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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 REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Southcentral Foundation's ("SCF") motion seeks straightforward declarations about its rights under Section 325 regarding three remaining disputed issues. SCF consistently has sought, and continues to seek, declarations that Section 325 entitles it to a minimum amount of information, which includes information subject to legal privilege. While Alaska Native Tribal Health Consortium ("ANTHC") has amended its governance policies to set a minimum amount of information, it maintains that it can reduce that amount (or the universe of Permitted Recipients) in the future, and it refuses to share information subject to legal privilege. These are concrete disputes that the Court needs to resolve.

ANTHC barely engages with SCF's arguments on the merits, apart from its arguments regarding legal privilege which are misguided. Rather, ANTHC resorts to familiar tactics of evasion and hyperbole, erecting procedural strawmen and claiming that SCF's requests are animated by some dastardly plot to undermine ANTHC. The Ninth Circuit did not credit these tactics and this Court should not either. All SCF seeks is what it has sought consistently for over five years: for the Court to declare SCF's rights under Section 325, restoring ANTHC to the transparent, accountable consortium that Congress prescribed. The declaration that SCF seeks would not rewrite ANTHC's governance documents—it would enforce them, and ensure that they cannot be rescinded in the future in ways that violate Section 325.

None of the arguments that ANTHC raises in its opposition has merit. *First*, ANTHC repeats false and unsupportable narratives, likely designed for external consumption, that this case is an SCF power grab and that SCF is misrepresenting facts. Not so. Regardless of the outcome of this case, SCF will still have only one seat on the

ANTHC Board and only one vote in the Boardroom. And ANTHC provides no evidence of any misstatement by SCF; rather it is ANTHC that premises its entire brief on a demonstrable falsehood. ANTHC baldly claims that "SCF's Motion never mentions the Agreement [i.e. the Stipulated Judgment]"[1] when, in fact, SCF described the document (which is public[2]) in full, cited it numerous times,[3] and limited its motion to the issues reserved in it. If anything, it is ANTHC that has ignored the Stipulated Judgment, which ANTHC breached at the very first Board meeting after it was entered.

Second, none ANTHC's procedural strawmen has any basis in fact or law.

- *SCF is not violating the Stipulated Judgment*. The three declarations SCF seeks are ones that ANTHC agreed that SCF could seek at summary judgment.

- *SCF does not seek an advisory opinion*. This is merely a reframed version of the mootness argument that the Ninth Circuit rejected. The Ninth Circuit was clear that ANTHC cannot render this case non-justiciable by simply changing its offending policies. Moreover, ANTHC clearly disagrees with SCF about the rights that SCF has under Section 325, giving rise to the kind of concrete controversy that this Court needs to decide.

- *SCF does not seek unpled relief*. SCF raised the core issues in this motion in its complaint. ANTHC also affirmatively invited the Court to decide this case on the basis of its revised governance documents, estopping ANTHC from arguing to the contrary and demonstrating that ANTHC is not prejudiced.

- *The Court, not ANTHC, gets to interpret federal law*. ANTHC cannot avoid a ruling from this court by promising that the only changes to its governance documents that it will make in the future will comply with ANTHC's interpretation of Section 325. ANTHC has a history of violating Section 325 and continues to withhold critical governance information to which SCF is entitled. This Court must issue the declaration SCF seeks to remedy

[1] ANTHC's Opposition to SCF's Motion for Summary Judgment ("Opp."), ECF No. 317 at 2.

[2] ECF No. 313.

[3] SCF's Motion for Summary Judgment ("Mot."), ECF No. 316 at 17-18.

> ANTHC's illegal conduct and prevent it from reneging on the commitments it has made in its current governance documents. ANTHC is not the arbiter of what is lawful under federal law—this Court is.

Finally, ANTHC has very little to say about the merits of the remaining issues, and what it does say is legally incorrect. ANTHC offers no argument on SCF's two "Scope of Information" issues (whether ANTHC can diminish the amount of information available to SCF or further restrict the universe of people who can access ANTHC information). And it is wrong on the privilege issue: SCF's entitlement to privileged information is governed by federal law, and ANTHC can share privileged information with SCF under the common interest doctrine given that Section 325 supplies the requisite commonality of interest.

There were high hopes that ANTHC's new leadership would usher in an era of transparency and reform and reject the tactics employed by ANTHC's former President/Chair. Yet nearly a year later, the Designating Entities still know next to nothing about the governance crisis ANTHC faced, one that goes to the core of their governance rights in ANTHC. The strident tone that ANTHC continues to use in its filings indicates that ANTHC has little interest in restoring the full transparency that Congress mandated and the Ninth Circuit confirmed.

That all begs the question: what else is ANTHC hiding? Why is ANTHC fighting the remnants of this lawsuit so hard? What information does it not want the Designating Entities to see?

The Court should focus on the three straightforward remaining legal issues (ANTHC never argues that there are any facts in dispute) and grant SCF's motion in full. The future of transparent and effective governance at the largest, most comprehensive tribal health organization in the United States depends on it.

