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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

Southcentral Foundation,

Plaintiff,

vs.

Alaska Native Tribal Health Consortium,

Defendant.

Case No. 3:17cv-00018-TMB

**SOUTHCENTRAL FOUNDATION'S MOTION FOR SUMMARY JUDGMENT**

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## **I. INTRODUCTION**

For years, Defendant Alaska Native Tribal Health Consortium (“ANTHC”) denied Southcentral Foundation (“SCF”) the information that SCF needed to exercise effectively its governance and participation rights in ANTHC. This is beyond dispute. In a published opinion, the Ninth Circuit held that ANTHC was wrong: the Court had “no difficulty concluding” that SCF, as a Designating Entity, has “governance and participation rights” in ANTHC, and a corresponding “entitlement to information necessary to effectively exercise those rights,” pursuant to Section 325.<sup>1</sup>

The Ninth Circuit’s opinion *should* have led to a resolution of this case without further action from this Court, and *should* have led to ANTHC providing SCF the documents and information to which it is entitled. Indeed, ANTHC revised its governance documents in the last year to, in its words, “*comply with the Ninth Circuit’s decision.*”<sup>2</sup> ANTHC’s current governance documents now largely comply with Section 325. All ANTHC had to do was stipulate that its current governance documents reflect the baseline required by Section 325, and then faithfully apply them, and this case would have been over. This has not happened. ANTHC maintains that certain rights in its governance documents are not required by Section 325, leaving the specter that ANTHC will again

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<sup>1</sup> *Southcentral Found. v. Alaska Native Tribal Health Consortium*, 983 F.3d 411, 417, 420 (9th Cir. 2020). Section 325 refers to Section 325 of the Department of the Interior and Related Agencies Appropriation Act of 1998, Pub. L. No. 105-83, 111 Stat. 1543, attached to the Declaration of William D. Temko (“Temko Decl.”), filed herewith, as Exhibit 1.

<sup>2</sup> ECF No. 310 at 6 (emphasis added).

amend its governance documents to deny SCF its Section 325 rights.<sup>3</sup> ANTHC also has not interpreted and applied its governance documents in light of its obligations under Section 325. SCF, thus, still requires the Court to declare its Section 325 rights in three critical respects.

*First*, ANTHC refuses to concede that the amount of information available to SCF, through its Designated Director, under ANTHC's current governance documents is required by Section 325. ANTHC's current policies provide that Designated Directors may share "all information and documents the [Designated] Director determines necessary for his or her Designating Entity to exercise its governance and participation rights."<sup>4</sup> SCF contends that this is a baseline required by Section 325. ANTHC disagrees, arguing that it has the right to amend this provision in the future and reduce the information available to Designating Entities. SCF is entitled to a declaration stating that because Section 325 allows it to access all documents and information that it, through its Designated Director, deems necessary to exercise its governance and participation rights effectively, ANTHC cannot abridge the rights that this provision grants.

*Second*, and relatedly, ANTHC refuses to honor its commitment to share with SCF information subject to the attorney-client privilege (or other similar legal protection) under

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<sup>3</sup> This is a real concern: ANTHC amended its bylaws *on four occasions* between December 2, 2020 and December 3, 2021, amending two dozen provisions. *See* Declaration of April Kyle in Support of SCF's Summary Judgment Motion ("Kyle Decl.") Ex. 3 ("Dec. 3, 2021 Bylaws") at 20.

<sup>4</sup> Kyle Decl. Ex. 1 (ANTHC Code of Conduct ("2021 Code of Conduct")) § 2.3.2. "Designating Entities" refers to the thirteen RHEs named in Section 325 plus the Unaffiliated Alaska Native Tribal Health Committee which appoints two ANTHC Directors to represent the Unaffiliated Tribes.



a common interest arrangement. ANTHC's current governance documents obligate ANTHC to enter into a common interest agreement with SCF if it is at all possible to do so.<sup>5</sup> Yet ANTHC steadfastly refuses to enter into such an agreement with SCF. SCF is entitled to a declaration that its entitlement to governance documents and information includes documents and information subject to legal privilege, because it shares a common interest with ANTHC.

*Third*, ANTHC refuses to acknowledge that Section 325 sets a baseline for the universe of persons at SCF who can view ANTHC governance information, and that baseline includes SCF's Directors, Officers, and legal counsel. Again, ANTHC's governance documents already allow this narrow universe of people to view ANTHC's confidential information (provided they agree to keep it confidential).<sup>6</sup> But ANTHC maintains that Section 325 does not prevent it from narrowing this universe even further in the future. Allowing ANTHC to do so would eviscerate Section 325's guarantees. Thus, SCF is entitled to a declaration that under Section 325, its Designated Director may share ANTHC governance documents and information with, at a minimum, SCF's Board, Officers, and legal counsel.

This case, however, is about more than SCF's rights under Section 325. Congress enacted Section 325 as a means to an end. By requiring ANTHC to be transparent and accountable to the Designating Entities, Congress established an oversight mechanism to ensure that ANTHC spends prudently and accountably the hundreds of millions of dollars

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<sup>5</sup> Kyle Decl. Ex. 2 (ANTHC policy regarding Disclosure of Records and Information to Designating Entities ("2021 Disclosure Policy")) § 5.4.1.1.

<sup>6</sup> *Id.* §§ 5.2, 5.6.

in federal funds that it receives. When ANTHC denies Designating Entities like SCF their rights under Section 325, it subverts the oversight scheme that Congress designed.

This lack of transparency has led to tangible harm. The governance crisis involving ANTHC's former Board Chair and President, in which, allegedly, he "unrelentingly coerced, forced, and required sex"<sup>7</sup> of one of his subordinates, is an outgrowth of the violations of Section 325 that ANTHC defended for years. ANTHC's former Board Chair and President created the Executive Committee and advanced restrictive information policies so that he could shield his own misdeeds from the Board and, in turn, the Designating Entities. The result was that he operated with impunity, created legal risk for, and caused reputational harm to ANTHC.

Through this lawsuit, SCF seeks to restore the transparency and accountability that Congress mandated in Section 325. The Ninth Circuit's opinion leads to only one conclusion: that SCF, as a Designating Entity, enjoys robust informational rights under Section 325 that ANTHC cannot abridge. SCF seeks a declaration that certain rights—rights ANTHC's governance documents *already* recognize—are required by Section 325 and that ANTHC must faithfully provide them. The Court should grant SCF's motion in full.

## **II. BACKGROUND**

Because this case has been pending for nearly five years and the Court is familiar

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<sup>7</sup> Temko Decl. Ex. 6 (Kyle Hopkins & Michelle Theriault Boots, *ANTHC Boss Resigned After Employee Accused Him of "Unrelenting" Abuse*, Anchorage Daily News, March 2, 2021).

with Section 325, the facts that the parties advanced at summary judgment in 2017,<sup>8</sup> and the published opinion of the Ninth Circuit,<sup>9</sup> SCF's background section focuses on only those facts relevant to the issues in this motion.

**A. Congress Enacts Section 325 to Ensure That Healthcare for Alaska Native People Is Administered Transparently and Cooperatively**

Congress enacted Section 325 in 1997 after more than 200 Alaska tribes and tribal organizations could not reach agreement on how the new Alaska Native Medical Center ("ANMC") would be managed and governed.<sup>10</sup> Congress authorized the creation of ANTHC as a single consortium that would be composed of, be run by, and draw on the expertise of the regional health entities ("RHEs") and Unaffiliated Tribes that were already managing extensive healthcare networks in Alaska.<sup>11</sup>

Congress made clear that Section 325 not only authorized the new consortium, but specified a governance structure designed to ensure that all of the Designating Entities could have a voice in ANTHC's governance. Congress provided that the "Consortium shall be governed by a 15-member Board of Directors, which shall be composed of one representative" of each RHE specifically named in Section 325(a), and two additional representatives from the Unaffiliated Tribes.<sup>12</sup> Section 325 also provides that "[e]ach

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<sup>8</sup> See ECF Nos. 31, 38 and 205 (SCF); ECF Nos. 35, 36 and 204 (ANTHC).

