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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

SOUTHCENTRAL FOUNDATION, Plaintiff, v. ALASKA NATIVE TRIBAL HEALTH CONSORTIUM, Defendant.	Case No.: 3:17-cv-00018-TMB

ALASKA NATIVE TRIBAL HEALTH CONSORTIUM'S OPPOSITION TO SOUTHCENTRAL FOUNDATION'S MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

On January 7, 2022, ANTHC and SCF filed their Settlement Agreement and [Potential] Stipulated Partial Judgment (Agreement) in which they dramatically narrowed the remaining scope of this lawsuit. ANTHC agreed that some provisions in its policies "as they existed at the time SCF filed the Lawsuit were contrary to Section 325."[1] SCF agreed, in turn, that "*the version of [ANTHC's Bylaws, Disclosure Policy, and Code of Conduct] referenced in this Agreement conform to Section 325*."[2] The parties told the Court the Agreement "resolves all claims and counterclaims as between [them] except for [three] issues which the parties may raise and oppose on any grounds in their summary judgment motions," the "*Reserved Issues*."[3] Yet two weeks later, SCF moved for summary judgment (Motion) seeking multiple rulings most of which, if granted, would overturn governance policies SCF had just stipulated "conform to Section 325"[4] and shift aspects of ANTHC's governance authority—which Section 325 vests in ANTHC's Board—to SCF.[5] All such arguments against ANTHC's existing policies involve "*Settled Questions*"[6] and should be rejected to enforce the settlement agreement.

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[1] *See* Declaration of James Torgerson (Torgerson Decl.), filed contemporaneously herewith, Ex. 1 (hereinafter "Agreement"), at 8 of 43, ¶ 7.
[2] *Id.* (emphasis added).
[3] *Id.* at 6 of 43. The Reserved Issues are defined on pages 23 (Reserved Issues related to Scope of Information) and 28 (Reserved Issue related to Privileged Information).
[4] Agreement at 8 of 43, ¶ 7.
[5] *See* SCF's Motion for Summary Judgment (Motion), Dkt. 316, filed Jan. 21, 2022.
[6] The Settled Questions are defined on pages 16–17 (Settled Questions related to Scope of Information and Privileged Information).

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The rulings SCF seeks also should be denied for multiple jurisdictional and procedural reasons, and because they fail on their merits. For instance, SCF argues that the Court should strip ANTHC's Board of the power to make *lawful* changes—which is the only discretion ANTHC's Board seeks to retain—to its current information governance policies, including regarding who can be given ANTHC's confidential information. There is no justification in logic or law for the Court to issue an advisory opinion prohibiting ANTHC from taking hypothetical, lawful actions in the future. SCF also seeks access to all of ANTHC's attorney-client-privileged information even when, as a matter of law, the common-interest doctrine does not apply. Entering into a common-interest agreement would not change that. Disclosures waiving the privilege are allowed under ANTHC's current policies only if authorized by Board vote, and contrary to SCF's position, Section 325 does not strip ANTHC's Board of the power to decide collectively whether to waive the attorney-client privilege and give that power to SCF to decide unilaterally.[7]

II. BACKGROUND

Because the context for this lawsuit is well known to the Court from past pleadings and has little relevance to the narrow legal issues SCF reserved the right to raise in its Motion, ANTHC will not recount it here. What is relevant is the Agreement. It controls which questions have been settled and which issues SCF reserved for its Motion. Tellingly, SCF's Motion never mentions the Agreement. Also, before turning to the substance of the

[7] *See* SCF's Proposed Order (Proposed Order), Dkt. 316-1, filed Jan. 21, 2022.

Motion, SCF's continued vilification of ANTHC will be briefly addressed below. SCF apparently believes that its aspersions will spur the Court to (inadvertently) transfer complete control over ANTHC's most sensitive documents and information from its 15-member congressionally mandated Board to SCF alone. But Congress—including Senator Stevens specifically—trusted ANTHC's Board to govern ANTHC, not SCF.[8] And while the Ninth Circuit held that SCF has a right to certain ANTHC information, it did not hold that SCF has a right to any of the ANTHC Board's governance authority.[9] It did not take from ANTHC's Board authority over ANTHC's Disclosure Policy and give that authority to SCF. SCF's request for rulings to shift power from ANTHC's Board to SCF should be denied.

A. Most of SCF's requested rulings conflict with the Agreement.

The Agreement is a major milestone. Five years after SCF filed its complaint, the parties finally were able to bring closure to the vast majority of the disputed issues in the case. The Agreement reflects both the Ninth Circuit's decision regarding the governance and participation rights held by ANTHC participants, such as SCF, and the extensive revisions ANTHC's Board made to its governance policies to implement that decision. The

[8] *See* Department of the Interior and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-83, § 325, 111 Stat. 1543 (1997) (Section 325); *see also* Letter from Alaska Senator Ted Stevens to Sophia Chase (Sept. 10, 1997), Ex. 4 to William Temko Decl. ISO SCF's Motion (Temko Decl.), Dkt. 316-12, filed Jan. 21, 2022, at 2–3.

[9] *See Southcentral Found. v. Alaska Native Tribal Health Consortium*, 983 F.3d 411, 413 (9th Cir. 2020).

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parties agreed that the Agreement "resolve[d] all claims and counterclaims as between [the parties] in [the Lawsuit]" [10] with only three narrow "Reserved Issues."

Although carefully disguised, much of the relief SCF seeks is inconsistent with the Agreement. SCF repeatedly tries to hide that it is asking the Court to overturn ANTHC's existing policies—the same policies it stipulated in the Agreement "conform" to Section 325—by first misstating those policies and then arguing either that (1) ANTHC is violating the (misstated) policy or (2) the Court should declare that the (misstated) policy binds ANTHC.

A conspicuous example is SCF's repeated misleading quote from ANTHC's current policies that "a Designated Director is 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.'"[11] SCF deceptively omits the remainder of the quoted sentence, which *limits* the information a Director can share with the entity that designated him or her to serve on ANTHC's Board (Designating Entity).[12] The omitted language constrains a Director's discretion, permitting disclosure of information "under the *procedures and limitations* set out in ANTHC's Bylaws, Code

[10] Agreement at 6 of 43.
[11] Motion at 23–24 (citation omitted); *see id.* at 2, 16, 18.
[12] *Id.* at 23–24.

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of Conduct, and [Disclosure Policy]."[13] This omission plainly is intentional; SCF does it every time.[14]

SCF then asserts that "[t]he Court needs do no more than enter a declaratory judgment stating that these parts of ANTHC's governance documents . . . are required by Section 325 and this part of the case is over."[15] Of course, ANTHC's existing governance documents already bind ANTHC, so if that was what SCF truly was seeking, judicial intervention would be unnecessary. And the Agreement expressly limits ANTHC to only changing its governance documents in ways that comply to Section 325, so no judicial intervention is needed in that regard either.[16] Instead, under the guise of seeking either enforcement of ANTHC's existing policies or protection against future noncompliance, SCF is surreptitiously seeking an Order *rewriting* ANTHC's existing "conforming" policies and, in so doing, giving SCF power over ANTHC's governance that Section 325 gives to ANTHC's Board. The Court should reject SCF's deceptive effort to rewrite ANTHC's Disclosure Policy[17] and the Agreement.[18]

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[13] *See* Agreement at 35 of 43 (§ 2.2.2.1) (emphasis added), at 8 of 43, ¶ 6 (same).
[14] *See* Motion at 2, 16, 18, 23–24.
[15] *See id.* at 24 (footnotes omitted).
[16] *See* Agreement at 9 of 43, ¶ 8.
[17] *See id.* at 39–43 of 43 (Disclosure of Records and Information to Designating Entities (the "Disclosure Policy")).
[18] *See id.* at 8 of 43.

B. By vilifying ANTHC, SCF apparently seeks to justify depriving ANTHC's Board of governance powers Congress gave it under Section 325 and shifting them to SCF.