II. ANTHC EMPLOYS DISTRACTING, FALSE NARRATIVES

ANTHC's brief seeks to complicate the three straightforward issues in SCF's motion through a series of hyperbolic and misleading statements. This rhetoric is irrelevant and should not derail the Court from focusing on the issues that remain.

First, ANTHC repeats its tired and false narrative that this lawsuit is some kind of "extraordinary power grab"[4] in which SCF seeks to "transfer complete control over ANTHC's most sensitive documents and information" to "SCF alone."[5] ANTHC also asserts, contrary to the plain language of the Ninth Circuit's opinion, that SCF lacks governance rights in ANTHC.[6] ANTHC is wrong on both counts.

ANTHC fundamentally misunderstands (or misrepresents) Section 325, which does provide that SCF and the other Designating Entities govern ANTHC, through their representatives on ANTHC's Board. SCF's Designated Director "stands in the shoes" of SCF at ANTHC Board meetings because Congress charged SCF and the other Designating Entities with governing ANTHC.[7] The Ninth Circuit had "no difficulty concluding" that SCF has "governance and participation rights under Section 325" and is entitled to "information necessary to exercise th[ose] right[s] intelligently."[8] ANTHC is not a run-of-

[4] Opp. at 6.

[5] *Id.* at 3.

[6] *Id.* ("And while the Ninth Circuit held that SCF had a right to certain ANTHC information, it did not hold that SCF had a right to any of the ANTHC's Board's governance authority.").

[7] *Southcentral Found. v. Alaska Native Tribal Health Consortium*, 983 F.3d 411, 418 (9th Cir. 2020).

[8] *Id.* at 417, 419.

the-mill non-profit corporation—it is a uniquely designed consortium governed by SCF and the other Designating Entities.

SCF continues to seek only that to which it is entitled under Section 325, not to "aggrandiz[e]" itself at the expense of ANTHC.[9] At the end of this lawsuit, SCF will still have only one vote at Board meetings. All SCF seeks is what the Ninth Circuit has already held that it is entitled to: the information that Congress guaranteed it could have in Section 325 so that it can exercise effectively its governance rights in ANTHC.

Second, ANTHC falsely claims that SCF has made a "pattern of misrepresentations and misleading statements."[10] Yet ANTHC does not cite a single one, much less a "pattern." That is because none exists.

Rather, it is ANTHC that advances misleading attacks. ANTHC's brief makes the demonstrably false statement that "SCF's Motion [for Summary Judgment] never mentions the Agreement [i.e. the Stipulated Judgment, ECF No. 313]."[11] But SCF's brief described the Stipulated Judgment in full and cited it repeatedly.[12] SCF expressly recognized that "ANTHC and SCF entered into a partial Settlement Agreement and Potential Stipulated Judgment ('Stipulated Judgment') on January 7, 2022. . . in which ANTHC agreed that some, but not all, of [its governance] changes are required by Section 325."[13] While the Stipulated Judgment covered certain issues, it left key issues in the case unresolved, and

[9] Opp. at 7.

[10] *Id.* at 6.

[11] *Id.* at 2.

[12] Mot. at 17-18 & nn.68-70.

[13] *Id.* at 17.

ANTHC's unwillingness to resolve those issues forced SCF to bring this motion.

ANTHC's reliance on the Stipulated Judgment is ironic considering that ANTHC violated the Stipulated Judgment at its first opportunity. The Stipulated Judgment provides that "all Directors," defined to include both Primary and Alternate Directors, "may attend all Board and Board Committee meetings, including Executive Sessions."[14] The ANTHC Board met on January 24, 2022 and went into Executive Session.[15] ANTHC removed SCF's Alternate from the meeting and then, at the direction of ANTHC's General Counsel, refused to let her back into the Executive Session.[16] It was not until SCF's General Counsel emailed ANTHC's General Counsel pointing out this breach that ANTHC relented and allowed SCF's Alternate to attend the Executive Session.[17]

III. ANTHC'S PROCEDURAL ARGUMENTS FAIL

A. SCF's Motion Did Not Violate the Settlement Agreement

ANTHC's argument that SCF's motion goes beyond the three Reserved Issues in the Stipulated Judgment is premised on a selective and misleading interpretation of that document. In Paragraph 7 of the Stipulated Judgment, SCF agreed that most of the policies in ANTHC's governance documents "conform to Section 325," but *expressly* carved out the three "Reserved Issues,"[18] where the parties agreed:

> Notwithstanding this paragraph or any other statement in this Agreement, SCF expressly reserves the right to make arguments regarding the Reserved Issues, including that ANTHC's interpretation and application of its current

[14] ECF No. 313 at 7 ¶ 3.

[15] Declaration of Ileen Sylvester in Support of SCF's Reply ¶ 2.

[16] *Id.*

[17] *Id.*

[18] ECF No. 313 at 8-9 ¶ 7.