<sup>9</sup> *Southcentral Found.*, 983 F.3d at 411.

<sup>10</sup> August 16, 2017 Declaration of Katherine Gottlieb in Support of Southcentral Foundation's Motion for Summary Judgment, ECF No. 205-3 ¶ 15; see also S. Rep. No. 105-56 (1997) ("Senate Report"), Temko Decl. Ex. 3 at 110.

<sup>11</sup> Senate Report, Temko Decl. Ex. 3 at 110.

<sup>12</sup> Section 325(b), Temko Decl. Ex. 1.

member of the Board of Directors shall be entitled to cast one vote. 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.”<sup>13</sup>

Section 325’s legislative history confirms that Section 325 created governance rights for SCF and the other Designating Entities. The Senate Report accompanying its passage provides that Section 325 addresses “the issue of governance of the new Alaska Native Medical Center to ensure efficient, experienced Alaska Native management and control” over ANMC.<sup>14</sup> The Senate Report explains that in authorizing ANTHC, it was Congress’s goal to “draw on the existing expertise of the Alaska Native regional health entities now managing extensive regional health networks in Alaska” so that the “scarce funds available to meet the health needs of Alaska Natives [will] be professionally and prudently managed to provide [the] maximum amount of high quality health services to Alaska Natives.”<sup>15</sup> This purpose was confirmed by a near-contemporaneous letter sent by Section 325’s author, Senator Ted Stevens, who explained that he “developed Section 325 . . . to ensure efficient, experienced Alaska Native management and control when responsibility for [ANMC’s] operation is transferred from the [IHS] to Alaska Native management.”<sup>16</sup>

These governance provisions, guaranteeing transparency to ANTHC’s constituent

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<sup>13</sup> *Id.*

<sup>14</sup> Senate Report, Temko Decl. Ex. 3.

<sup>15</sup> *Id.*

<sup>16</sup> Letter from Ted Stevens to Sophia Chase, September 10, 1997 (“Stevens Letter”), Temko Decl. Ex. 4.

organizations and equal access to ANTHC decision-making, were critical because Section 325 changed the structure of the tribal health system in Alaska, giving ANTHC the exclusive authority to provide certain statewide health services.<sup>17</sup> In exchange, Congress gave the Designating Entities governance rights in ANTHC, exercised through their “representative[s]” on the ANTHC Board.

**B. ANTHC Enacts Governance Policies That Violate Section 325 to Cover up Malfeasance**

**1. ANTHC Creates the Illegal Executive Committee to Secretly Increase Its Former President’s Compensation**

In December 2014, at the urging of its former President and Board Chair, Andy Teuber, and shortly after reaching a \$153 million settlement with the Indian Health Service,<sup>18</sup> ANTHC passed certain Bylaw amendments that created a five-person Executive Committee that could wield the full power of the ANTHC Board.<sup>19</sup> Mr. Teuber also proposed evaluating the compensation paid to ANTHC Directors, including evaluating whether Directors should receive compensation *retroactively*, even though the ANTHC Articles of Incorporation from ANTHC’s founding until 2011 did not permit Directors to receive compensation at all.<sup>20</sup> The implicit message to ANTHC Directors was that if they adopted the Bylaw amendments that Mr. Teuber proposed, they would later be rewarded

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<sup>17</sup> Section 325(c), Temko Decl. Ex. 1 (the services that ANTHC provides shall “only be provided by the Consortium”).

<sup>18</sup> Temko Decl. Ex. 5 (ANTHC Press Release, June 27, 2014).

<sup>19</sup> See August 16, 2017 Declaration of Ileen Sylvester in Support of Southcentral Foundation’s Motion for Summary Judgment (“2017 Sylvester Decl.”), ECF No. 205-2 ¶ 13; see also, generally, *id.* ¶¶ 8-15.

<sup>20</sup> 2017 Sylvester Decl. ¶ 14 & Ex. 7.

financially. Mr. Teuber's proposed amendments passed.<sup>21</sup>

Mr. Teuber then wasted no time convening the Executive Committee in secret—without notice to Directors who were not on the Committee—for the purpose of approving a new compensation package for himself worth over \$1 million per year.<sup>22</sup> Because the amended Bylaws that ANTHC approved did not require the full ANTHC Board to ratify Executive Committee action before it became effective, Mr. Teuber's new contract was a done deal: the Executive Committee had bound ANTHC to the agreement without agreement of the Board, and there was nothing the Board could do about it.

## **2. ANTHC Erects Illegal Information Barriers to Further Conceal Its Wrongdoing**

To conceal his new compensation (and whatever else he might not have wanted others to know about at ANTHC), Mr. Teuber then took further measures to limit the information that Directors received, as well as the information that they could provide to their Designating Entities. ANTHC did this, principally, through three documents: (1) the 2016 “Gag Order”; (2) the ANTHC Directors’ Code of Conduct; and (3) the Disclosure Policy.

### **(a) The 2016 “Gag Order” Prevents Sharing of Privileged Material**

In early January 2016, SCF's Alternate Designated Director learned about an unnoticed meeting of the Executive Committee and decided to attend.<sup>23</sup> ANTHC's

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<sup>21</sup> 2017 Sylvester Decl. ¶ 15.

<sup>22</sup> See February 26, 2018 Declaration of William D. Temko (“Temko Feb. 26, 2018 Decl.”), Ex. B, ECF No. 126-2 at 3.

<sup>23</sup> 2017 Sylvester Decl. ¶ 29.

management planned at that meeting to present the Executive Committee with a long-promised legal opinion explaining the legality of the Executive Committee.<sup>24</sup> SCF's Alternate Director, however, was not permitted to view this privileged legal opinion unless she first signed an onerous confidentiality agreement.<sup>25</sup> This proposed agreement asked her to agree that she would not share ANTHC confidential information, including "privileged materials," with *anybody* other than the ANTHC Board, ANTHC management, or ANTHC counsel "without the advance approval of the Board or the Chair of the Board," i.e. Mr. Teuber.<sup>26</sup> The proposed agreement stated that it was to be "broadly construed so as to provide maximum protection for the interests of ANTHC," without mentioning the rights of Designating Entities.<sup>27</sup>

The effect was that if a Director refused to sign it then the Director could not see ANTHC's confidential or privileged information—information that Directors had a nearly absolute right to access—or share such information with their Designating Entities without ANTHC's permission. In short, the agreement placed SCF's governance rights at the mercy and discretion of ANTHC—the organization SCF and the other Designating Entities are charged with overseeing.

SCF's Primary and Alternate Designated Directors refused to sign the agreement, which they characterized as an "oppressive gag order" in an email to ANTHC.<sup>28</sup>

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<sup>24</sup> *Id.*

<sup>25</sup> 2017 Sylvester Decl. Ex. 19, ECF No. 215-12.

<sup>26</sup> *Id.* ¶¶ 1, 2.

<sup>27</sup> *Id.* ¶ 6.

<sup>28</sup> 2017 Sylvester Decl. Ex. 20, ECF No. 215-13.

**(b) The ANTHC Code of Conduct**

After ANTHC insisted that SCF's Designated Directors sign the "gag order," SCF proposed amending ANTHC's Code of Conduct to clarify that Designated Directors have the right to share information and documents with their Designating Entities in order to obtain direction and input from those entities pursuant to Section 325.<sup>29</sup> Information sharing would be subject to common sense restrictions to ensure that disclosure did not harm ANTHC, including agreement from the Designating Entities to keep ANTHC information confidential.<sup>30</sup>

ANTHC refused to entertain SCF's proposed revisions to the Code of Conduct, and instead proposed its own revisions that the Board adopted in June 2016.<sup>31</sup> These changes permitted Directors to share certain basic information such as Board resolutions, final meeting minutes, and Board packet materials with their Designating Entities, but they did not permit full disclosure of all documents and information Designating Entities need to exercise effectively their governance rights in ANTHC.<sup>32</sup>

And, like the "gag order," ANTHC expressly required Directors to get ANTHC's permission before sharing information: any "Director who would like to convey

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<sup>29</sup> 2017 Sylvester Decl. ¶ 32, Ex. 22, ECF No. 216-2 at 23.

