

UNITED STATES DISTRICT COURT  
DISTRICT OF NORTH DAKOTA  
WESTERN DIVISION (BISMARCK)

CISSY THUNDERHAWK; WAŠTÉ WIN  
YOUNG; REVEREND JOHN FLOBERG; and  
JOSÉ ZHAGÑAY on behalf of themselves and all  
similarly-situated persons,

Plaintiffs,

vs.

COUNTY OF MORTON, NORTH DAKOTA;  
SHERIFF KYLE KIRCHMEIER; GOVERNOR  
DOUG BURGUM; FORMER GOVERNOR JACK  
DALRYMPLE; DIRECTOR GRANT LEVI;  
SUPERINTENDENT MICHAEL GERHART JR;  
TIGERSWAN LLC; and DOES 1 to 100

Defendants.

**Case No. 1:18-cv-00212**

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**REPLY TO TIGERSWAN'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS'  
MOTION TO DISMISS TIGERSWAN'S COUNTERCLAIM**

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**I.**

As a threshold matter, it is unclear whether TigerSwan is abandoning its Counterclaim (“Original Counterclaim”) to Plaintiffs’ Original Complaint.

Some background is helpful: on February 1, 2019, Plaintiffs moved to dismiss TigerSwan’s Original Counterclaim while also filing a First Amended Complaint. TigerSwan answered the First Amended Complaint on February 21, 2019, filing a second Counterclaim (“New Counterclaim”) that appears largely duplicative of, but is not identical to, its first. In the memorandum at issue (also filed by TigerSwan on February 21, 2019), TigerSwan relies exclusively on allegations put forth in its New Counterclaim. In other words, TigerSwan is now arguing that its *Original* Counterclaim should not be dismissed because of what it alleged in its *New* Counterclaim. Suffice it to say, assuming TigerSwan is not abandoning its Original Counterclaim, the relevant allegations for purposes of this Motion to Dismiss are only those made in that Original Counterclaim.

Regardless, the gist of the Original Counterclaim at issue is that TigerSwan disputes Plaintiffs’ allegations and, as a result, does not believe that it should have been named in this action. TigerSwan has now clarified that the sole legal basis for its Original Counterclaim is the state tort of abuse of process. But a factual dispute of this nature cannot serve as the basis for such a claim.

**II.**

Abuse of process is a common law tort recognized in North Dakota in which “legal process” is used “against another primarily to accomplish a purpose for which it was not designed.” *Zuffa, LLC v. Kamranian*, No. 1:11-CV-036, 2011 WL 3627301, at \*3 (D.N.D. Aug.

17, 2011). “Under North Dakota law, the essential elements of an abuse of process claim are: (1) an ulterior purpose; and (2) a willful act in the use of the process not proper in the regular conduct of the proceeding.” *Id.*; see *Wachter v. Gratech Co., Ltd.*, 608 N.W.2d 279, 287 (N.D. 2000) (adding that a plaintiff must still show actual damages suffered as a result of the abuse of process).

Crucially, according to the North Dakota Supreme Court, “[i]n cases involving abuse-of-process claims, our decisions require some overt act akin to extortion or attempting to obtain a collateral advantage beyond the issuance of the formal use of process.” *Riemers v. Hill*, 881 N.W.2d 624, 631 (N.D. 2016). This requires “more than the formal use of process itself.” *Id.*; see also *Jordet v. Jordet*, 861 N.W.2d 147, 153 (N.D. 2015) (noting that “[t]he improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club”).

TigerSwan has alleged no facts that show anything of this nature. Instead, TigerSwan’s allegations inform exclusively on the merits of the underlying case. Yet one of the key *appropriate* uses of the legal process is to test the factual and legal claims that determine whether a case has merit. In the underlying suit, Plaintiffs have detailed many facts implicating TigerSwan in a range of constitutional misconduct—most of which TigerSwan disputes. Irrespective of whether TigerSwan will ultimately prevail on these issues of factual disagreement, or whether TigerSwan’s unsupported claims of its consequential freedom from liability are correct as a legal matter, merely recognizing that a plaintiff’s factual allegations are disputed is insufficient to show that the plaintiff has *abused* (rather than simply used) the legal process. *Id.*

If this Court accepts each of TigerSwan's factual allegations as true, TigerSwan has not shown that Plaintiffs have "(1) an ulterior purpose" *or* that Plaintiffs have taken "(2) a willful act in the use of the process not proper in the regular conduct of the proceeding." *Zuffa*, 2011 WL 3627301, at \*3; *see, e.g., Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *ADP, Inc. v. Barth-Peffer, Inc.*, No. 07-CV-055, 2008 WL 163632, at \*1 (D.N.D. Jan. 17, 2008). TigerSwan's Original Counterclaim must therefore be dismissed.

Dated: March 7, 2019

Respectfully Submitted



By:

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