> governance documents is not in compliance with Section 325 with regard to the Reserved Issues in the preamble.[19]

The Stipulated Judgment could not have been clearer: SCF was *not* agreeing that *all* of ANTHC's revised policies complied with Section 325. Moreover, SCF expressly reserved the argument that even as to those policies that conform with Section 325 on their face, ANTHC's application of those policies violates Section 325. While ANTHC repeatedly states that SCF agreed that ANTHC's governance documents "conform" to Section 325,[20] not once does ANTHC mention the last sentence of Paragraph 7, which expressly supersedes any statement to the contrary in the Stipulated Judgment.

To be clear: SCF's motion seeks rulings on only the three Reserved Issues on which ANTHC and SCF *agreed* SCF could move:

1. That the level of information that ANTHC's current governance documents afford SCF cannot be reduced;
2. That the information that SCF's Designated Director can share with SCF includes information subject to privilege; and
3. That the universe of persons at SCF who can access ANTHC's information cannot be reduced.

None of this should be controversial. And none of it goes beyond the Reserved Issues.

ANTHC's argument that SCF seeks to rewrite ANTHC's policies in a way that gives SCF the ability to decide what information it is entitled to receive ignores that ANTHC's governance documents already afford SCF that right. "Designating Entities are entitled to all documents and information they need to effectively exercise their

[19] *Id.*

[20] *E.g.*, Opp. at 1, 4, 13, 16, 19, 24, 25, 27.

governance and participation rights," subject to certain minimal and routine limitations set forth in ANTHC's current governance documents.[21] The "General Rule" is that "Directors may share with Permitted Recipients of their Designating Entities all documents and information they receive as a Director," again, subject to the aforementioned minimal and routine limitations.[22]

SCF is not asking the Court to rewrite any of these provisions. SCF merely recognizes that the current policies represent a "floor" of minimum compliance with Section 325, and seeks a final judgment in this litigation preventing ANTHC from backsliding or expanding the limitations in its governance documents. SCF's concerns are well-founded; ANTHC has a history of exploiting seemingly routine or minimal exceptions to swallow the rule. Its former Code of Conduct provided that any "Director who would like to convey 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,"[23] thereby adding an exception that on its face looked routine, but in reality meant that nothing could be shared without permission. The Court's intervention is necessary here to declare that such limitations violate Section 325 and establish the baseline of information the Designating Entities are entitled to receive under federal law.

Contrary to ANTHC's overdramatic rhetoric, SCF is not arguing that the specific limitations in Sections 5.4.1.2 through 5.4.1.6 of the Disclosure Policy should be rolled

[21] Kyle Decl. Ex. 1, ECF No. 316-4 at 4, § 2.2.2.1.

[22] Kyle Decl. Ex. 2, ECF No. 316-5 at 1, § 5.3.

[23] 2017 Sylvester Decl. Ex. 24 (ECF No. 216-4) at 8.

back. Not once does SCF argue that it is entitled to "HIPPA-protected private medical information," "competitively sensitive information about other ANTHC participants" or sensitive "financial information of ANTHC employees."[24] These are the routine and minimal limitations to which SCF agreed. SCF is entitled to a declaration that ANTHC cannot expand these limitations and violate SCF's Section 325 rights.[25]

B. SCF Is Not Seeking an Advisory Opinion on the Scope of Information Issues

ANTHC repackages the mootness argument that the Ninth Circuit rejected to argue that any ruling on the "Scope of Information" issues (i.e. the information that can be shared and the persons with whom it can be shared) would be advisory.[26] But ANTHC clearly disagrees with SCF's interpretation of Section 325. Unless ANTHC is willing to stipulate to the complete relief to which SCF is entitled, this case is not moot and the declaration SCF seeks is not advisory.

ANTHC's voluntary cessation of its illegal behavior does not render this case moot or mean that any opinion the Court may issue is advisory, especially given ANTHC's claim that it should be the sole decider of the rights that Section 325 provides. It is blackletter law that that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice," especially

[24] Opp. at 17-18.

[25] Confusingly, ANTHC block quotes what it portrays as passages from SCF's motion or proposed order. *Id.* at 15, 21. Those passages are not quotes. They are ANTHC's own hyperbolic assertions and misinterpretations of SCF's arguments, formatted to mislead the Court about the nature of SCF's requests.

[26] *Id.* at 22-24.

where the defendant's "intention could change at any time."[27] The Ninth Circuit went out of its way to reject ANTHC's mootness argument, explaining that ANTHC could not simply amend its policies and then claim the case was no longer justiciable.[28] Yet that is exactly what ANTHC claims here: that because its policies currently allow for most of the relief that SCF seeks and it has no plans to change them,[29] there is no Article III Case or Controversy. ANTHC dresses up this argument as one about "advisory opinions," to disguise its failed mootness argument, but merely invokes the same doctrine in reverse; the mootness doctrine exists to prevent courts from issuing advisory opinions.[30]

This Court should reject ANTHC's argument for the same reasons that the Ninth Circuit rejected it. ANTHC has advanced no facts to overcome its "heavy burden" to show that its violation of Section 325 will not recur.[31] Indeed, it specifically argues that it retains the ability to amend its policies in ways that could infringe SCF's rights. Just as ANTHC could not moot the case by changing its policies and claiming that SCF was not

[27] *Native Vill. of Nuiqsut v. Bureau of Land Mgmt.*, 9 F.4th 1201, 1215 (9th Cir. 2021) (quotation marks omitted).