SCF wants the Court to eliminate the Board's power to collectively decide whether SCF is entitled to see a given piece of ANTHC's Highly Sensitive Confidential Information—including its attorney-client-privileged information—so that SCF can make that decision unilaterally.[19] If SCF's request became the law, ANTHC's policies would need to be rewritten to shift substantial power from its Board to SCF and other entities like it in violation of Section 325's mandated Board governance structure.

In support of this extraordinary power grab, SCF devotes a significant portion of its brief to yet again attempting to vilify ANTHC.[20] It reaches back yet again to remind the Court of the single substantive meeting of ANTHC's Executive Committee, which happened more than seven years ago in 2014, despite the fact that the Executive Committee has not existed for years and is disallowed under ANTHC's current policies. At the same time, SCF tries to cast itself yet again as the white knight—the only one of all the entities represented on ANTHC's Board stepping forward to save the day.

This is ironic given the pattern of misrepresentations and misleading statements that are the staples of SCF's approach to this litigation. SCF's self-portrait also is suspect in

[19] *See* Proposed Order at 1–2.

[20] Because SCF's extensive attacks, mischaracterizations, and factual misstatements are not relevant to the narrow legal issues currently before the Court, ANTHC will not respond to them, except to broadly reject SCF's general narrative and to specifically deny the existence of a causal link between the events of the past and ANTHC's level of disclosure of its confidential information to Designating Entities.

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that the result it seeks in the litigation is self-aggrandizing: a stronger SCF and a weaker ANTHC—which likely is why so many other ANTHC participants oppose SCF's goals here.[21] They plainly have a different view of what is best for them and for ANTHC and its mission.[22] SCF's posture also is more than a little hypocritical given its own recent troubles.[23]

In addition to attacking ANTHC yet again, SCF touts the qualifications of its people,[24] which ANTHC does not dispute. But SCF is not unique in that regard. There are well-qualified individuals working in other Native health organizations all across Alaska. And from that deep pool are selected the Directors on ANTHC's Board.

ANTHC was designed to draw upon existing expertise from all across Alaska in its governance and management,[25] and to be "governed by a board of directors."[26] ANTHC's governance is entrusted to its *15-member Board* for good reason. Between them, they have

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[21] *See* [Proposed] Brief of *Amici Curiae* Alaska Tribes and Tribal Health Organizations Regarding Necessary and Indispensable Parties, Dkt. 308-1, filed Dec. 12, 2021.
[22] *Id*. at 7 ("[T]he Nonparty Designating Entities believe that what SCF is seeking in this suit may impede or impair the Nonparty Designating Entities' ability to protect their interests if SCF's Lawsuit proceeds in their absence.").
[23] *See* Torgerson Decl., Ex. 2, Michelle Theriault Boots, *Southcentral Foundation Fires 3 Dental Executives over 'Substantiated Serious Compliance Issues'*, Anchorage Daily News (July 21, 2020), https://www.adn.com/alaska-news/2020/07/21/southcentral-foundation-fires-three-executives-over-substantiated-serious-compliance-issues/; *id.* at Ex. 3, Liz Ruskin, *Southcentral Foundation CEO Katherine Gottlieb to resign amid records scandal*, Alaska Public Media (Aug. 3, 2020) (https://www.ktoo.org/2020/08/03/southcentral-foundation-ceo-katherine-gottlieb-to-resign-amid-records-scandal/.
[24] *See* Motion at 34–36.
[25] *See id.* at 6 (citing legislative history of Section 325).
[26] Ex. 3 to Temko Decl., Dkt. 316-11, at 6.

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decades of relevant experience, an impressive record of accomplishment, and—very importantly—a statewide perspective.

For example, the Board's Chair, Ms. Kimberley Strong, is also the Chair of SouthEast Alaska Regional Health Consortium (SEARHC), a non-profit health consortium serving the health interests of the residents of Southeast Alaska. She has served on that board for 12 years, including as the Chair for 8 years, and has worked in the Native healthcare field for 21 years. Ms. Strong also has served on many other statewide, regional, and local boards, including serving as the President of the Chilkat Indian Village of Klukwan and as a Trustee for Alaska Pacific University. Other ANTHC Board members include, as further examples, Mr. Robert Clark, who has served as the President and CEO of the Bristol Bay Area Health Corporation for 47 years; Mr. Chuck Clement, who currently is the President and CEO of SEARHC and who previously worked at other healthcare organizations including as the former VP/Chief Operating Officer of SCF; and Mr. Andrew Jimmy, who has served on the ANTHC Board for over 20 years and is the President of the Tanana Chiefs Conference Health Board of Directors.[27]

In short, ANTHC's Board is composed of preeminent leaders in the provision of statewide health care services to Alaska Natives. As part of their responsibility for governing ANTHC, each of these 14 other Directors is entitled to just as much power over

[27] *See* Declaration of Rob Lynch (Lynch Decl.), filed contemporaneously herewith, ¶ 3; *see also* Ex. 1 to Lynch Decl. (brief synopsis regarding Board members).

ANTHC as is the Director designated by SCF: one vote on ANTHC's Board.[28] The Ninth Circuit's decision recognized SCF's governance and participation rights in ANTHC through its representative on ANTHC's Board. It did not change ANTHC's governance structure.

But that is what SCF is trying to do. SCF is asking the Court to take away from those accomplished and informed Directors the ability to react to future unforeseeable changes—such as the advent of new laws or technologies—and to potentially make lawful (only lawful[29]) changes to ANTHC's information sharing policies in the future. And SCF is asking the Court to take from the Board the power to decide when to disclose ANTHC's privileged information consistent with Section 325 when such disclosures would waive the privilege, and to give that power to SCF—to unilaterally decide to receive such information as it "deems necessary"[30]

III. STANDARD OF REVIEW

When a plaintiff moves for summary judgment, it has "the burden of proving—specifically, by a preponderance of the evidence—that [the court] ha[s] jurisdiction over [its] claims."[31] In the context of a request for declaratory judgment, this includes proving

[28] Section 325(b).
[29] *See* Agreement at 9 of 43, ¶ 8 (explaining ANTHC's Board retains the discretion to amend ANTHC's governance documents but only "in a way consistent with the Agreement, Section 325 or other applicable law, or any order of the Court").
[30] Proposed Order at 2, ¶ 1.
[31] *City of San Jose, Cal. v. Trump*, 497 F. Supp. 3d 680, 700 (N.D. Cal.) (citing *Leite v. Crane Co.*, 749 F.3d 1117, 1121–22 (9th Cir. 2014)), *vacated and remanded on other grounds*, 141 S. Ct. 1231 (2020).

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that there is a case and controversy before the court and that all the elements of the claim are satisfied as a matter of law.[32] When deciding a motion for summary judgment, "'the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.'"[33]

IV. ANALYSIS

A. This lawsuit should be dismissed under Rule 19.

SCF's Motion seeks relief that implicates the interests of absent ANTHC participants, including those sovereign absent participants that submitted an *amicus* brief. This underscores the need to dismiss this lawsuit under Rule 19.[34] By asking for declaratory judgments on the Settled Questions and Reserved Issues, SCF seeks to unilaterally overturn multiple changes to ANTHC's governance policies made by its Board and to restrict the Board's future discretion to make lawful changes to these policies. But to obtain declaratory relief, the "[t]he petitioner must have a practical interest in the declaration sought and *all parties having an interest therein or adversely affected must be made parties*

[32] *Watts v. United States*, 703 F.2d 346, 347 (9th Cir. 1983) ("To obtain a summary judgment in favor of a claim, 'the moving party must offer evidence sufficient to support a finding upon every element of his [or her] claim . . ., except those elements admitted . . .' by the adversary." (alterations in original) (quoting *United States v. Dibble*, 429 F.2d 598, 601 (9th Cir. 1970))); *Tradebay, LLC v. eBay, Inc.*, 278 F.R.D. 597, 604 (D. Nev. 2011) (explaining that a party seeking declaratory relief is required "to establish 'a case of actual controversy' within the court's jurisdiction" (citation omitted)).