<sup>30</sup> *Id.* SCF did not propose materially changing or eliminating the section of the Code of Conduct dealing with conflicts of interest that would require recusal. Nor does SCF challenge that portion of ANTHC's governance documents today. SCF does not seek access to documents or information regarding matters where SCF has a conflict of interest, as that term is defined in ANTHC's 2021 Code of Conduct (Kyle Decl. Ex. 1 § 2.1.1.1).

<sup>31</sup> 2017 Sylvester Decl. ¶ 33.

<sup>32</sup> 2017 Sylvester Decl. ¶¶ 33-36 & Ex. 24 (ECF No. 216-4) at 8.



confidential or sensitive information,” including privileged information, to his or her Designating Entity, had to “coordinate with the Chair of the Board . . . to determine whether the disclosure can be made.”<sup>33</sup> This entrenched the control that ANTHC’s Board Chair (Mr. Teuber) had over the information Designating Entities could receive. All he had to do was mark something as privileged or confidential, tell a Director that it was unable to be shared and the Director could not share it.

### **(c) The Disclosure Policy**

ANTHC also adopted a new “Disclosure of Records and Information Policy” at the September 2016 ANTHC Board meeting that further restricted the information that ANTHC would share with its own Directors and the Designating Entities.<sup>34</sup> Rather than providing that ANTHC Directors have a virtually absolute right to information, it stated that Directors could obtain information about ANTHC only if the request was “reasonable,” which it defined as “a request that has a specific, stated, legitimate purpose.”<sup>35</sup> Directors were presumptively prohibited from seeking privileged information, as the policy provided that “[o]rdinarily, requests are unreasonable”—meaning, ANTHC would deny them—“to the extent they . . . seek[] privileged information or work product.”<sup>36</sup> The policy also stated that providing Directors with “confidential, sensitive, proprietary or privileged information may be conditioned on adequate safeguards and

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<sup>33</sup> 2017 Sylvester Decl. Ex. 24 (ECF No. 216-4) at 8.

<sup>34</sup> 2017 Sylvester Decl. ¶ 37; Temko Feb. 26, 2018 Decl. Ex. C (ECF No. 241-3).

<sup>35</sup> Temko Feb. 26, 2018 Decl. Ex. C (ECF No. 241-3) ¶¶ 5, 8.

<sup>36</sup> Temko Feb. 26, 2018 Decl. Ex. C (ECF No. 241-3) ¶ 8.

assurances,”<sup>37</sup> but did not state what kinds of assurance would be required or who would set them. In short, the Disclosure Policy gave unidentified ANTHC personnel absolute discretion to determine what information would be shared and with whom, including Directors, with a rebuttable presumption against disclosure. The Disclosure Policy, thus, not only ran counter to Section 325, but also appeared to violate the Directors’ rights to information under Alaska law.

**C. SCF’s Lawsuit and the Ninth Circuit’s Decision**

**1. SCF Brings Suit to Remedy ANTHC’s Illegal Behavior**

SCF brought suit on January 20, 2017—almost exactly five years before the date of this filing—to seek redress for ANTHC’s violations of Section 325.<sup>38</sup> The complaint alleged that a panoply of ANTHC actions and governance policies violated Section 325, including the creation of the Executive Committee and ANTHC’s restrictive information sharing policies that gave ANTHC control over what information SCF could access and restricted access to confidential and privileged information.<sup>39</sup>

After a brief period of informal discovery, the parties brought cross-motions for summary judgment.<sup>40</sup> SCF’s motion detailed the facts recited above regarding the Executive Committee and ANTHC’s information barriers. ANTHC did not, because it could not, dispute any of these facts in its opposition papers. Rather, it argued that creating the Executive Committee and enacting restrictive information policies were valid

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<sup>37</sup> *Id.* ¶ 5.

<sup>38</sup> Complaint, ECF No. 2.

<sup>39</sup> *Id.* ¶¶ 28-42, 47-51, Prayer for Relief.

<sup>40</sup> ECF Nos. 31, 38 and 205 (SCF); ECF Nos. 35, 36 and 204 (ANTHC).

exercises of ANTHC's authority.<sup>41</sup> Indeed, ANTHC has asserted that "ANTHC may restrict the flow of information from directors to their Regional Health Entities,"<sup>42</sup> and that Section 325 "did not expressly or impliedly authorize disclosure of confidential information" to them.<sup>43</sup>

ANTHC also moved to dismiss SCF's complaint for lack of standing, for mootness, and based on tribal sovereign immunity.<sup>44</sup> On September 18, 2018, the Court granted ANTHC's motion to dismiss on the basis of standing, and denied the other pending motions as moot.<sup>45</sup>

## **2. The Ninth Circuit Completely Vindicates SCF's Governance Rights in ANTHC and SCF's Interpretation of Section 325**

The Ninth Circuit reversed and remanded the case for further proceedings.<sup>46</sup> After analyzing the plain language of Section 325, it had "no difficulty concluding that SCF has met its burden to demonstrate that the injury it asserts—infringement of its governance and participation rights under Section 325—is sufficiently concrete and particularized," and that SCF had standing to pursue its redress.<sup>47</sup> In other words, the Ninth Circuit held that if what SCF alleged were true, then ANTHC had violated Section 325. ANTHC has never

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<sup>41</sup> ECF No. 61, 218 at 18-22 (Executive Committee), 27-28 (information barriers).

<sup>42</sup> ECF No. 21 at 31.

<sup>43</sup> ECF Nos. 35, 36 and 204 at 42.

<sup>44</sup> See ECF Nos. 33, 34 and 203 (standing and mootness); No 30 (sovereign immunity). ANTHC subsequently withdrew its sovereign immunity motion and explicitly waived in this litigation any sovereign immunity it may possess. See ECF Nos. 125, 125-1.

<sup>45</sup> ECF No 149.

<sup>46</sup> *Southcentral Found.*, 983 F.3d at 420.

<sup>47</sup> *Id.* at 417.

disputed the facts in SCF's complaint, nor did it serve any discovery after remand.

As to SCF's specific claims, the Court of Appeals held that SCF had adequately alleged an injury for its Executive Committee claim because "Section 325 allocates the right to govern [ANTHC] to a Board of Directors that *expressly* includes a representative from SCF."<sup>48</sup> It noted with approval SCF's allegation that "the delegation to [the Executive Committee of] the full powers of the Board[] infringed on SCF's right under Section 325(b) to cast its vote in the management of the Consortium."<sup>49</sup> It rejected ANTHC's argument that Section 325 granted governance rights to the Board members only.<sup>50</sup> It squarely held that Congress described ANTHC Board Members as "representative[s]" of their Designating Entities because each "stands in the shoes of the designating entity by acting on its behalf."<sup>51</sup> It concluded "that Section 325 granted SCF governance and participation rights in the management of ANTHC to be exercised through SCF's representative on the Board and that SCF has alleged an injury in fact."<sup>52</sup>

The Ninth Circuit reached a similar conclusion as to SCF's information sharing claims. It held that SCF's "informational injury" was "inextricably tied to its interest in exercising its *governance and participation* rights" in ANTHC.<sup>53</sup> It agreed that:

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<sup>48</sup> *Id.* at 417-418 (emphasis in original).

<sup>49</sup> *Id.* at 418.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 419. The Ninth Circuit also explained that the Executive Committee claim was not moot because ANTHC failed to meet its "'heavy burden' to establish mootness by virtue of the subsequent Bylaws amendment." *Id.* at 418-419.