[28] *Southcentral Found.*, 983 F. 3d at 418-19.

[29] A declaration that a private defendant will not engage in certain conduct is insufficient to overcome the voluntary cessation doctrine. *See Native Vill. of Nuiqsut*, 9 F.4th at 1215 ("the voluntary cessation exception to mootness would apply if the only new circumstance that arose since the district court decided this case were ConocoPhillips's declaration").

[30] *E.g.*, *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000) ("any opinion as to the legality" of a moot issue "would be advisory"); Erwin Chemerinksy, *Federal Jurisdiction* 127, (3d ed. 1999) (mootness doctrine designed to prevent advisory opinions).

[31] *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 862 (9th Cir. 2017).

harmed,[32] it cannot now claim that SCF seeks an advisory opinion by changing its policies and stating in passing that it has no current plans to change them in the future, especially given ANTHC's history and the ongoing nature of the parties' legal relationship.[33]

Unless ANTHC is willing to sign the stipulation attached as Exhibit 1, there is no question that there is sufficient adversity here on the Scope of Information issues. Disputes seeking declaratory judgments are justiciable where they are "definite and concrete, touching the legal relations of parties having adverse legal interests" and "admit of specific relief through a decree of a conclusive character."[34] There need be only "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."[35] "A party does not seek an advisory opinion where 'valuable legal rights ... [would] be directly affected to a specific and substantial degree' by a decision from the court" and there is "'an honest and actual antagonistic assertion of rights by one [party] against another.'"[36] Cases, like

[32] *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1308 (9th Cir. 1982) (case not moot where there was a possibility that the defendant could change its policy in the future and its new policy had not "completely eradicated the effect" of the former policy).

[33] Wright & Miller, 13C Fed. Prac. & Proc. Juris. § 3533.3.1 (3d ed.) ("Discontinuance of current behavior may have little significance when the parties are bound by a continuing relationship—or hope of a relationship—that is affected by a specific legal uncertainty."). *See also Publicis Commc'n v. True N. Commc'ns, Inc.*, 206 F.3d 725, 728 (7th Cir. 2000) (partial compliance did not moot case given "history of bickering between these litigants").

[34] *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (quotation marks and alterations omitted).

[35] *Id.* (quotation marks omitted).

[36] *Ctr. for Biological Diversity v. United States Forest Serv.*, 925 F.3d 1041, 1047-48 (9th Cir. 2019), quoting *U.S. Nat'l Bank v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 446 (1993) (alteration not added).

this one, that "touch[] upon the intertwined legal relations" between parties readily meet Article III's Case or Controversy requirement.[37]

ANTHC forced SCF to bring this motion when it refused to stipulate that it would not change its policies in the future to reduce the amount of information SCF could obtain or reduce the universe of Permitted Recipients.[38] ANTHC cannot have it both ways: either it agrees with SCF and will sign the addendum to the Stipulated Judgment attached hereto, or it disagrees, creating the kind of adversity that merits this Court's intervention.

ANTHC's adverse position on both of the Scope of Information issues is readily apparent. The disagreement on the Permitted Recipient issue is *written into the Stipulated Judgment*. ANTHC insisted on stating in the Stipulated Judgment that the definition of Permitted Recipients could be changed in the future, stating that "ANTHC's Board of Directors retains the discretion to amend this definition."[39] SCF disagrees. ANTHC agreed that this issue could be raised at summary judgment,[40] which is why the Parties agreed that the definition of Permitted Recipients could be frozen "as the Court may find" on this motion.[41]

ANTHC's brief makes clear there is concrete adversity on the information sharing issue as well. ANTHC argues that it cannot stipulate that it will not reduce the amount of

[37] *Shell Gulf of Mexico, Inc v. Ctr. for Biological Diversity, Inc.*, 2012 WL 12865419, at *8 (D. Alaska June 26, 2012).

[38] ECF No. 313 at 6; *id.* at 8-9 ¶ 7.

[39] *Id.* at 8 n.7.

[40] *Id.* at 6; *id.* at 8-9 ¶ 7.

[41] *Id.* at 8 n.7.

information available to Designating Entities in the future because it wants to retain discretion to make changes to its policies.[42] In SCF's view, no change can reduce the amount of information currently available to SCF as a Designating Entity. Because ANTHC disagrees, there is concrete adversity on the baseline of information that Section 325 requires ANTHC to share.

ANTHC's current position is consistent with the position that its counsel took in December 2021. SCF proposed adding to the Stipulated Judgment that ANTHC would be precluded from amending its governance documents "in a way that reduces the documents and information that SCF, as a Designating Entity, has a right to receive under ANTHC's current governance documents."[43] ANTHC refused to add this sentence to the Stipulated Judgment, arguing that "there are aspects of the recent changes ANTHC made to its governance policies that while supported by the Board are not required by law," which resulted in the reservation of this issue for summary judgment.[44]

A decree from this Court is critical to preserve SCF's "valuable legal rights."[45] ANTHC's "completion of activity is not the hallmark of mootness. Rather, a case is moot only where no effective relief for the alleged violation can be given."[46] The declaration SCF seeks would provide effective relief and prevent ANTHC from undoing changes to its governance documents as soon as this case ends, something ANTHC specifically argues

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[42] Opp. at 26.