[33] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (ellipsis in original; citation omitted).

[34] ANTHC's Motion for Judgment on the Pleadings, Dkt. 296, filed Oct. 20, 2021.

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or be cited."[35] In considering whether such relief is proper, "[i]t is of great importance that the rights of third parties might be prejudiced by a declaratory judgment[.]"[36] Here, all of the absent participants have the same interest as SCF in the disputed governance issues, including an interest in having their voices heard and considered in deciding these issues. Nine absent participants, including sovereign Tribes, have informed the Court of their interests, and have asked that SCF's suit be dismissed. The Motion likewise should be denied on this basis.

B. The Motion should be denied on numerous procedural and substantive grounds.

SCF seeks declarations concerning two categories of policies: (1) policies involving the scope of information to which SCF is entitled and to whom at SCF it may be given (together the "Scope of Information" claims),[37] and (2) policies governing the handling of privileged information (the "Privileged Information" claims).[38] As to both categories, SCF seeks rulings on both Settled Questions (i.e., challenges to existing policies that SCF agreed comply with Section 325)[39] and Reserved Issues. All of the relief SCF seeks should be denied.

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[35] Fed. R. Civ. P. 57 advisory committee's note to 1937 adoption (emphasis added); *Nev. Eighty-Eight, Inc. v. Title Ins. Co. of Minn.*, 753 F. Supp. 1516, 1529 (D. Nev. 1990); *Shell Oil Co. v. Aetna Cas. & Sur. Co.*, 158 F.R.D. 395, 402 (N.D. Ill. 1994).
[36] *Waialua Agric. Co. v. Maneja*, 178 F.2d 603, 613 (9th Cir. 1949); *see also Mallow v. Hinde*, 25 U.S. 193, 198 (1827).
[37] Proposed Order ¶¶ 1, 3.
[38] *Id.* ¶ 2.
[39] *Id.* ¶ 1 ("Any ANTHC policy to the contrary violates Section 325 and shall be amended."), ¶ 2 (same), ¶ 3 (same).

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1. None of the relief SCF seeks was pled.

Because none of SCF's present requests for declaratory relief are included in its complaint, they are not properly before the Court.[40] Neither the factual allegations these issues are based on nor the specific requests for declaratory judgment are pled in the complaint. "Federal Rule of Civil Procedure 8(a)(2) requires that the allegations in the complaint 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'"[41] Although a plaintiff may amend its complaint to add factual allegations or claims, it is black letter law that a plaintiff may not accomplish the same result through discovery or summary judgment briefing.[42]

SCF had multiple opportunities to present its new claims to this Court. SCF could have moved for leave to file a supplemental pleading under Fed. R. Civ. P. 15(d), or for leave to file an amended complaint under Fed. R. Civ. P. 15(a)(2). Either motion would, if

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[40] *Trishan Air, Inc. v. Fed. Ins. Co.*, 635 F.3d 422, 435 (9th Cir. 2011) (holding that claim not raised in complaint "was not properly before the district court); *Wasco Prods., Inc. v. Southwall Techs., Inc.*, 435 F.3d 989, 992 (9th Cir. 2006) ("[S]ummary judgment is not a procedural second chance to flesh out inadequate pleadings.").

[41] *Pickern v. Pier 1 Imports (U.S.), Inc.*, 457 F.3d 963, 968 (9th Cir. 2006) (citation omitted).

[42] *See id.* at 969 ("Although the new allegations were not part of the original complaint, Pickern might have proceeded by filing a timely motion to amend the complaint. However, Pickern did not amend the complaint to include more specific allegations."); *compare Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1109 (9th Cir. 2008) (en banc) (Fletcher, J., dissenting) (asserting that the court should look past the requirements of Fed. R. Civ. P. 8(a) when defendants "showed no prejudice arising out of the alleged lack of notice, and they addressed the merits of the issue in their opposition" to plaintiff's summary judgment motion), *with id.* at 1079–80 (majority opinion) (holding claim was improperly pled despite the claim having been fully briefed at summary judgment by all parties and presented for oral argument).

granted, have brought these claims before the Court and properly provided ANTHC with notice of SCF's factual allegations and claims based on them. SCF filed neither.

In addition to being denied notice by SCF's failure to plead the relief it seeks in its Motion, ANTHC also is now forced to make arguments in opposing summary judgment about the Court's jurisdiction over SCF's claims and about the justiciability of the relief SCF seeks that ANTHC normally could have raised much earlier in a motion to dismiss. By failing to amend or supplement its complaint, SCF has attempted to skip over those procedural hurdles, prejudicing ANTHC's opportunity to oppose on those grounds.

a. The Settled Questions were not pled.[43]

Given that SCF has agreed that ANTHC's current policies conform to Section 325, ANTHC had no notice of SCF's current request to upend ANTHC's existing policies and shift to SCF the ANTHC Board's power to decide whether Designating Entities' access to ANTHC's most sensitive documents may be limited in any reasonable way, including to comply with HIPAA or preserve ANTHC's attorney-client privilege. SCF's request for declaratory judgment on the Settled Questions were not pled.[44]

[43] The Settled Questions are defined on pages 16–17.

[44] *See State Farm Fire & Cas. Co. v. Millman*, 413 F. Supp. 3d 940, 962 (D. Alaska 2019) (declining in declaratory judgment action to reach the merits of an argument when plaintiff's complaint "lacks any factual allegations or a request for declaratory judgment" on the issue).

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b. The Scope of Information Reserved Issues were not pled.[45]

As for the two Scope of Information Reserved Issues, there is nothing in SCF's complaint supporting a request for relief preventing the ANTHC Board from amending the current information sharing policies, even if the hypothetical changes would be consistent with applicable law. Given that the Disclosure Policy at issue did not exist five years ago when SCF's complaint was filed, this is unsurprising. These Reserved Issues were not pled.

c. The Privileged Information Reserved Issue was not pled.

The Court should also deny SCF's request for a ruling that the common-interest doctrine would preserve ANTHC's privilege and enjoining ANTHC to sign a common-interest agreement,[46] because SCF never pled this claim. SCF's complaint alleges no facts to support applying the common-interest doctrine, no claim regarding the legal consequences of disclosing ANTHC's privileged information, and no prayer for any relief relating to the common-interest doctrine, much less an injunction to enter into a common-interest agreement.

In sum, all the relief SCF now seeks was not pled and should be denied.

2. All of the rulings SCF seeks as to Settled Questions are foreclosed by the Agreement and judicial estoppel, and SCF's substantive arguments lack merit.

With regard to SCF's Scope of Information Settled Question claim, SCF reneges on its settlement agreement concession that ANTHC's current policies conform to Section

[45] The Reserved Issues are defined on pages 23 and 28.
[46] Proposed Order ¶ 2.

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325 and seeks several rulings that would strike down those very policies and grant SCF complete discretion to unilaterally determine what ANTHC information SCF gets to see.[47] The thrust of the rulings SCF seeks is that:

> *SCF, as an entity, gets to decide what information it gets to see. Any limits on SCF's power to unilaterally decide what ANTHC information it gets to see must be struck down as violating Section* 325.[48]

SCF's Privileged Information Settled Question claim also seeks multiple rulings that would strike down the manifestly reasonable process for determining when and whether to share privileged information found currently in ANTHC policy. SCF asserts that Section 325 requires disclosure of ANTHC's privileged information, *without a Board vote*, upon SCF's unilateral determination that it is necessary. The thrust of SCF's requested rulings is that:

> *Section 325 controls the scope of the information to which SCF is entitled, and no ANTHC policy may abridge SCF's rights to ANTHC's documents and information, including documents and information subject to privilege*.[49]

As will be explained below, the Agreement resolved all of these issues. SCF is precluded from prevailing on them now by contract law and judicial estoppel. And even if that were not so, SCF's substantive arguments lack merit.