<sup>53</sup> *Id.* at 420.

the alleged deprivation of information necessary to exercise effectively the governance and participation rights allocated to the regional health entities in Section 325 constitutes an injury in fact sufficient to confer Article III standing. Indeed, *the right to govern would be a hollow promise absent the information necessary to exercise that right intelligently.*<sup>54</sup>

In sum, the Ninth Circuit “conclude[d] that Section 325 conferred governance and participation rights to SCF, which necessarily includes an entitlement to information necessary to effectively exercise those rights.”<sup>55</sup> It, thus, adopted the interpretation of Section 325 advanced by SCF and squarely rejected ANTHC’s misinterpretation of the law.

The Court of Appeals then remanded this case for further proceedings, issuing its mandate on December 29, 2020.<sup>56</sup>

**D. ANTHC Amends Its Governance Documents to Comply with the Ninth Circuit’s Ruling**

After remand, ANTHC recognized that the Ninth Circuit’s ruling effectively declared its former governance policies illegal. ANTHC asked this Court for a stay so that it could “revise ANTHC’s governance policies in light of the Ninth Circuit’s decision,”<sup>57</sup> which it conceded “would control its future governance.”<sup>58</sup> On May 4, 2021, the ANTHC Board adopted a motion directing ANTHC’s management to review and recommend amendments to ANTHC’s governing documents “that should be made *to comply with the*

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<sup>54</sup> *Id.* at 419 (emphasis added).

<sup>55</sup> *Id.* at 420.

<sup>56</sup> ECF No. 279.

<sup>57</sup> ECF No. 286 at 6.

<sup>58</sup> ECF No. 287 at 3.

*Ninth Circuit’s decision*” in this case.<sup>59</sup>

Over the ensuing months, ANTHC worked on amending its governance documents to comply with the Ninth Circuit’s decision, including meeting with SCF and its counsel. ANTHC’s operative governance documents are a result of this process. Those documents generally comply with Section 325. In particular:

- ANTHC’s Bylaws eliminated the Executive Committee and provide that no Board committee can take action without the full Board ratifying that action.<sup>60</sup>
- Every Director is guaranteed notice of every Committee meeting and can attend and participate in every Committee meeting.<sup>61</sup>
- Absent a conflict of interest, ANTHC Directors have “a nearly ‘absolute’ right to information about ANTHC.”<sup>62</sup>
- “Directors may share with Permitted Recipients of their Designating Entities all documents and information they receive as a Director,” subject to certain minimal limitations and routine protections in the ANTHC Handbook.<sup>63</sup> Designated Directors are entitled to provide “his or her Designating Entity with all information and documents *the Director determines necessary* for his or her Designating Entity to exercise its governance and participation rights.”<sup>64</sup>
- ANTHC agreed that it presumptively would enter into a common interest or joint defense agreement with each Designating Entity, including SCF, so that it can share information subject to the common interest or joint defense

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<sup>59</sup> ECF No. 287 at 3.

<sup>60</sup> Kyle Decl. Ex. 3 (Dec. 3, 2021 Bylaws) at 13, Article VIII(A).

<sup>61</sup> *Id.* at 14, Article VIII(C); *id.* at 15, Article IX(B).

<sup>62</sup> *Id.* at 7 Article III(F).

<sup>63</sup> Kyle Decl. Ex. 2 (2021 Disclosure Policy) § 5.3.

<sup>64</sup> Kyle Decl. Ex. 1, (2021 Code of Conduct) § 2.3.2 (emphasis added). *See also id.* § 2.2.2.1. (“Designating Entities are entitled to all documents and information they need to effectively exercise their governance and participation rights.”).

doctrines.<sup>65</sup> ANTHC's Disclosure Policy provides that it "has a model common interest agreement and a model joint defense agreement designed to allow the sharing of privileged materials in a manner that preserves the legal protection" and promised to execute one with each Designating Entity, including SCF, "if it is at all possible to do so."<sup>66</sup>

- Designated Directors may share all information and documents that the Director determines are necessary for the Designating Entity to exercise its governance and participation rights with the following "Permitted Recipients": "(a) a member of [the Designating Entity's] Board of Directors; (b) a member of [the Designating Entity's] tribal council; (c) an officer of the Designating Entity; or (d) the Designating Entity's legal counsel," provided they agree to keep the information confidential.<sup>67</sup>

ANTHC and SCF entered into a partial Settlement Agreement and Potential Stipulated Partial Judgment ("Stipulated Judgment") on January 7, 2022—over a year after the Ninth Circuit issued its mandate and many months after ANTHC amended its governance documents—in which ANTHC agreed that some, but not all, of these changes to its governance policies are required by Section 325.<sup>68</sup> In the Stipulated Judgment, ANTHC agreed that Section 325 grants SCF, as a Designating Entity, certain rights that are already reflected in ANTHC's governance documents, namely those concerning (1) the Executive Committee, (2) notice to directors of meetings, and (3) the information that Designated Directors are allowed to receive from ANTHC.<sup>69</sup> ANTHC agreed that it cannot amend its governance documents to lessen or eliminate these rights.<sup>70</sup>

However, ANTHC refuses to agree that several critical aspects of its current

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<sup>65</sup> Kyle Decl. Ex. 2 (2021 Disclosure Policy) § 5.4.1.1.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at §§ 5.2; 5.6.

<sup>68</sup> ECF No. 313.

<sup>69</sup> *Id.* ¶¶ 1-5.

<sup>70</sup> *Id.* ¶ 8.

governance documents reflect rights guaranteed by Section 325, leaving open the prospect that ANTHC will change them in the future.

*First*, ANTHC maintains that it retains discretion to reduce the universe of information that Designated Directors can share with their Designating Entities. In other words, ANTHC does not believe that the provisions guaranteeing SCF the right to all information it needs to exercise effectively its governance rights<sup>71</sup> are required by Section 325. ANTHC also declined to agree that it is the Designated Director who decides what information the Designating Entity should receive, as its current documents provide,<sup>72</sup> apparently maintaining that Section 325 permits ANTHC to make that decision.

*Second*, although ANTHC agreed to enter into a common interest agreement with SCF so that it could share privileged information, to date, it has refused to do so, and ANTHC maintains that doing so is not required by Section 325.

*Third*, ANTHC claims that it can reduce the universe of people at Designating Entities who can view ANTHC confidential information. ANTHC does not agree that the set of “Permitted Recipients” that its current governance documents guarantee can access critical governance information is the minimum required by Section 325.

Thus, even though ANTHC characterized its revised governance documents as a “full remedy” for SCF,<sup>73</sup> so long as ANTHC continues to assert that critical provisions of its current governance documents are not required by Section 325 and can be amended in

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<sup>71</sup> Kyle Decl. Ex. 2 (2021 Disclosure Policy) § 5.3; Kyle Decl. Ex. 1, (2021 Code of Conduct) § 2.2.2.1.

<sup>72</sup> Kyle Decl. Ex. 1, (2021 Code of Conduct) § 2.3.2.

<sup>73</sup> ECF No. 310 at 5.



the future, SCF still lacks complete relief. And by refusing to execute a common interest agreement with SCF, ANTHC refuses to follow the letter of its current governance documents.

**E. Facing a Governance Crisis, ANTHC Continues to Withhold Critical Governance Information from SCF**

Immediately after remand, ANTHC fell into a governance crisis, putting its pledge to live by the Ninth Circuit’s decision and the promises in its new governance documents to the test. Returning to its old ways, however, ANTHC continues to withhold critical documents and information that SCF is entitled to receive.

**1. A Governance Crisis Highlights the Need for Directors to Consult with Their Designating Entities**

On February 23, 2021, Mr. Teuber abruptly resigned from ANTHC.<sup>74</sup> The reason for his resignation soon became clear when, on March 2, 2021, Pro Publica and the Anchorage Daily News published a story describing allegations that Mr. Teuber had “unrelentingly coerced, forced, and required sex” of one of his subordinates since 2019.<sup>75</sup> The accuser’s detailed allegations, delivered in a letter to the ANTHC Board on February 23 and to the press, were graphic and appalling.<sup>76</sup> The accuser also claimed that ANTHC had tolerated and enabled similar abuse in the past.<sup>77</sup> The same day that the story was

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<sup>74</sup> Temko Decl. Ex. 2 (Michelle Theriault Boots, *Andy Teuber, Head of the Alaska Native Tribal Health Consortium, Resigns*, Anchorage Daily News, Feb. 23, 2021).