[43] Declaration of Nicholas D. Fram in Support of SCF's Reply ("Fram Decl.") ¶ 2.

[44] *Id.*

[45] *Ctr. for Biological Diversity*, 925 F.3d at 1048.

[46] *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1065 (9th Cir. 2002).

that it is entitled to do.

C. SCF Is Not Seeking Relief It Did Not Plead

ANTHC's contention that the Court should not issue any declaratory judgment because SCF is seeking relief it did not plead fails for multiple independent reasons.

First, ANTHC is wrong. The remaining issues in this case are legal issues that boil down to whether ANTHC can, compliant with Section 325, reduce the amount of information that SCF can receive. This is one of the two fundamental legal issues that SCF raised in its complaint (along with the now-resolved Executive Committee issue). SCF's complaint is full of allegations about how ANTHC withheld information from SCF.[47] SCF's prayer for relief seeks a declaration that SCF is "entitled to all information provided to the ANTHC Directors," including "confidential and privileged ANTHC information," and that ANTHC policies to the contrary must be amended.[48] It is this Court that must decide the baseline of information required by Section 325, a federal statute. Clearly, the Complaint offered more than a "short and plain" statement of the issues in this case[49] and placed ANTHC on "notice as to what is at issue in the lawsuit," which is the only standard SCF needed to meet.[50]

Second, the *only* difference now is that ANTHC has amended its policies. But as SCF pointed out in its Motion, ANTHC expressly and repeatedly invited the Court "to decide this case based on reviewing [these revised] governance policies ANTHC believes

[47] *E.g.*, ECF No. 2 ¶¶ 28-42.

[48] *Id.* ¶¶ 47-50.

[49] Fed. R. Civ. P. 8(a).

[50] *Elec. Const. & Maint. Co. v. Maeda Pac. Corp.*, 764 F.2d 619, 622 (9th Cir. 1985).

reflect the Ninth Circuit's decision rather than based on reviewing ANTHC's governance policies adopted before that decision was made."[51] ANTHC made these statements to gain an advantage in the litigation in its arguments encouraging the Court to stay the case—arguments that were ultimately successful.[52] Tellingly, ANTHC does not address or acknowledge these past statements at all. Having forcefully argued that the Court *should* resolve the case based on its revised policies, ANTHC is estopped from arguing that the Court cannot do so now.[53]

ANTHC would have no argument that SCF is seeking unpled relief had it not amended its governance policies. Just as those amendments do not moot this case, they do not require SCF to file a new lawsuit. If ANTHC's view were the law, then defendants could always escape liability by consistently tweaking their offending behavior and arguing that doing so requires filing a new action. But "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint."[54]

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[51] ECF No. 287 at 2; *see also id.* at 6 ("it would be better and more efficient for the Court to consider any governance policies that ANTHC adopts in light of the Ninth Circuit's decision, rather than starting down the road of adjudicating policies that had been adopted prior to the Ninth Circuit's guidance"); 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.").

[52] *See* ECF No. 291.

[53] *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (courts invoke judicial estoppel to prohibit parties from "deliberately changing positions according to the exigencies of the moment"); *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001) (judicial estoppel "precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position.").

[54] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007).

Third, there is clearly no prejudice to ANTHC in the Court deciding the remaining issues (which ANTHC, again, specifically agreed that SCF could raise on summary judgment). ANTHC does not identify any facts that it was unable to gather and it cannot argue that it was surprised by the issues in SCF's motion, given that they were clearly articulated in the Stipulated Judgment. There is no argument that ANTHC lacked "notice"[55] of what the legal issues in this suit are such that it would prejudice ANTHC for the Court to decide this motion.[56]

D. This Court Is the Arbiter of Federal Law, Not ANTHC

Finally, ANTHC asks this Court to trust that any future changes to its governance will comply with Section 325, and that therefore the Court need not issue any declaration. In essence, ANTHC is asking that this Court outsource the interpretation of federal law to ANTHC, the defendant. That is problematic for two reasons.

First, because ANTHC's current governance documents, fairly applied, reflect the minimum required by Section 325, ANTHC would necessarily violate Section 325 if it reduces the amount of information or the universe of persons who can view it in the future. ANTHC would not violate Section 325 if it adopted policies to increase the amount of information that SCF may access or the universe of people who can view it. What ANTHC cannot legally do is further restrict the information that SCF can obtain or the

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

[56] If the Court believes that the issues raised by SCF's motion were not fairly encompassed in the original pleadings, then it should construe SCF's summary judgment as a motion for leave to amend, especially given the issues in SCF's motion do "not require further discovery." *Desertrain v. City of Los Angeles*, 754 F.3d 1147, 1154-55 (9th Cir. 2014).

universe of people at SCF who can see it, something ANTHC *never* promises that it will refrain from. After all, if this were its position, then it would have agreed to SCF's language in the Stipulated Judgment and the Scope of Information issues would not remain live.[57] Because ANTHC maintains that it can further abridge SCF's Scope of Information rights, clearly it contemplates that future changes would violate Section 325.