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[47] Perhaps to obscure the fact that this issue is settled under the Agreement, SCF states the relief it seeks in multiple ways in its Motion and Order. *See* Motion at 23, 25; Proposed Order at 1–2.

[48] *Compare* Motion at 23, 24; Proposed Order, ¶ 1 *with* Agreement at 8 of 43, ¶ 7.

[49] *Compare* Motion at 2–3, 25–33; Proposed Order, ¶ 2 *with* Agreement at 8 of 43, ¶ 7.

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a. SCF's is breaching the Agreement by requesting rulings on Settled Questions.

ANTHC's information sharing policies were (1) voted for by SCF's Designated Director when they were adopted by ANTHC's Board,[50] and (2) stipulated to by SCF in the Agreement.[51] By asking the Court to overturn those policies, SCF is negating that history and breaching the terms of the Agreement.[52] SCF is either precluded from requesting such rulings because they are not among the Reserved Issues or, even if it may raise them, the relief it seeks is foreclosed by its stipulations in the Agreement, including SCF's agreement that all of ANTHC's current policies conform to Section 325.[53]

ANTHC's current information sharing policies identify the broad scope of information to which SCF and other Designating Entities are entitled. But they also list six narrow categories of information, called "Highly Sensitive Confidential Information," that SCF may not unilaterally decide to see. They are:

(1) attorney-client and other privileged information,
(2) certain medical, personal financial, and personnel information,
(3) sensitive compliance, accreditation, clinical risk and other such information about *other* tribal health entities,

[50] Lynch Decl., ¶¶ 4–7.
[51] Agreement at 8 of 43, ¶ 7.
[52] SCF's conduct here actually highlights the perils of giving SCF itself, rather than its Designated Director, discretion over important governance issues, including what information should be shared with SCF. It is hard to imagine how SCF's Designated Director could make the arguments SCF has made about the Settled Questions without breaching the Director's duty of loyalty to ANTHC, given that she just participated in developing and adopting the policies SCF asks the Court to overturn. SCF, of course, owes ANTHC no such duty.
[53] Agreement at 8 of 43, ¶ 7.

(4) sensitive epidemiology and population health information about populations served by *other* regions,
(5) information protected by specific contractual or legal restrictions, such as HIPAA, and
(6) information about what individual Directors said, supported, or opposed in executive session.[54]

The reasons these categories of information need special protection are self-evident. But Directors are not absolutely precluded from disclosing even this information if a majority of the Board, all of whom also represent Designating Entities, authorize the disclosure.[55] In other words, as to almost all of ANTHC's information, including most confidential information, each Director can decide unilaterally if the information should be provided to his or her Designating Entity. But as to Highly Sensitive Confidential Information, the disclosure decision rests with the Board.

That would change if the Court entered SCF's proposed Order. SCF is asking the Court to hold that SCF itself, through its Designated Director, can unilaterally decide to obtain such information as: (1) ANTHC's patients' HIPAA-protected private medical information, (2) who said what during a Board executive session, (3) competitively sensitive information about *other* ANTHC participants with whom the Designating Entity may compete, (4) sensitive personnel and financial information of ANTHC employees, and

[54] *See id.* at 41–42 of 43. The policy also includes a seventh category for unspecified exceptional circumstances. *See id.* at 42 of 43 (Section 5.4.1.7).
[55] *See id.* at 41 of 43 (Section 5.4.1—"Unless otherwise permitted under this section (5.4.1) or by a majority vote of the ANTHC Board of Directors . . . .").

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(5) ANTHC's attorney-client privileged information, thereby potentially waiving ANTHC's privilege.

Because SCF agreed that the limits to disclosure in ANTHC's existing information sharing policies comply with Section 325,[56] its argument now that they do not is foreclosed. This is a Settled Question. All the relief SCF seeks, however stated, that is inconsistent with ANTHC's existing information sharing policies should be denied.[57]

"[C]ourts have inherent power summarily to enforce a settlement agreement with respect to an action pending before it; the actual merits of the controversy become inconsequential."[58] Under Alaska law, settlement agreements are strictly enforced,[59] and "[t]here is a strong public policy in favor of the settlement of disputes."[60]

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[56] *See id.* at 8 of 43, ¶ 7.

[57] The result is the same as to SCF's related but distinct request for a ruling regarding ANTHC's *past* information-sharing practices. Motion at 23 ("Yet ANTHC has not agreed that its former information-sharing policies violated Section 325 …. SCF is entitled to that declaration."). That question also has been settled. Under the Agreement, the parties resolved all past claims and counterclaims. *See* Agreement at 6 of 43. Because SCF agreed to resolve that claim, it cannot now be granted relief based on it.

[58] *Dacanay v. Mendoza*, 573 F.2d 1075, 1078 (9th Cir. 1978).

[59] *See Alleva v. Municipality of Anchorage*, 467 P.3d 1083, 1089 (Alaska 2020) ("'As a matter of law, a valid release will bar any subsequent claims covered by the release. "A policy favoring termination of litigation and encouraging settlement agreements should prevail."'" (citation omitted)); *Jeff D. v. Andrus*, 899 F.2d 753, 759 (9th Cir. 1989) ("The construction and enforcement of settlement agreements are governed by principles of local law which apply to interpretation of contracts generally."). Settlement agreements are interpreted under Alaska using contract principles. *See Hussein-Scott v. Scott*, 298 P.3d 179, 182 (Alaska 2013).

[60] *Municipality of Anchorage v. Schneider*, 685 P.2d 94, 98 (Alaska 1984).

SCF told the Court that it and ANTHC had "resolve[d] all claims and counterclaims as between [them] except for [three] issues which the parties may raise and oppose on any grounds in their summary judgment motions."[61] SCF agreed that "the version of [ANTHC's governance] documents referenced in this Agreement conform to Section 325."[62] It should be held to its word. ANTHC asks the Court to enforce the Agreement and reject any arguments SCF now makes that are inconsistent with it.

b. Judicial estoppel likewise requires denying SCF the relief it seeks on the Settled Questions.

The doctrine of judicial estoppel also weighs in favor of denying SCF the rulings it seeks on the Settled Questions. "[O]btaining a favorable settlement is equivalent to winning a judgment for purposes of applying judicial estoppel."[63] SCF obtained the resolution of ANTHC's counterclaims in exchange for agreeing, *inter alia*, that ANTHC's current policies conform to Section 325 and other relevant laws.[64] Judicial estoppel "'precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position.'"[65] The doctrine is "intended to protect the integrity of the judicial process by preventing a litigant from 'playing fast and loose with the courts.'"[66] It is difficult to characterize SCF's conduct any other way.

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[61] Agreement at 6 of 43.
[62] *Id.* at 8 of 43, ¶ 7.
[63] *See Rissetto v. Plumbers & Steamfitters Loc. 343*, 94 F.3d 597, 604–05 (9th Cir. 1996).
[64] *Compare* Agreement at 6 of 43 *with id.* at 8 of 43, ¶ 7.
[65] *Wagner v. Pro. Eng'rs in Cal. Gov't*, 354 F.3d 1036, 1044 (9th Cir. 2004) (quoting *Rissetto*, 94 F.3d at 600).
[66] *Id.* (quoting *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990)).

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c. SCF's Settled Question arguments lack merit.

It is undisputed that Designating Entities are entitled to the information necessary to effectively exercise their governance rights, but the question is *who decides whether particular information falls into that category*. ANTHC's current policies reflect the balancing that the ANTHC Board performed last summer, and provide that almost all of ANTHC's information, including most confidential and proprietary information, may be provided to Designating Entities. But as to Highly Sensitive Confidential Information, the Board decides whether the information need be shared. The reasonableness of this balance that the ANTHC Board struck is evident from the fact that SCF's own Designated Director voted in favor of it.[67]

But SCF's position is now that SCF, through its Designated Director, must be allowed to unilaterally decide, even as to Highly Confidential Sensitive Information. SCF asks the Court to declare that "Section 325 entitles SCF to all information that it, through its Designated Director, deems necessary" and that "[n]o ANTHC policy may abridge SCF's right to . . . documents and information."[68] The upshot would be that SCF would have unilateral power to decide that particular privileged information is necessary, for example, and SCF could unilaterally waive ANTHC's privilege. SCF's approach is wrong.