<sup>75</sup> Temko Decl. Ex. 6 (Kyle Hopkins & Michelle Theriault Boots, *ANTHC Boss Resigned After Employee Accused Him of “Unrelenting” Abuse*, Anchorage Daily News, March 2, 2021).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

published, Mr. Teuber and his helicopter disappeared over the Gulf of Alaska.<sup>78</sup>

These events quickly evolved into one of the largest governance challenges that ANTHC has ever faced. Not only had ANTHC experienced an unexpected and “sudden change in leadership,”<sup>79</sup> but found itself embroiled in a public governance crisis. Congress’s oversight scheme requires that ANTHC make information about governance challenges just like this available to the Designating Entities, so that they can help ANTHC navigate them and continue to deliver high quality healthcare to Alaska Native People. The current situation is a prime example of one where SCF’s Designated Director needs to consult with SCF about the right actions for ANTHC to take.

## **2. ANTHC Withholds Governance Information from SCF and Refuses to Enter a Common Interest Agreement, Continuing to Violate Section 325**

Despite the promise in ANTHC’s governance documents that SCF is entitled to all documents and information that its Designated Director gets, ANTHC has continued to stymie SCF. ANTHC publicly announced that it would open an investigation.<sup>80</sup> ANTHC

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<sup>78</sup> Temko Decl. Ex. 7 (Zaz Hollander, *Coast Guard Says Debris in Gulf of Alaska “Consistent” with Helicopter Piloted by Former Health Executive*, Anchorage Daily News, March 3, 2021). Mr. Teuber has not been seen in public again. Although his remains were never found, he was declared legally dead in April 2021. Zaz Hollander, *Missing Alaska Health Executive’s “Death by Accident” Verdict Leaves Questions Surrounding Helicopter Crash*, Anchorage Daily News, April 28, 2021, <https://www.adn.com/alaska-news/aviation/2021/04/28/missing-alaska-health-executives-death-by-accident-verdict-leaves-questions-surrounding-helicopter-crash/>.

<sup>79</sup> *ANTHC Leadership Transition*, ANTHC.org, Feb. 26, 2021, <https://anthc.org/news/anthc-leadership-transition/>.

<sup>80</sup> Temko Decl. Ex. 6 (Kyle Hopkins & Michelle Theriault Boots, *ANTHC Boss Resigned After Employee Accused Him of “Unrelenting” Abuse*, Anchorage Daily News, March 2, 2021).

then conducted a privileged investigation into the matters underlying its governance crisis.<sup>81</sup> Because it claims privilege over the investigation, it has refused to let SCF's Designated Director share the findings of that investigation with SCF, meaning SCF's Board and Officers, despite SCF's governance and informational rights, have as much information about the results of the investigation as the general public.<sup>82</sup>

Because ANTHC's governance documents provide that ANTHC will enter into a common interest agreement with Designating Entities, SCF requested in July 2021 that ANTHC execute one so that SCF can exercise its Section 325 rights.<sup>83</sup> Despite repeated follow-up requests over the last six months, ANTHC has refused to enter into any such arrangement, maintaining that doing so is not legally permissible.<sup>84</sup> Even though ANTHC committed to enter into a common interest agreement "if at all possible," its refusal to fulfill this commitment abridges SCF's Section 325 rights, rendering them nothing more than a "hollow promise."

### **III. LEGAL STANDARD**

Summary judgment is proper when a "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."<sup>85</sup> If the moving party satisfies its initial burden of production, then the non-moving party must "identify with reasonable particularity the evidence that precludes summary

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<sup>81</sup> Kyle Decl. ¶ 4; ECF No. 310 at 3.

<sup>82</sup> Kyle Decl. ¶ 4.

<sup>83</sup> *Id.* ¶ 5.

<sup>84</sup> *Id.*

<sup>85</sup> Fed. R. Civ. P. 56(a).

judgment.”<sup>86</sup> A “mere ‘scintilla’ of evidence will not be sufficient to defeat a properly supported motion for summary judgment; rather, the nonmoving party must introduce some ‘significant probative evidence.’”<sup>87</sup> If the non-moving party fails to make this showing, the moving party is entitled to summary judgment.<sup>88</sup>

#### IV. ARGUMENT

##### A. SCF Is Entitled to a Declaration Stating that it Is Entitled to All Documents and Information its Designated Director Deems Necessary for SCF to Exercise Its Governance Rights Effectively

Section 325 grants “SCF governance and participation rights in the management of ANTHC.”<sup>89</sup> ANTHC injured SCF by “depriv[ing it] of information necessary to exercise effectively [its] governance and participation rights.”<sup>90</sup> ANTHC did this through restrictive information policies that limited the flow of information to SCF’s Designated Director, and required that SCF’s Designated Director obtain permission from the ANTHC Board Chair before sharing with SCF information ANTHC designated as “confidential.”<sup>91</sup>

ANTHC can no longer defend the legality of these policies. Indeed, it has repeatedly argued that this Court should ignore those policies and, instead, rule on the legality of its revised policies, contending “it would be better and more efficient for the Court to consider any governance policies that ANTHC adopts in light of the Ninth

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<sup>86</sup> *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996) (citation omitted).

<sup>87</sup> *Summers v. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir. 1997) (citation omitted).

<sup>88</sup> *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

<sup>89</sup> *Southcentral Found.*, 983 F.3d at 419.

<sup>90</sup> *Id.*

<sup>91</sup> *See* Section II(B)(2), *supra*.

Circuit's decision, rather than starting down the road of adjudicating policies that had been adopted prior to the Ninth Circuit's guidance."<sup>92</sup> Yet ANTHC has not agreed that its former information sharing policies violated Section 325 because they did not provide that SCF was entitled to all documents and information that it deems necessary to exercise effectively its governance rights. SCF is entitled to that declaration.

As to ANTHC's current policies, SCF, similarly, is entitled to a declaration that ANTHC cannot change them in the future to remove certain rights that they currently guarantee. Because Section 325 entitles SCF to a declaration that it is entitled to all documents and information that its Designated Director deems necessary for SCF to exercise effectively its governance and participation rights, SCF is entitled to a declaration stating that ANTHC's current policies are the minimum required by Section 325. That is, SCF is entitled to a declaration stating that ANTHC may not amend its policies in a way that provides less information than they currently do.

In particular, SCF agrees that, under Section 325, "Designating Entities are entitled to all documents and information they need to effectively exercise their governance and participation rights,"<sup>93</sup> and that a Designated Director is entitled to provide "his or her Designating Entity with all information and documents the Director determines necessary

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<sup>92</sup> ECF No 287 at 6; *see also id.* at 2 ("Even if the parties do not resolve the litigation, it would provide the Court with the opportunity to decide this case based on reviewing the governance policies ANTHC believes reflect the Ninth Circuit's decision rather than based on reviewing ANTHC's governance policies adopted before that decision was made."); ECF No 290 at 3 ("But even if the parties are unable to settle, at worst the litigation would proceed based on actual, current disagreements.").

<sup>93</sup> Kyle Decl. Ex. 1, (2021 Code of Conduct) § 2.2.2.1.

for his or her Designating Entity to exercise its governance and participation rights.”<sup>94</sup> The Court needs do no more than enter a declaratory judgment stating that these parts of ANTHC’s governance documents—documents ANTHC represented it amended *to comply with Section 325*<sup>95</sup>—are required by Section 325, and this part of the case is over.