Second, ANTHC's position is problematic because it boils down to an argument that ANTHC, not this Court, gets to interpret federal law and decide what SCF's Section 325 rights are. But that is not the law. "The interpretation of law is uniquely within the proper concern of the judiciary,"[58] and "federal courts are the final arbiters of federal law."[59] This essential function of the courts has been recognized since *Marbury v. Madison*,[60] and ANTHC offers no support for the suggestion that defendants get to decide what is legal and what is not. ANTHC's attempt to usurp this role also runs completely counter to the oversight structure Congress enacted.[61]

Left to its own devices, ANTHC has a history of denying information to SCF and the other Designating Entities. ANTHC always maintained that its governance policies were consistent with Section 325.[62] ANTHC was wrong, and its erroneous view of the law

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[57] Fram Decl. ¶ 2.

[58] *Gomez v. Harris*, 504 F. Supp. 1342, 1345 (D. Alaska 1981).

[59] *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314 (9th Cir. 1990).

[60] *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.")

[61] *See* Mot. at 5-7.

[62] *E.g.*, Amended Answer and Counterclaims, ECF No. 21, at 31 (seeking an order that ANTHC's governance documents "comply with federal and state law").

led to real world consequences for ANTHC, as well as for anybody its former President/Chair abused. It was never ANTHC's prerogative to decide what information SCF got, and it certainly is not now, after the tangible harms of ANTHC's restrictive information policies have come to light.[63]

IV. ANTHC'S RESPONSES ON THE MERITS ARE EITHER NONEXISTENT OR WRONG

A. ANTHC Has No Response to SCF's Scope of Information Arguments

ANTHC does not advance any argument on the merits of SCF's Scope of Information arguments, a clear concession that it has none.

Minimum Information Sharing. SCF is entitled to a declaration stating that ANTHC's current information sharing policies represent minimum compliance with Section 325. Section 325 guarantees SCF "information necessary to effectively exercise" its "governance and participation rights" in ANTHC.[64] For these rights to mean anything, the Court must define their scope to guide the parties' relationship going forward. Otherwise, ANTHC could easily violate SCF's rights by withholding information on the grounds that it is not "necessary," or change its governance documents to restrict information sharing with SCF, something ANTHC claims it has the right to do. Anything short of a definitive order on the minimum information sharing required by Section 325 would turn SCF's rights into the "hollow promise" that the Ninth Circuit's decision

[63] ANTHC also argues that the Court should dismiss the case based on its Rule 19 motion. Opp. at 10-11. SCF opposes that request for the reasons set out in its opposition to ANTHC's motion. *See* ECF No. 302.

[64] *Southcentral Found.*, 983 F.3d at 420.

foreclosed.[65]

Permitted Recipients. For SCF's governance and participation rights to be meaningful, SCF's Designated Director must be able to share ANTHC information with some set 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. ANTHC does not argue that SCF is wrong, or that Section 325 requires sharing with some more limited group of people. Indeed, 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, at a minimum, SCF's Designated Director may share all governance documents and information she receives with SCF's Board, Officers, and legal counsel (provided they agree to keep them confidential).

B. Section 325 Entitles SCF to Information Subject to Legal Privilege

ANTHC does not dispute that the results of its investigation into the governance issues surrounding its former President/Chair that it is currently withholding from SCF under a claim of legal privilege constitute critical governance information. Instead, it sets forth an erroneous interpretation of both federal and state law governing evidentiary privilege to justify its withholding. But Section 325 entitles SCF to that information[66] and

[65] *Id.* at 419.

[66] As previously discussed, the Ninth Circuit's discussion of the relationship between a Designating Entity and its Designated Director renders a common interest agreement unnecessary under the circumstances. Mot. at 26 n.102. However, on this motion, SCF

ANTHC can share it—and has promised to do so—under the common interest doctrine. ANTHC's refusal is based on a flawed interpretation of that doctrine under both federal and Alaska law.

1. SCF and ANTHC Share a Common Interest Pursuant to Section 325

ANTHC erroneously claims that it lacks a "common interest" with SCF over the governance issues it currently faces because SCF is a disconnected "third party."[67] This entirely fails to account for the relationship that Section 325 created and the rights that it endowed. The Ninth Circuit was clear: "Section 325 conferred governance and participation rights to SCF."[68] Legal issues affecting ANTHC's governance necessarily implicate SCF's governance rights, and its interests in advising ANTHC, through its Designated Director, on how to navigate them. That means that SCF needs the "information necessary to effectively exercise [its] rights,"[69] even if that information is contained in privileged communications. The Ninth Circuit did not carve out any exception to its holding for privileged communications, which often will contain critical governance information.