Section 325 provides that ANTHC "shall be governed by a Board of Directors," and decisions "shall be made by consensus whenever possible, and by majority vote in the

[67] *See* Lynch Decl., ¶¶ 4–7.
[68] Proposed Order, ¶¶ 1–3.

event that no consensus can be reached," with each Director being "entitled to cast one vote."[69] Section 325 also specifies that the Board is to determine its own procedures. SCF's bid to unilaterally decide which documents are necessary, thereby potentially waiving ANTHC's privilege on them or violating laws protecting patient and employee privacy, is flatly contrary to the governance rights created by Section 325(b). The Court should refuse to read the express governance rights in Section 325(b) out of existence by transferring the determination of when ANTHC's most sensitive documents and information may be disclosed from the Board *as a whole* to each Director or participant individually. Instead, the Court should leave intact the ANTHC Board's current harmonization of the relevant statutes.

3. Both of SCF's Reserved Issues on Its Scope of Information claims are procedurally improper and meritless.

SCF's Motion seeks rulings on two Reserved Issues regarding its Scope of Information claims, each of which would strip ANTHC's Board of authority to lawfully change existing policies:

> *Whether the ANTHC Board can and should be precluded from making any lawful changes to its information sharing policies if they would in some way limit the information available to SCF compared to the information to which it is entitled under ANTHC's existing policies.*[70]

[69] Section 325(b).
[70] *See* Agreement at 6 of 43; Motion at 2, 22–25; Proposed Order, ¶ 1.

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Whether the ANTHC Board can and should be precluded from making any lawful changes limiting the individuals at SCF, referred to as "Permitted Recipients," who are entitled to see ANTHC's confidential information.[71]

ANTHC agrees SCF reserved the right to raise these two issues. But SCF is not entitled to the relief it seeks.

a. The Court lacks jurisdiction over the Scope of Information Reserved Issues because SCF is seeking advisory opinions.

Because SCF moved for summary judgment, it has the burden of production.[72] This burden includes proving that the Court has jurisdiction over its claims.[73] "The Constitution limits Article III federal courts' jurisdiction to deciding 'cases' and 'controversies.'"[74] Thus, the Court's "role is neither to issue advisory opinions nor to declare rights in hypothetical cases, but to adjudicate live cases or controversies."[75]

Here, SCF seeks to limit ANTHC's Board's authority to change its information sharing policies in the future.[76] But this issue is hypothetical, speculative, and not ripe for

[71] *See* Agreement at 6 of 43; Motion at 3, 33–37; Proposed Order, ¶ 3.
[72] *See Watts*, 703 F.2d at 347.
[73] *See Leite*, 749 F.3d at 1121 (noting that "[t]he plaintiff bears the burden of proving by a preponderance of the evidence that each of the requirements for subject-matter jurisdiction has been met").
[74] *Oklevueha Native Am. Church of Haw., Inc. v. Holde*r, 676 F.3d 829, 835 (9th Cir. 2012) (quoting U.S. Const. art. III, § 2).
[75] *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc); *see also Oklevueha Native*, 676 F.3d at 835 (explaining that ripeness is a required component of the Article III case and controversy requirement, and that the basic rationale of the ripeness requirement is to prevent courts from entangling themselves in abstract disagreements).
[76] *See* Motion at 23–25; Proposed Order at 1–2.

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resolution. The undisputed record shows that (1) ANTHC's existing policies regarding the scope of information that may be shared with Designating Entities conform to Section 325;[77] (2) ANTHC is not currently considering any changes to either the scope of information that may be shared with SCF or the scope of SCF's Permitted Recipients;[78] and (3) ANTHC seeks to preserve its Board's discretion to adopt future changes to its policies, but only those that *comply with Section 325 and any other applicable law*.[79] SCF has produced no evidence of a case or controversy that would give this Court jurisdiction to enter the declarations SCF seeks.

Further, "[f]or a declaratory judgment to issue, there must be a dispute which 'calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts.'"[80] When a party requests a declaratory judgment that is premised on the occurrence of a future event or interference with rights, and any such event or interference is uncertain, speculative, or hypothetical, declaratory relief is not proper.[81] Here, this limitation is of particular importance given that SCF's requested relief involves

[77] *See* Agreement at 8 of 43, ¶ 7.
[78] Lynch Decl. ¶ 8.
[79] *See* Agreement at 9 of 43, ¶ 8 (noting that ANTHC "may not amend any governance document in a way inconsistent with . . . Section 325 or other applicable law").
[80] *Ashcroft v. Mattis*, 431 U.S. 171, 172 (1977) (citation omitted). SCF also lacks any grounds to obtain a declaratory judgment about ANTHC's prior policies because (1) it has settled those issues and (2) "a declaratory judgment merely adjudicating past violations of federal law—as opposed to continuing or future violations of federal law—is not an appropriate exercise of federal jurisdiction." *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 868 (9th Cir. 2017).
[81] *See Ashcroft*, 431 U.S. at 172.

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the rights of third parties (absent participants, including Tribes) to effect future lawful changes to ANTHC's governance policies.[82]

Accordingly, SCF's request for declaratory relief should be denied. It is in fact a request for an advisory opinion. Given SCF's stipulated agreement that ANTHC's current information sharing policies "conform" to Section 325, SCF may not properly complain about any existing information sharing policies. SCF is asking the Court to prohibit hypothetical changes that do not exist and may never exist. But courts are not permitted to issue advisory opinions.[83] "'The declaratory judgment procedure . . . may not be made the medium for securing an advisory opinion in a controversy which has not arisen.'"[84] Again, this limitation is especially important when there are absent third parties who would be affected by the advisory opinion,[85] and is even more true when those absent third parties include, as is the case here, sovereign Tribes.[86]

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[82] *See Jordan v. Sosa*, 654 F.3d 1012, 1026 (10th Cir. 2011) ("A declaratory judgment that merely seeks to affect the (uncertain) future conduct of third parties—who are not named in a plaintiff's complaint—would involve the very sort of speculative, 'hypothetical' factual scenario that would render such a judgment a prohibited advisory opinion.").

[83] *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) ("We are not permitted to render an advisory opinion[.]"); *Golden v. Zwickler*, 394 U.S. 103, 108 (1969) ("'(T)he federal courts established pursuant to Article III of the Constitution do not render advisory opinions. . . . This is as true of declaratory judgments as any other field.'" (quoting *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1947))).

[84] *Desert Water Agency v. U.S. Dep't of the Interior*, 849 F.3d 1250, 1258 (9th Cir. 2017) (ellipsis in original) (quoting *Coffman v. Breeze Corp.*, 323 U.S. 316, 324 (1945)).

[85] *See supra* note 82 and accompanying text.

[86] *See Enter. Mgmt. Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989) ("[T]he Tribe's interest here [is] its sovereign right not to have its legal

(continued . . .)

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b. ANTHC's Board should not be stripped of the discretion to make lawful changes to its information sharing policies.

SCF's argument that ANTHC's Board should be stripped of the power to make lawful changes to its information sharing policies is based on misrepresentations of ANTHC's position, the Agreement, and ANTHC's existing policies. For instance, SCF says that "ANTHC does not believe that the provisions [in its governance policies] guaranteeing SCF the right to all information it needs to exercise effectively its governance rights are required by Section 325."[87] It uses this statement as a pretext for asking the Court to enter rulings overturning ANTHC's existing policies. But the Agreement states that SCF:

> is entitled to all documents and information it needs to effectively exercise its governance and participation rights. To effectuate this right, SCF's Designated Director may share with SCF such documents and information under the procedures and limitations set out in ANTHC's Bylaws, Code of Conduct, and Board Policy on the Disclosure of Records and Information to Designating Entities, which were drafted to ensure the Designating Entities' governance rights. This includes SCF's Designated Director's right to share such documents and information with SCF's Permitted Recipients.[88]

As previously mentioned, SCF stipulated that ANTHC's governance documents "conform" to Section 325.[89] ANTHC is required to comply with those policies and, except for the application of the common-interest doctrine, SCF does not contend that ANTHC

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duties judicially determined without consent[.]"); *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992) (same).