This declaration is important to prevent ANTHC from turning SCF’s governance rights into a “hollow promise.”<sup>96</sup> One way ANTHC might do that is by claiming that it has the right to decide what information it thinks is “necessary” for SCF to exercise its governance rights, rather than allowing SCF’s Designated Director to make that determination. This would be a return to the former regime, and would let ANTHC withhold information that it wants to bury. ANTHC could subvert the entire oversight scheme that Section 325 created if it is allowed to decide what information Designated Directors can provide to their Designating Entities. It was these kinds of features in ANTHC’s former governance policies—features that gave its former Chair/President complete discretion over the kinds of information Designating Entities could access<sup>97</sup>—that rendered their governance rights “hollow.”<sup>98</sup>

ANTHC might also impair SCF’s Section 325 rights by again changing its

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<sup>94</sup> Kyle Decl. Ex. 1, (2021 Code of Conduct) § 2.3.2. *See also* Kyle Decl. Ex. 2 (2021 Disclosure Policy) § 5.3 (“Directors may share with Permitted Recipients of their Designating Entities all documents and information they receive as a Director, subject to the limitations and protections set out in section 5.4” of the ANTHC Handbook).

<sup>95</sup> ECF No. 310 at 6 (emphasis added).

<sup>96</sup> *Southcentral Found.*, 983 F.3d at 419.

<sup>97</sup> *E.g.* 2017 Sylvester Decl. Ex. 24 (ECF No. 216-4) at 8.

<sup>98</sup> *Southcentral Found.*, 983 F.3d at 419.

governance documents to restrict information sharing with SCF, something ANTHC has not disclaimed. In particular, ANTHC has stated that it wants to retain the discretion to reduce the amount of information available to SCF because the current guarantee that SCF can access “all information and documents [SCF’s Designated] Director determines necessary for his or her Designating Entity to exercise its governance and participation rights” is not required by Section 325.<sup>99</sup> ANTHC is wrong. Section 325 does not allow ANTHC to pick and choose the information Designating Entities are entitled to access. That, too, would gut the oversight scheme that Congress designed, and render SCF’s governance rights illusory.

SCF, thus, is entitled to a declaration that Section 325 does not permit ANTHC to decide what information SCF, as a Designating Entity, can access, and that ANTHC cannot reduce the amount of information it makes available.

**B. SCF Is Entitled to a Declaration that Its Entitlement to Documents and Information Under Section 325 Includes Privileged Information**

One important category of documents and information that ANTHC continues to withhold categorically from SCF is documents and information subject to the attorney-client privilege, or similar legal protection. ANTHC continues to withhold this information despite committing in its governance documents to enter into a common interest agreement with SCF. When it has come time for ANTHC to fulfill this promise, ANTHC has faltered.<sup>100</sup>

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<sup>99</sup> Kyle Decl. Ex. 1, (2021 Code of Conduct) § 2.3.2.

<sup>100</sup> SCF does not contend that it would be entitled to privileged (or other) information where a conflict of interest exists. For example, SCF does not claim it is entitled to ANTHC’s privileged information concerning this lawsuit.

ANTHC now claims that sharing privileged information would waive privilege and that it cannot share such information under a common interest agreement because it lacks a “common interest” with its Designating Entities. ANTHC is wrong. ANTHC misapplies the common interest doctrine and fails to account for the impact of Section 325, which solidifies the common interest between ANTHC and its Designating Entities, including SCF. Moreover, privileged information is frequently at the core of the “information necessary” for SCF to exercise its governance rights “intelligently,”<sup>101</sup> as illustrated by the recent governance crisis.<sup>102</sup>

**1. Under Federal Law, ANTHC Can Share Critical Governance Information With SCF Without Waiving Privilege Under a Common Interest Agreement**

“Questions of privilege that arise in the course of the adjudication of federal rights are ‘governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.’”<sup>103</sup> Federal courts

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<sup>101</sup> *Southcentral Found.*, 983 F.3d at 419.

<sup>102</sup> Because SCF seeks to hold ANTHC to its promise to enter into a common interest agreement, SCF focuses on ANTHC’s misapplication of this doctrine. However, SCF notes that a common interest agreement is superfluous here given the relationship of SCF and ANTHC. SCF’s Designated Director, as a member of the ANTHC Board, has a right to receive ANTHC’s privileged information. The Ninth Circuit specifically rejected “ANTHC’s argument that Section 325 grants rights of governance *only* to Directors,” holding that each Director “stands in the shoes of the designating entity by acting on its behalf.” *Southcentral Found.*, 983 F.3d at 418. SCF cannot stand in its Designated Director’s shoes unless it can obtain all of the documents and information that its Designated Director can obtain. There is no question that SCF’s Designated Director is entitled to access ANTHC’s privileged information. Consequently, SCF is entitled to receive information at its Director’s discretion, without that disclosure threatening waiver.

<sup>103</sup> *United States v. Zolin*, 491 U.S. 554, 562 (1989) (quoting Fed. R. Evid. 501); *see also Chicago Bridge & Iron Co., N.V. v. Fairbanks Joint Crafts Council, AFL-CIO*, 2019 WL 2579627, at \*2 (D. Alaska June 23, 2019) (citing *Kaufman v. Bd. of Trs.*, 168 F.R.D. 278,



recognize that “[t]he need to protect the free flow of information from client to attorney logically exists whenever multiple clients share a common interest about a legal matter.”<sup>104</sup> The common interest doctrine “protects the confidentiality of communications passing from one party to the attorney of another party when made to further a joint effort”<sup>105</sup> or “in the course of an ongoing common enterprise and intended to further the enterprise.”<sup>106</sup> It “applies where (1) the communication was made by separate parties in the course of a matter of common interest or joint defense; (2) the communication was designed to further that effort; and (3) the privilege has not been waived.”<sup>107</sup> To invoke the common interest rule, the parties must come to some form of agreement, although that agreement need not be reduced to writing.<sup>108</sup>

“The common interest privilege does not require a complete unity of interests

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280 (C.D. Cal. 1996)); *Kerr v. U.S. Dist. Court for N. Dist. of Cal.*, 511 F.2d 192, 197 (9th Cir. 1975)) (“In federal question cases such as this, federal common law determines whether there is a privilege.”).

<sup>104</sup> *United States v. Schwimmer*, 892 F.2d 237, 243-244 (2d Cir. 1989) (citation omitted) (collecting cases to summarize the common interest rule); *see also Redding v. Soc, LLC*, 2020 WL 4001001, at \*2 n.3 (D. Nev. July 15, 2020) (“The common interest privilege is an exception to the waiver rule when the parties sharing the communication are engaged in a discussion of common interest.”).

<sup>105</sup> *Avocent Redmond Corp. v. Rose Elecs., Inc.*, 516 F. Supp. 2d 1199, 1202 (W.D. Wash. 2007)

<sup>106</sup> *Schwimmer*, 892 F.2d at 243.

<sup>107</sup> *Avocent Redmond Corp.*, 516 F. Supp. 2d at 1203.

<sup>108</sup> *In re Pac. Pictures Corp.*, 679 F.3d 1121, 1129 (9th Cir. 2012) (“the parties must make the communication in pursuit of a joint strategy in accordance with some form of agreement—whether written or unwritten”).

among the participants.”<sup>109</sup> Two parties may share a common interest even where their interests are not identical, where their interests are “adverse in substantial respects,” and “even where a lawsuit is foreseeable in the future.”<sup>110</sup> The Ninth Circuit has recognized that, “[e]ven where the non-party who is privy to the attorney-client communications has never been sued on the matter of common interest and faces no immediate liability, it can still be found to have a common interest with the party seeking to protect the communications.”<sup>111</sup> The common interest “*may be either legal, factual, or strategic in character.*”<sup>112</sup>

The unique relationship Congress created in Section 325, where SCF has “governance and participation rights” that “necessarily includes an entitlement to information necessary to effectively exercise those rights,”<sup>113</sup> means that SCF and ANTHC share a common interest over information that involves ANTHC governance. Section 325

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<sup>109</sup> *In re Mortg. & Realty Tr.*, 212 B.R. 649, 653 (Bankr. C.D. Cal. 1997) (collecting cases and describing the history of the common interest privilege in the federal courts); *see also* Restatement (Third) of the Law Governing Lawyers § 76, cmt. e (2000) (“The interests of the separately represented clients need not be entirely congruent.”). Federal Courts including the Ninth Circuit have looked to the Restatement in considering aspects of the common interest doctrine. *See United States v. Gonzalez*, 669 F.3d 974, 982 (9th Cir. 2012).