The governance issues that have arisen in the wake of the resignation of ANTHC's former President/Chair are paradigmatic examples of the kind of issues that SCF has the right to provide input on. The abuses he wrought require ANTHC to rethink how it

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seeks only to hold ANTHC to the commitment enshrined in its governance documents to share information under a common interest agreement.

[67] Opp. at 30.

[68] *Southcentral Found.*, 983 F.3d at 420.

[69] *Id.*

governs itself from the top down. But what did he do? Were his misdeeds limited to what was in the newspapers? Or did they extend into other areas? Did any other ANTHC Director or employee know about or participate in his misconduct? What governance failures contributed to or permitted his behavior?

ANTHC has publicly stated that it commissioned an independent investigation to answer these questions.[70] But SCF and the other Designating Entities remain in the dark about the results of that investigation, which ANTHC refuses to share, citing legal privilege.[71] SCF, thus, must exercise its governance rights with nothing more than it knows from reading the Anchorage Daily News. SCF does not know the extent of the problems that need solving, meaning that SCF cannot "intelligently" offer input on what course of conduct is the best way forward for ANTHC.[72] That is completely contrary to the system that Congress designed, and deprives SCF of information that is critical for it to exercise its governance and participation rights.[73]

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[70] Kyle Hopkins and Michelle Theriault Boots, *Hours After an Employee Accused Him of Sexual Misconduct, Prominent Alaska Executive Resigns*, ProPublica (Mar. 2, 2021), https://www.propublica.org/article/hours-after-an-employee-accused-him-of-sexual-misconduct-prominent-alaska-executive-resigns ("ANTHC spokesperson Shirley Young said Monday that the tribal health organization is conducting an 'independent outside' investigation…").

[71] Kyle Decl., ECF No. 316-2 ¶ 4.

[72] *Southcentral Found.*, 983 F.3d at 419.

[73] Citing an out of context quote from SCF's reply brief from SCF's successful appeal, ANTHC obliquely argues that SCF "acknowledged that privileged information 'may not be able to be shared.'" Opp. at 36. ANTHC takes an isolated phrase out of context. SCF was characterizing ANTHC's argument; it never conceded that privileged information cannot be shared. It was also acknowledging, as it does here, that there "might be some information that, on rare occasion, may not be able to be shared." SCF's Reply Brief at 8 n.2, Dkt. 58 (Case No. 18-35868, 9th Cir. July 3, 2019).

2. The Common Interest Need Not Be Identical

Next, ANTHC argues that SCF has failed to demonstrate the requisite commonality of interest because it has failed to demonstrate that SCF and ANTHC are "pursuing a common legal strategy"[74] or that SCF and ANTHC share the same exposure to identical "legal problems."[75] ANTHC construes this element too narrowly. "The common interest privilege does not require a complete unity of interests among the participants."[76] Two parties may share a common interest even where their interests are "adverse in substantial respects," or "where a lawsuit is foreseeable in the future."[77] And ANTHC ignores that the common interest "*may be either legal, factual, or strategic in character*."[78] That SCF may not face identical liability to ANTHC does not mean that it lacks a common interest.[79]

3. SCF Does Not Need to Provide Legal Services to ANTHC for the Common Interest Doctrine to Apply

ANTHC incorrectly claims that SCF must show that sharing information under a common interest arrangement is "'made for the purpose of facilitating the rendition of professional legal services to the client,' i.e., legal services *to ANTHC*."[80] In other words,

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[74] Opp. at 35.

[75] *Id.* at 27 (noting that SCF seeks information regarding "a legal issue ANTHC, but not SCF, is facing").

[76] *In re Mortg. & Realty Tr.*, 212 B.R. 649, 653 (Bankr. C.D. Cal. 1997).

[77] *Id.*

[78] Restatement (Third) of the Law Governing Lawyers § 76, cmt. e (2000) (emphasis added). Alaska trial courts moreover have looked to the Restatement and to federal law in deciding common interest issues. *See HDI Gerling America Ins. Co. v. Carlile Transp. Sys., LLC*, 2016 WL 8416505, at *1 (Alaska Super. Ct. Sep. 1, 2016); *State v. Williams Alaska Petroleum, Inc.*, 2018 WL 11389356, at *6 (Alaska Super. Ct. Dec. 10, 2018).

[79] Alaska trial courts have observed that a common interest may arise outside litigation. *HDI Gerling*, 2016 WL 8416505, at *1.

[80] Opp. at 30-31.

ANTHC argues that SCF must show that it seeks access to critical governance information "for the purpose of facilitating" legal advice *to ANTHC by SCF*. This bizarre formulation effectively requires that SCF prove it is acting as ANTHC's lawyer to access the information to which it is legally entitled. ANTHC's formulation would render the common interest doctrine a dead letter and a common interest agreement redundant; SCF is not ANTHC's lawyer, and if it were, the attorney-client privilege itself would attach. The common interest doctrine regularly applies to allow two entities with their own legal interests to share privileged information in furtherance of their common interests.