[87] Motion at 18 (footnote omitted).

[88] Agreement at 8 of 43, ¶ 6 (footnotes omitted).

[89] *Id.* at 8 of 43, ¶ 7.

has failed to do so. Despite what SCF has told the Court, therefore, SCF needs no ruling on SCF's right to information necessary to exercise its governance rights. The only open issue is whether ANTHC's Board retains the discretion to potentially revise its existing information disclosure policies, including as to the recipients of the information, *so long as any potential revision conforms to Section 325 and all other applicable laws*.

This point is worth emphasizing. The discretion ANTHC's Board is seeking to preserve is the discretion to make *lawful* changes to its policies. This is consistent with paragraph 8 of the Agreement, which states:

> ANTHC's Board of Directors shall retain the discretion to amend ANTHC's governance documents … but may not amend any governance document in a way inconsistent with this Agreement, Section 325 or other applicable law, or any order of the Court.[90]

No matter what SCF says, ANTHC *does not* seek the discretion to make *unlawful* changes to its governance documents.

The ruling SCF seeks, therefore, is in the nature of a mandatory injunction prospectively prohibiting ANTHC's Board from ever making *lawful* changes to its information governance policies that SCF believes might be less favorable to it than ANTHC's current policies.[91] Such a ruling would be an extraordinary and completely unjustified infringement on the authority and responsibility of the ANTHC's Board. SCF's request should be denied.

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[90] *Id.* at 9 of 43, ¶ 8.

[91] Of course, if there are no lawful changes that ANTHC can make—which SCF appears to believe—ANTHC already is prohibited from making any changes.

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4. SCF's Reserved Issue regarding Privileged Information is meritless under both state and federal law.

The final Reserved Issue involves a question of the interpretation and application of ANTHC's existing Privileged Information policy:

> *Whether the common interest doctrine would apply to extend the attorney-client privilege to all disclosures to SCF of ANTHC's privileged documents and information that SCF, through its Designated Director, believes are necessary, including two investigative reports into a legal issue ANTHC, but not SCF, is facing.*[92]

This is a legal question as to which ANTHC's only interest is to correctly interpret and apply the relevant law. If disclosing privileged information—including the reports SCF currently seeks—would not waive ANTHC's attorney-client privilege, ANTHC would enter into a common-interest agreement with SCF and disclose the information. But application of the common-interest doctrine requires a case-by-case determination, and ANTHC has determined that on the facts here the common-interest doctrine would not extend to the requested reports. That means they cannot be shared with SCF[93] under ANTHC's current policies, which SCF has stipulated "conform" to Section 325, absent a Board vote, which SCF has not requested.[94]

[92] *See* Agreement at 6 of 43; Motion at 2–3, 25–33; Proposed Order, ¶ 2.
[93] Agreement at 41 of 43.
[94] Lynch Decl., ¶ 9.

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a. The common-interest doctrine does not extend the attorney-client privilege to all disclosures to SCF of ANTHC's privileged information.

(i) SCF has not shown that the common-interest doctrine would apply to the investigative reports SCF seeks.

SCF seeks certain investigative reports made by ANTHC's outside counsel, on a theory that the common-interest doctrine would prevent waiver of ANTHC's privilege. If disclosing the reports to SCF would exceed the bounds of the common-interest doctrine—which ANTHC believes to be the case—then under ANTHC's Disclosure Policy (to which SCF stipulated in the Agreement),[95] ANTHC may not disclose them without a Board vote.

Here, understanding the scope of the common-interest doctrine requires first understanding the scope of the attorney-client privilege itself. Attorney-client privilege serves "to promote the freedom of consultation of legal advisors by clients by removing the apprehension of compelled disclosure by the legal advisors."[96] As such, under both Alaska and federal law, attorney-client privilege protects only "confidential communications made for the purpose of facilitating the rendition of professional legal services to the client."[97] The common-interest doctrine creates an exception to the rule that

[95] Agreement at 8 of 43, ¶ 7; *see id.* at 41 of 43, § 5.4.1.1.
[96] *United Servs. Auto. Ass'n v. Werley*, 526 P.2d 28, 31 (Alaska 1974); *see also Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (purpose of attorney-client privilege is "to encourage full and frank communication between attorneys and their clients").
[97] Alaska R. Evid. 503(b); *accord United States v. Sanmina Corp.*, 968 F.3d 1107, 1116 (9th Cir. 2020) ("The attorney-client privilege protects confidential communications between attorneys and clients, which are made for the purpose of giving legal advice.").

disclosure to third parties destroys the privilege, but because this exception thereby expands the privilege, it will be narrowly construed under Alaska[98] and federal law.[99]

In ANTHC's judgment, these fundamental principles foreclose a prospective ruling that the common-interest doctrine applies to disclosure of the reports to SCF. First, contrary to SCF's attempt to deny state law's relevance,[100] Alaska law governs determinations of privilege both in state court[101] and in any civil claim or defense in federal court as to which Alaska law supplies the rule of decision.[102] Conversely, federal common law will govern a privilege question in federal court on adjudication of a federal claim.[103] Because SCF asks for a declaratory ruling on the applicability of the common-interest doctrine prospectively, before it is known in which forum a litigant might demand ANTHC's reports, SCF must establish that ANTHC's privilege will be protected under *both* bodies of law. Here, SCF has failed to show that it would be upheld under either, much less under both.

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[98] *Mat-Su Valley Med. Ctr., LLC v. Bolinder*, 427 P.3d 754, 763 & n.27 (Alaska 2018) ("[W]e generally construe an evidentiary privilege narrowly."); *id.* at n.27 (collecting cases); *Langdon v. Champion*, 752 P.2d 999, 1004 (Alaska 1988) ("'Given our commitment to liberal pre-trial discovery, it follows that the scope of the attorney-client privilege should be strictly construed in accordance with its purpose.'" (citation omitted)); *United Servs. Auto.*, 526 P.2d at 31 (same).
[99] *United States v. Ruehle*, 583 F.3d 600, 607 (9th Cir. 2009) ("Because it impedes full and free discovery of the truth, the attorney-client privilege is strictly construed." (internal quotation marks and citation omitted)).
[100] Motion at 31.
[101] *Williams v. State*, 480 P.3d 95, 99–100 (Alaska Ct. App. 2021).
[102] Fed. R. Evid. 501.
[103] *Clarke v. Am. Com. Nat'l Bank*, 974 F.2d 127, 129 (9th Cir. 1992).

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a. **SCF cannot establish that it satisfies the common-interest doctrine requirements under Alaska law.**

Alaska codified its common-interest doctrine in Alaska Rule of Evidence 503(b)(3):

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing **confidential communications** ***made for the purpose of facilitating the rendition of professional legal services to the client***: . . . (3) by the client or the client's lawyer to a lawyer representing another ***in a matter of common interest***[.][104]

As pertinent here, a "confidential" communication is one that is "not intended to be disclosed to third persons other than those ***to whom disclosure is in furtherance of the rendition of professional legal services to the client***."[105]

To prevail, SCF must establish, *inter alia*, all of the following: (1) that disclosure of the reports to SCF's officers, directors, and counsel would be a confidential communication made for the purpose of facilitating the rendition of legal services to ANTHC; (2) that the reports would be intended to be disclosed only to persons at SCF to whom the disclosure would be in furtherance of the rendition of legal services to ANTHC; and (3) that the reports concern a matter in which SCF has a common legal interest with ANTHC. None of these requirements can be met as to the investigative reports.