<sup>110</sup> *In re Mortg. & Realty Tr.*, 212 B.R. at 653.

<sup>111</sup> *United States v. Zolin*, 809 F.2d 1411, 1417 (9th Cir. 1987), withdrawn in part, 842 F.2d 1135 (9th Cir. 1988), and overruled by *United States v. Jose*, 131 F.3d 1325 (9th Cir. 1997); *see also Gonzalez*, 669 F.3d at 980 (“parties in separate actions might nonetheless have reasons to work together toward a common objective, and there is no requirement that actual litigation even be in progress”); *Schwimmer*, 892 F.2d at 244 (“it is therefore unnecessary that there be actual litigation in progress for the common interest rule of the attorney-client privilege to apply”).

<sup>112</sup> Restatement (Third) of the Law Governing Lawyers § 76, cmt. e (2000) (emphasis added).

<sup>113</sup> *Southcentral Found.*, 983 F.3d at 420.

charges SCF and the other Designating Entities with overseeing ANTHC. Given SCF's oversight role, its governance and participation rights, its entitlement to information necessary to the effective exercise of its rights, and its obligation to use ANTHC information to provide input about what is in the best interest of ANTHC, there is no question that the two parties share the requisite common interest. ANTHC, thus, can share information with SCF under a common interest arrangement without risking waiver of any applicable protection, and must do so if SCF requests one.

Not only does the Ninth Circuit's decision confirm the common interest ANTHC and SCF share, but it also brushed aside concerns ANTHC raised about privilege. In its briefing before the Ninth Circuit, ANTHC forcefully argued that SCF's interpretation of Section 325 could not be correct because if it were, "privilege might not attach or would be waived if the RHEs were entitled to participate in or obtain ANTHC's communications with counsel."<sup>114</sup> While the Ninth Circuit did not expressly address this issue, it rejected ANTHC's view of Section 325 wholesale, and its explanation of the information to which SCF is entitled did not identify any exceptions. Rather, it confirmed that Congress granted SCF strong informational rights that are "differen[t] in kind" from informational rights that exist in other contexts.<sup>115</sup> It also explained that the degree of these rights is significant, encompassing "information *necessary* to exercise *effectively* [its] governance and participation rights."<sup>116</sup> The Ninth Circuit's opinion, thus, supports the notion that the

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<sup>114</sup> Appellee's Answering Brief at 30, No. 18-35868 (9th Cir. July 3, 2019), ECF Nos. 31, 54.

<sup>115</sup> *Southcentral Found.*, 983 F.3d at 420.

<sup>116</sup> *Id.* at 419 (emphasis added).

information to which SCF is entitled to access includes privileged information.

That the Ninth Circuit did not identify a “privileged information” exception to SCF’s informational rights makes sense given that such information often will be at the core of the governance interests that SCF has in ANTHC. Governance often involves legal matters, especially in highly regulated industries like healthcare. Allowing ANTHC to withhold information subject to privilege will create an exception to Section 325 so wide that SCF’s rights risk becoming the “hollow promise” of which the Ninth Circuit warned.

ANTHC’s steadfast refusal to enter into a common interest agreement with SCF, despite promises to the contrary in its governance documents, highlights SCF’s need for the declaration it seeks. SCF possesses an obvious common interest with ANTHC in developing a strategy to resolve the governance challenges presented by the past misconduct of its former Chair/President. As reflected in Section 325’s legislative history, Congress specifically intended that ANTHC would draw on the expertise of the Designating Entities.<sup>117</sup> Yet, nearly a year after Mr. Teuber resigned, SCF’s Designated Director still has not been able to share critical information about Mr. Teuber’s misconduct and ANTHC’s response (and any accompanying investigations) with the SCF Board.<sup>118</sup> No information could be more necessary to the effective exercise of SCF’s governance rights than critical information about the most pressing governance issue that ANTHC has

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<sup>117</sup> See Temko Decl. Exs. 3 (Senate Report) & 4 (Stevens Letter).

<sup>118</sup> Kyle Decl. ¶ 4.

ever faced.<sup>119</sup>

SCF seeks to hold ANTHC to its promise to enter into a common interest agreement with SCF, which the parties can do without ANTHC waiving privilege, so that SCF may receive information necessary to exercise its rights under Section 325. SCF's governance rights would be hollow indeed if ANTHC were allowed to continue to shield governance information under the cloak of privilege and then refuse to enter into a common interest agreement with a Designating Entity. SCF, thus, is entitled to a declaration that its "entitlement to information necessary to effectively exercise" its governance and participation rights includes privileged information, that can and must be shared with SCF under the common interest doctrine without ANTHC waiving any applicable legal privilege.

## **2. Disclosure of Critical Governance Information to SCF Does Not Waive Privilege Under Alaska Law**

ANTHC may claim that undeveloped Alaska law around common interest agreements acts as a bar to SCF's access to privileged information. ANTHC is incorrect. State privilege law does not govern SCF's entitlement to information; Section 325 does. And, as discussed above, federal common law informs the privilege implications of a federal right. As a result, state law cannot limit what information SCF must receive under Section 325.

Even so, nothing about Alaska law would risk disclosure, especially if the

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<sup>119</sup> Even if the law required a factual or strategic interest related to current or potential litigation, there is little question that the allegations against ANTHC's former Chair/President make litigation reasonably likely.

information were provided to SCF under the common interest agreement contemplated by ANTHC's revised governance policies. Alaska law recognizes the existence of a privilege against disclosure of "confidential communications made for the purpose of facilitating the rendition of professional legal services to the client," when those communications occur "by the client or the client's lawyer to a lawyer representing another in a matter of common interest."<sup>120</sup> The commentary to Rule 503 provides that this rule applies "[w]hen clients represented by different lawyers pursue a 'joint defense' or 'pool information.'"<sup>121</sup>

Although the Alaska Rules of Evidence recognize the common interest doctrine,<sup>122</sup> Alaska law is undeveloped in this area—there do not appear to be any published Alaska decisions applying or analyzing the doctrine. Relying on the Restatement in denying a motion to compel, an Alaska trial court observed that the common interest doctrine "can arise where counsel for two or more clients with a common interest, in either litigated or *non-litigated matters*, agree to share information concerning the matters."<sup>123</sup> Another Alaska trial court analyzed the Restatement and Federal law to determine that two parties who engaged in settlement negotiations over which party bore the legal responsibility for groundwater cleanup possessed a "substantially similar common legal interest" required to

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<sup>120</sup> Alaska R. Evid. 503(b)(3).

<sup>121</sup> Alaska R. Evid. 503, *commentary* ("When clients represented by different lawyers pursue a 'joint defense' or 'pool information,' subdivision (b)(3) provides that each client has a privilege as to his own statements, but that any client wishing to disclose his own statements made at the joint conference may do so. When there is no common interest to be promoted by a joint consultation, the Rule does not apply.").

<sup>122</sup> Alaska R. Evid. 503(b)(3); Alaska R. Evid. 503, *commentary*.

