undivided
9 loyalty to ANTHC that is not subordinate to the duties owed to any other
10 entities.¹⁰

11 These specific facts indicate that ANTHC operates independently from its
12 constituents. ANTHC, through Mr. Helgesen, describes ANTHC as an entity controlled
13 by Alaska Native tribes through "their elected or appointed regional board members."¹¹
14 The Plaintiffs cited to the specific dockets (not just in summary or conclusory form, but
15 with specifics) in the Southcentral Litigation because those dockets establish that the
16 relationships between ANTHC board members and the tribes are not fluid or open.¹²
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18 ⁸ Dkt. 73 at 17.

19 ⁹ *Id.*

20 ¹⁰ *Id.* at 18.

21 ¹¹ Dkt. 52 at 4 ¶ 9.

22 ¹² For example, at Dkt. 31 in the Southcentral Litigation, Southcentral Foundation
23 describes the ANTHC board as limiting information that can be provided to designating
24 entities, including denying those entities access to information regarding ANTHC's
25 operations. Dkt. 31 at 24. That same docket describes the disagreement between
26 ANTHC's executives and members of the board who want to share in the governance of
ANTHC. *Id.* at 24-26.

1 Those dockets describe, in detail, the governance of ANTHC, and issues of dispute
2 between certain members of the ANTHC board, including the sometimes intense
3 competition that drives confidentiality decisions, and the relationship between ANTHC
4 and its constituents. By ANTHC's own description, ANTHC acts in its own best interest,
5 independent from any of its constituents, including those entities from whom it argues it
6 derives sovereign immunity as an arm of the tribe. All of these facts establish that
7 ANTHC is not an arm of tribe, entitled to sovereign immunity.¹³
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10 These are the specific **facts** (not legal principles) that make jurisdictional
11 discovery necessary. These facts relate to each of the White factors: (1) the method of
12 creation of the economic entities; (2) their purpose; (3) their structure, ownership, and
13 management, including the amount of control the tribe has over the entities; (4) the
14 tribe's intent with respect to sharing its sovereign immunity; and (5) the financial
15 relationship between the tribe and the entities.¹⁴
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17 ANTHC's argument that Plaintiffs failed to controvert or contest facts related to
18 the ANTHC's status as an arm of the tribe is false. Plaintiffs disputed ANTHC's
19 arguments at length in the opposition, and provided specific examples of contradictory
20 statements by ANTHC executives and others that justify an order allowing jurisdictional
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24 ¹³ *Supra* at n.8.

25 ¹⁴ *Barron*, 2019 WL 80889 at *13 (citing *White*, 765 F.3d at 1025).

1 discovery. The cases cited by ANTHC make clear that jurisdictional discovery is
2 necessary here, as the facts relate entirely to ANTHC's sovereign immunity.

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4 DATED this 3rd day of May 2019, at Anchorage, Alaska.

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15 **CERTIFICATE OF SERVICE**

16 I hereby certify that on May 3, 2019 a copy of the
17 foregoing Plaintiffs' Reply In Support of the Cross-
18 Motion for Jurisdictional Discovery served
19 electronically through the CM/ECF system on
20 Nicholas C. Perros, Richard L. Pomeroy, and Richard
21 D. Monkman.

22 s/Molly C. Brown