First, under Alaska Rule 503's plain text, two mutually-reinforcing prerequisites must be satisfied before the privilege attaches to any information disclosed to a third party. Communications to the third party must be "made for the purpose of facilitating the

[104] Alaska R. Evid. 503(b) (emphases added).
[105] Alaska R. Evid. 503(a)(5) (emphasis added).

rendition of professional legal services to the client," *i.e.*, legal services *to ANTHC*.[106] And, the communications must not be intended to be disclosed to third parties other than those "to whom disclosure is in furtherance of the rendition of professional legal services to [ANTHC]."[107] Commentary to Rule 503(b) confirms that while communications "by client or his lawyer to a lawyer representing another in a matter of common interest" may be privileged, "[a]ll these communications must be specifically for the purpose of obtaining legal services for the client; otherwise the privilege does not attach."[108] And at least one Alaska trial court has enforced this requirement in the common-interest context.[109] Indeed, to do otherwise would be to radically expand the attorney-client privilege beyond its purpose of protecting a client's ability to get fully informed legal advice from its lawyers.

Any possible argument by SCF that the Restatement or caselaw from other jurisdictions lacks these "rendition of legal services" requirements would fail. Although

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[106] Alaska R. Evid. 503(b).
[107] Alaska R. Evid. 503(a)(5).
[108] Commentary to Alaska R. Evid. 503(b). Consistent with this principle, the Commentary goes on to address the situation in which different clients who are separately represented "pursue a 'joint defense' or 'pool information.'" *Id.* The Commentary refers to this as a "joint consultation," again confirming that the common-interest privilege in Alaska law requires that the communications be in furtherance of obtaining legal advice. *Id.* Here, of course, the reports do not involve a joint defense or pooling scenario.
[109] *See HDI Gerling Am. Ins. Co. v. Carlile Transp. Sys., LLC*, No. 3AN-14-07190 CI, 2016 WL 8416505, at *2 (Alaska Super. Ct. Sept. 1, 2016) (denying motion to compel communications between parties with common legal interest "that were for the purpose of furthering the rendition of professional legal services," but ordering that "communications that fall outside those parameters" "must be produced").

out-of-state authorities may be persuasive on an issue where Alaska law is silent, they cannot override express elements of Alaska's own Rule 503.[110]

For the investigative reports, SCF cannot meet these Alaska-law prerequisites. Indeed, SCF does not even try. Rather, the record confirms that disclosure to SCF would not be for the rendition of legal services to ANTHC. SCF's Designated Director declares that SCF needs the reports "in order for SCF to exercise [its] rights effectively,"[111] but SCF's exercise of its rights is not the rendition of legal services to ANTHC. The Director also states she must share the reports with SCF's personnel "in order to get their input" or to "obtain guidance and input from them."[112] But SCF's use of these reports "to provide input about what is in the best interest of ANTHC"[113] is unmistakably not "the rendition of legal services to [ANTHC]," and SCF's directors and officers would not be persons "to whom disclosure is in furtherance of the rendition of professional legal services to [ANTHC]."[114] In such circumstances, "the privilege does not attach."[115] Thus, under Alaska Rule 503's plain text, and consistent with the purpose of the attorney-client privilege, ANTHC believes that the common-interest doctrine would not preserve

[110] Moreover, even the Restatement (Third) of the Law Governing Lawyers confirms that the common-interest doctrine applies only to communications "that otherwise qualif[y] as privileged under §§ 68-72," which require "the purpose of obtaining or providing legal assistance" to the client. Restatement (Third) of the Law Governing Lawyers §§ 68, 72, 76, Westlaw (database updated Oct. 2021).
[111] Declaration of April Kyle (Dkt. 316-2) (Kyle Decl.), ¶ 4.
[112] *Id.*, ¶¶ 5–6.
[113] Motion at 29.
[114] Alaska R. Evid. 503(a)(5).
[115] Commentary to Alaska R. Evid. 503.

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ANTHC's privilege as to the investigative reports. This is true even if the other requirements of the common-interest doctrine were met, although ANTHC does not believe they can be.

Next, Alaska Rule of Evidence 503 requires that the disclosure be to a lawyer representing another client "in a matter of common interest."[116] No published Alaska cases interpret this element. But consistent with many courts elsewhere that require a common legal interest, rejecting a commercial or financial interest,[117] Alaska trial court orders require a "common legal interest."[118]

Here, SCF lacks a common interest as that term is used in Alaska law, let alone a common legal interest, as to the investigative reports. First, SCF contends that its governance rights automatically mean "there is no question that [SCF and ANTHC] share the requisite common interest."[119] To be sure, SCF's governance rights have their source in law—Section 325—and SCF is interested in ANTHC, but that does not mean SCF has a "common legal interest" with ANTHC as to the particular issue about which ANTHC is

[116] Alaska R. Evid. 503(b) (emphasis added).
[117] *See, e.g.*, *Energy Pol'y Advocs. v. Ellison*, 963 N.W.2d 485, 500 (Minn. Ct. App. 2021); *United States v. Patel*, 509 F. Supp. 3d 1334, 1340–41 (S.D. Fla. 2020).
[118] *State v. Williams Alaska Petroleum, Inc.*, No. 4FA-14-01544, 2018 WL 11389356, at *5 (Alaska Super. Ct. Dec. 10, 2018) ("for the common interest privilege to apply, the Settling Parties must have a . . . common legal interest"); *id.* at *6 (recognizing a "common legal interest" because both parties "are charged with being legally responsible for clean-up" of pollution); *HDI Gerling*, 2016 WL 8416505, at *1 (finding duty of insured to cooperate with insurer regarding subrogated claim was "common legal interest").
[119] Motion at 29.

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seeking legal services and receiving privileged communications. SCF presents no evidence that it also is confronting the legal issue for which ANTHC is obtaining legal services.

Next, SCF claims it has "an obvious common interest with ANTHC in developing a strategy to resolve the"—unspecified—"governance challenges presented by" Mr. Teuber.[120] But ANTHC being exposed to legal problems does not mean *SCF* has those same legal problems. The record does not show that SCF is exposed to any claim, liability, or contractual, statutory, or regulatory obligations based on Mr. Teuber's conduct. Notably, "[a] shared rooting interest . . . is not a common legal interest."[121] And despite SCF's refrain about supplying expertise and input,[122] "[e]xtension of the shared privilege to a non-party is based on the non-party's *legal interest in the matter*, not on the amorphous concept of its 'expertise' or knowledge of matters involved[.]"[123]

Implicitly acknowledging it cannot demonstrate a common *legal* interest as to the investigative reports, SCF argues that a common factual or strategic interest suffices.[124]

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[120] Motion at 30.
[121] *McCullough v. Fraternal Ord. of Police, Chi. Lodge 7*, 304 F.R.D. 232, 240 (N.D. Ill. 2014); *see also, e.g.*, *Campinas Found. v. Simoni*, No. 02 CIV 3965, 2004 WL 2709850, at *2-3 (S.D.N.Y. Nov. 23, 2004) (shared interest by litigants in various civil actions to recover money from defendant was insufficient).
[122] Motion at 5, 6, 29, 30, 35, 36; *see also* Kyle Decl., ¶¶ 5–6.
[123] *Am. Zurich Ins. Co. v. Mont. Thirteenth Jud. Dist. Ct.*, 280 P.3d 240, 247 (Mont. 2012) (emphasis added).
[124] Motion at 28.