ANTHC misreads Alaska Rule of Evidence 503(b). The portion of the rule that ANTHC cites merely means that in order for the common interest to apply, the original communication must have been made pursuant to the attorney-client privilege. That is, a non-privileged communication (i.e. one *not* made "for the purpose of facilitating the rendition of professional legal services to the client"[81]) cannot become subject to privilege if later communicated under the common interest doctrine. But if the original communication was subject to privilege, it does not lose its privileged character if it is communicated "by the client or the client's lawyer to a lawyer representing another in a matter of common interest."[82]

Moreover, ANTHC's position is flatly contrary to how it has operated under the blanket joint defense agreement it has had in place with SCF for the past 17 years covering all aspects of their joint operation of the Alaska Native Medical Center ("ANMC"). When

[81] Alaska R. Evid. 503(b).

[82] *Id.*

ANTHC has shared information pursuant to that agreement, it has never maintained that it did so in order for SCF to provide legal services to ANTHC. Nor has ANTHC ever claimed that such sharing was so that it could provide legal services to SCF.[83]

ANTHC's contention that the common interest doctrine applies only when sharing would facilitate SCF's provision of legal services to ANTHC belies common sense, experience, and the plain text of the Alaska Rules. It is not the law.

4. Common Interest Agreements Need Not Be Matter-Specific

The existence of the ANMC joint defense agreement also belies ANTHC's argument that common interest agreements must be agreed upon matter by matter.[84] This agreement covers how SCF and ANTHC "share confidential and privileged communications, information and work product, and cooperate with one another as part of a joint and common ongoing effort to protect their common interests in all aspects of the operation of ANMC."[85] The agreement recites that SCF and ANTHC "share a mutuality of interest" on *all* matters implicating ANMC.[86] ANTHC and SCF do not agree to new common interest agreements as new matters arise.[87]

That ANTHC entered into this agreement covering any issues that may arise at ANMC, demonstrates the infirmity of ANTHC's position here, which it has contrived to shield information from the Designating Entities.

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[83] Declaration of Lisa C. Mock in Support of SCF's Reply ("Mock Decl.") ¶ 3.

[84] Opp. at 38.

[85] Mock Decl." Ex. A at 1.

[86] *Id.*

[87] *Id.* ¶ 2.

5. Federal Law Governs the Common Interest Issues Here

While many of the forgoing arguments apply to the common interest doctrine as it is applied under both federal and Alaska law, the Court need not look further than federal law here. "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.'"[88] ANTHC's contention to the contrary is unsupported by authority.[89] ANTHC offers no response to SCF's argument that federal law governs the contours of the parties' common interest because it was federal law (i.e. Section 325) that created that interest in the first place.[90]

If ANTHC thinks that it lacks a common interest with SCF over the results of its

[88] *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, 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.").

[89] Opp. at 29.

[90] In a footnote (*Id.* at 35 n.127), ANTHC claims that SCF's argument should be rejected because SCF cites district court cases and authority from other jurisdictions that are "not good law after *In re Pacific Pictures*," 679 F.3d 1121, 1129-30 (9th Cir. 2012). This is misleading. The relationship analyzed in *Pacific Pictures* was between the government and a crime victim who was "not strategizing with the prosecution." *Id.* at 1129. *Pacific Pictures* neither announced a new rule nor overruled any prior authority, and itself relied on an out-of-circuit case, *In re Grand Jury Subpoenas,* 902 F.2d 244, 249 (4th Cir. 1990), which in turn relied on a case SCF cited, *United States v. Schwimmer*, 892 F.2d 237, 243-44 (2d Cir. 1989). Underscoring the frivolity of ANTHC's claim, other district courts within the Ninth Circuit after *Pacific Pictures* have relied on the district court authority SCF cited. *E.g.*, *Miller v. Boilermaker-Blacksmith Nat'l Pension Tr*., 2021 WL 2935056, at *6 (E.D. Wash. Apr. 16, 2021) (discussing *Avocent Redmond Corp. v. Rose Elecs., Inc.*, 516 F. Supp. 2d 1199 (W.D. Wash. 2007)).

investigation into the governance issues surrounding its former President/Chair—the most serious governance issues ANTHC has ever faced—then it is hard to imagine that ANTHC would ever find an instance where it has a common interest with the Designating Entities. That would render its promise to enter into a Common Interest Agreement "if it is at all possible to do so"[91] "hollow,"[92] and tear open an exception to Section 325 that would swallow SCF's rights whole. All ANTHC would need to do to prevent sharing would be (1) label something privileged and (2) say that it lacks a common interest. This gives ANTHC plenary control over SCF's informational rights and guts the oversight regime that Congress designed.

By contrast, a decision from this Court holding that SCF and ANTHC share a common interest in the governance of ANTHC would provide ANTHC the comfort it claims it needs to share privileged communications without waiving privilege. Yet ANTHC strenuously argues against that outcome, laying bare its disingenuous promise to share: it is easy to promise something "if at all possible" if one has the discretion to find it never possible to do so.

V. CONCLUSION

The Court should grant SCF's motion in full.

[91] Kyle Decl. Ex. 2, ECF No. 316-5 at 2, § 5.4.1.1.

[92] *Southcentral Found.*, 983 F.3d at 419.

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CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2022, a true and correct copy of the foregoing was served on:

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