<sup>123</sup> *HDI Gerling America Ins. Co. v. Carlile Transp Systems, LLC*, 2016 WL 8416505, at \*1 (Alaska Super. Sep. 1, 2016) (emphasis added).

invoke the common interest doctrine over settlement negotiations.<sup>124</sup> Under these circumstances, it would be appropriate for this Court to look to Federal law or the Restatement, both discussed in the analysis above.<sup>125</sup>

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The Court should declare that ANTHC cannot shield documents and information that SCF needs to exercise its governance and participation rights just because they are subject to a legal privilege, such as the attorney-client privilege or attorney work product protection. This declaration is important, not only given ANTHC's current stance, but given its history of wielding such protections to shield information from the Designating Entities.<sup>126</sup>

**C. Section 325 Entitles SCF's Designated Director to Share ANTHC Information with SCF's Board, Officers and Legal Counsel**

The final issue concerns the universe of people at SCF with whom SCF's Designated Director may share information—the “Permitted Recipients.” ANTHC's current governance documents provide that SCF's Designated Director may share “all documents and information [she] receive[s] as a Director” with persons who are “(a) a member of [SCF's] Board of Directors; (b) a member of [SCF's] tribal counsel; (c) an

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<sup>124</sup> *State v. Williams Alaska Petroleum, Inc.*, 2018 WL 11389356, at \*6 (Alaska Super. Dec. 10, 2018).

<sup>125</sup> *City of Kenai v. Cook Inlet Natural Gas Storage Alaska, LLC*, 373 P.3d 473, 483 n.45 (Alaska 2016) (“Federal law continues to be useful by analogy where Alaska law is less clear.”); *Weiner v. Burr, Pease & Kurtz, P.C.*, 221 P.3d 1, 8 (Alaska 2009) (observing that “The Restatement (Third) of the Law Governing Lawyers provides helpful guidance” and adopting a rule verbatim from the Restatement).

<sup>126</sup> See Section II(B)(2), *supra*.

officer [of SCF]; or (d) [SCF's] legal counsel.”<sup>127</sup> Yet, despite claiming that it amended its governance documents to comply with Section 325,<sup>128</sup> ANTHC refuses to agree that this universe of people is the minimum required by Section 325.<sup>129</sup>

ANTHC, again, is wrong. For SCF's governance and participation rights to be anything other than a “hollow promise,”<sup>130</sup> there must be *some* universe of persons at SCF with whom SCF's Designated Director can share information in order for SCF to exercise its governance and participation rights at all (much less, to exercise them effectively). That universe includes, at a minimum, SCF's Board, SCF's Officers, and their counsel.

*SCF Board.* Consistent with Alaska law, SCF's governance documents vest the power to govern SCF in SCF's Board of Directors.<sup>131</sup> In the parties' prior summary judgment briefing, ANTHC acknowledged that “the board of directors manages the affairs” of Alaska non-profits, citing the non-profit code.<sup>132</sup> For SCF—as an entity—to provide input to SCF's Designated Director then, at a minimum, SCF's Designated Director must be able to share information with SCF's Board of Directors. There should be no dispute that SCF's Designated Director can share information with SCF's Board pursuant to Section 325.

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<sup>127</sup> Kyle Decl. Ex. 2 (2021 Disclosure Policy) §§ 5.2, 5.3. SCF does not have a tribal council.

<sup>128</sup> ECF No. 310 at 6.

<sup>129</sup> ECF No. 313 at 6.

<sup>130</sup> *Southcentral Found.*, 983 F.3d at 419.

<sup>131</sup> See Alaska Stat. Ann. § 10.20.081 (“The affairs of a corporation shall be managed by a board of directors.”). See also Kyle Decl. ¶ 6.

<sup>132</sup> ECF No. 61, 218 at 21 (citing Alaska Stat. Ann. § 10.20.081).



*SCF Officers.* SCF's Designated Director has the right to share information with SCF's Officers under Section 325 also. Congress wanted the Designating Entities to provide input on the management and governance of ANTHC to "draw on the existing expertise of the Alaska Native regional health entities now managing extensive regional health networks in Alaska."<sup>133</sup> At SCF, that "expertise" resides not only with SCF's Board, but with SCF's Officers too, most of whom have worked at SCF for over 25 years.<sup>134</sup> For example:

- SCF's Vice President of Finance and Chief Financial Officer, Lee Olson, has held that role since 1998—as long as ANTHC has been around. He has extensive experience in healthcare finance and with ANTHC in particular, having served on the ANTHC Finance and Audit Committee for many years.<sup>135</sup>
- SCF's Vice President of Executive and Tribal Services, Ileen Sylvester, has been a vice president at SCF since 1996. She oversees tribal relations and village initiatives for healthcare delivery to 55 rural villages, as well as a number of different important community programs. She currently serves as SCF's Alternate Director on ANTHC's Board, a role she has had at various times in the past too.<sup>136</sup>
- SCF's Vice President of Organizational Development and Innovation, Michelle Tierney, has worked at SCF since 1996. She served on the Board of Examiners for the Malcolm Baldrige National Quality Program.<sup>137</sup> She holds a master's degree in public administration from the University of Alaska Anchorage, and master's and Ph.D. degrees in human and

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<sup>133</sup> Temko Decl. Ex. 3 at 110 (Senate Report).

<sup>134</sup> SCF's website (<https://www.southcentralfoundation.com/about-us/leadership/>) contains more information about SCF's Officers.

<sup>135</sup> Declaration of Lee Olson in Support of SCF's Motion for Summary Judgment ¶¶ 1-4.

<sup>136</sup> Declaration of Ileen Sylvester in Support of SCF's Motion for Summary Judgment ¶¶ 1-7.

<sup>137</sup> "The Baldrige Program oversees the nation's only Presidential award for performance excellence." See <https://www.nist.gov/baldrige>.

organizational systems from Fielding Graduate University in Santa Barbara, California, among other certifications.<sup>138</sup>

Quite clearly, SCF's Officers have a wealth of expertise to offer ANTHC. For SCF to be able to offer its "expertise" on critical ANTHC governance matters, SCF's Designated Director must be able to share ANTHC information with SCF's Officers.

*Legal Counsel.* SCF's Designated Director must also be able to share ANTHC confidential information, especially privileged information, with SCF's legal counsel. ANTHC operates in a highly regulated environment, facing a complex web of laws governing everything from employment issues, to recordkeeping, to healthcare delivery, to 501(c)(3) organization matters. SCF's Designated Director must be able to seek the advice of counsel when attempting to determine how various legal issues affect ANTHC.

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For SCF's governance and participation rights to be anything other than a "hollow promise,"<sup>139</sup> SCF's Designated Director must be able to share ANTHC information with some universe of people at SCF. ANTHC's current governance documents permit SCF's Designated Director to share all documents and information she receives with SCF's Board, Officers, and legal counsel. Section 325 may permit SCF's Designated Director to share information with a broader universe of persons. But on this motion, SCF does not ask the Court to declare anything more than what ANTHC's governance documents already provide: that pursuant to Section 325, SCF's Designated Director may share all

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<sup>138</sup> Declaration of Michelle Tierney in Support of SCF's Motion for Summary Judgment ¶¶ 1-8.

<sup>139</sup> *Southcentral Found.*, 983 F.3d at 419.

documents and information she receives with SCF's Board, Officers, and legal counsel.

**V. CONCLUSION**

"Section 325 granted SCF governance and participation rights in the management of ANTHC."<sup>140</sup> The "deprivation of information necessary to exercise effectively the governance and participation rights allocated to the regional health entities in Section 325," injured SCF.<sup>141</sup> The undisputed facts show that ANTHC deprived SCF of information necessary to exercise effectively its governance and participation rights when it enacted information barriers that prevented SCF's Designated Director from accessing and sharing critical governance information. SCF is entitled to a declaration, in the form lodged with this motion, stating that Section 325 entitles it to all information and documents its Designated Director deems necessary for SCF to exercise its governance and participation rights effectively, including confidential and privileged information. SCF is further entitled to a declaration stating that in order to avoid Section 325 turning into a "hollow promise,"<sup>142</sup> the persons at SCF with whom its Designated Director may share information are, at a minimum, SCF's Officers, Board, and their counsel.

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 21, 2022, a true and correct copy of the foregoing was served on:

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By electronic means through the ECF system.

*/s/ William D. Temko*

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