But Alaska's rule that the attorney-client privilege is to be narrowly construed[125] precludes this Court from predicting that the Alaska Supreme Court would adopt the laxer test.[126]

In sum, ANTHC believes that the Court cannot declare that the common-interest doctrine would preserve ANTHC's privilege on the investigative reports because SCF cannot establish any of the above requirements under Alaska law, much less all of them.

b. **SCF cannot establish that it satisfies the common-interest requirements under federal common law.**

SCF also cannot establish that ANTHC's privilege would remain intact in future litigation of federal claims in federal court. As just one example, the Ninth Circuit holds that the parties must be "pursuing a common legal strategy" and "make the communication in pursuit of [that] joint strategy."[127] Although SCF's Designated Director may vote on ANTHC's legal strategies, that does not make them joint strategies as between ANTHC and SCF.[128] Here, SCF claims that it wishes to provide input to ANTHC, but it does not even attempt to establish that SCF is pursuing a joint legal strategy with ANTHC regarding Mr. Teuber's conduct. Thus, the Court cannot declare that the common-interest doctrine

[125] *Mat-Su Valley Med. Ctr.*, 427 P.3d at 763; *Langdon*, 752 P.2d at 1004; *United Servs. Auto.*, 526 P.2d at 31.
[126] *Orkin v. Taylor*, 487 F.3d 734, 741 (9th Cir. 2007) (in absence of decision by state's highest court, federal court "must predict" how state's highest court would rule).
[127] *In re Pac. Pictures Corp.*, 679 F.3d 1121, 1129 (9th Cir. 2012). SCF relies on out-of-circuit cases or earlier district court cases in the Ninth Circuit that fail to employ these criteria (Motion at 27), but such cases are not good law after *In re Pacific Pictures*.
[128] This distinction is starkly obvious in any circumstances where SCF's Designated Director votes *against* the legal strategy that ANTHC pursues.

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will preserve ANTHC's privilege as to the investigative reports under federal law.

(ii) Section 325 does not alter the attorney-client privilege.

Attempting to evade the application of Alaska and federal privilege law, SCF asserts that Section 325 somehow negates privilege law or makes a common-interest agreement "superfluous."[129] SCF provides no legal authority for that proposition, nor does the purpose of the attorney-client privilege support it. And Section 325 does not address the legal consequences of disclosing ANTHC's privileged information to SCF.

First, Section 325 does not abrogate the common-interest doctrine. "[T]o abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law."[130] Here, Section 325 does not speak to privilege at all. Second, as SCF admits,[131] the Ninth Circuit did not recognize any "Section 325 exception" to attorney-client privilege. And in its briefing on appeal, SCF acknowledged that privileged information "may not be able to be shared."[132] Third, Section 325 does not make SCF (or other ANTHC participants) a co-client with ANTHC. SCF does not argue that it does, and it would be radically unworkable, given the conflicts of interest it would create.

In sum, although Section 325 sets the standard for the information to which SCF is entitled, it does not alter the analysis of whether sharing such information with SCF would

[129] Motion at 26 n.102, 31.
[130] *United States v. Texas*, 507 U.S. 529, 534 (1993) (citation omitted).
[131] Motion at 29 ("[T]he Ninth Circuit did not expressly address this issue.").
[132] *See* Case No. 18-35868, Dkt. 58, SCF's Appellants' Reply Brief at 8 n.2.

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destroy ANTHC's attorney-client privilege.

(iii) SCF is not entitled to a *per se* ruling that the common-interest doctrine will preserve ANTHC's privilege in all instances.

Although the investigative reports are the specific privileged information that SCF demands, SCF in fact seeks a much broader *per se* rule. SCF asks the Court to declare as a blanket matter that *all* of ANTHC's privileged information that SCF deems necessary for effective exercise of its governance rights "can and must be shared under the common-interest doctrine."[133] The Court should refuse to grant this sweeping prospective ruling.

First, a prospective determination that the common-interest doctrine's requirements would be met in all future disclosures of privileged documents to SCF is impossible. Rather, application of the common-interest doctrine must be a case-by-case determination. The mere existence of Section 325 does not establish that (1) the purpose and (2) recipients of a disclosure will be to facilitate the rendition of legal services to ANTHC, (3) SCF and ANTHC will have a common legal interest in the matter, and (4) the disclosure will further a joint legal strategy being pursued together by ANTHC and SCF. Indeed, the very fact that the disclosure of the investigative reports discussed above would not be shielded by the doctrine demonstrates conclusively that the *per se* rule SCF seeks would be improper.

Second, even if a *per se* rule were theoretically possible, SCF has not made the necessary showing. It has not proven that the purpose of disclosures and the persons to

[133] Motion at 31; *see also* Proposed Order, ¶ 2.

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whom the documents would be disclosed would always be to facilitate the rendition of legal services to ANTHC. It has not proven that it will always have a common legal interest with ANTHC. And it has not proven that every disclosure would be in furtherance of a joint legal strategy with ANTHC. Indeed, on all these points, the record shows otherwise.[134]

Third, a *per se* rule also is unnecessary. Contrary to SCF's accusations,[135] ANTHC is *not* adverse to common-interest agreements. ANTHC has entered into common-interest agreements with SCF in the past. As it has indicated, it stands ready to do so here,[136] but for its good faith conclusion that the doctrine does not apply, and therefore that disclosure to SCF of the information it seeks would waive ANTHC's attorney-client privilege.

SCF also insinuates that ANTHC is reneging on a commitment to enter into one overarching common-interest agreement. SCF refers often to the purported duty to enter into "a common interest agreement" or "one with each Designating Entity."[137] In reality, consistent with the fact-specific nature of the attorney-client privilege, the Disclosure Policy contemplates *matter-specific* agreements. When a "new matter that is subject to a legal protection arises," if a common-interest agreement would allow disclosure "without waiving" the privilege, ANTHC will start from a template and tailor it to the matter.[138] In

[134] *See supra* pages 32–35.
[135] *See* Motion at 25 ("ANTHC continues to withhold categorically….").
[136] *See supra* pages 27–28.
[137] *See, e.g.*, Motion at 3, 16-18, 21, 25, 31 (emphasis added).
[138] Agreement at 41 of 43, § 5.4.1.1 (noting ANTHC's model common-interest agreement and model joint defense agreement and providing that "[w]hen a new matter that is subject to a legal protection arises, counsel for ANTHC and the Designating Entity will (continued . . .)

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other words, in those particular matters where common-interest agreements will prevent waiver of ANTHC's privilege, ANTHC stands ready to enter into them.

V. CONCLUSION

The Motion is SCF's latest effort to obtain relief that would strip others of their statutory decision-making rights. It further bolsters ANTHC's Rule 19 motion. SCF now seeks to have the Court (1) set aside policies enacted by the absent ANTHC participants in the exercise of their governance rights;[139] (2) constrain their ability to adopt future, lawful policies;[140] and (3) substitute the Court's judgment for that of statewide Tribal leaders regarding the balance they struck to preserve both the statutory right to necessary information and the statutory right to decision-making by consensus or majority vote.[141] In short, SCF's outcome would erode the statutory governance rights of other ANTHC participants. As ANTHC already explained, such results make the absent Tribal participants necessary and indispensable parties.[142] If any doubt about that remained, SCF's summary judgment motion dispels it.

As for the motion at hand, ANTHC respectfully asks the Court to deny SCF's motion for summary judgment.

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confer and present amendments to the applicable model agreement, if needed, so that the matter may be shared with the Designating Entity if it is at all possible to do so without waiving the legal protection").

[139] *See* Proposed Order, ¶¶ 2–3 (any policy to the contrary "shall be amended").

[140] *Id.*, ¶ 2 ("No ANTHC policy may abridge SCF's right to all documents and information that SCF, through its Designated Director, deems necessary …."), ¶ 3 (same "including documents and information subject to Privilege").

[141] *Id.*, ¶¶ 2–3 ("Any ANTHC policy to the contrary … shall be amended.").

[142] ANTHC's Motion for Judgment on the Pleadings, Dkt. 296, at 12–17.

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CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2022, I filed a true and correct copy of the foregoing document with the Clerk of the Court for the United States District Court – District of Alaska by using the CM/ECF system. Participants in this Case No. 3:17-cv-00018-TMB who are registered CM/ECF users, and who are listed below, will be served by the CM/ECF system.

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