

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NORTH DAKOTA  
NORTHWESTERN DIVISION

Cissy Thunderhawk; Waste'Win Young;	)	Civil No. 1:18-cv-00212-CSM
Reverend John Floberg; and Jose	)	
Zhagnay, on behalf of themselves and	)	<b>TIGERSWAN'S MEMORANDUM</b>
all similarly-situated persons,	)	<b>IN SUPPORT OF TIGERSWAN'S</b>
	)	<b>RULE 56 MOTION FOR</b>
Plaintiffs,	)	<b>SUMMARY JUDGMENT,</b>
	)	<b>OR IN THE ALTERNATIVE</b>
vs.	)	<b>TIGERSWAN'S RULE 12(b)(6)</b>
	)	<b>MOTION TO DISMISS</b>
County of Morton, North Dakota;	)	
Sheriff Kyle Kirchmeier; Governor	)	
Doug Burgum; Former Governor Jack	)	
Dalrymple; Director Grant Levi;	)	
Superintendent Michael Gerhardt, Jr.;	)	
TigerSwan LLC, and Does 1 to 100,	)	
	)	
Defendants.	)	

¶1 The gravamen of the Plaintiffs' Complaint is that their First Amendment rights were violated by the closing of Highway 1806 or by the insistence of the private landowners, the state and county officials in charge of the road and with the authority to close the road. The Plaintiffs also allege that their First Amendment rights were violated by being required to protest in a particular location that was set aside for them by Energy Transfer Partners, the various landowners, and the state and county officials. The state and county defendants have made various motions to dismiss them from the case, and the plaintiffs have

responded in kind with motions of their own.<sup>1</sup> TigerSwan, it should be noted, was not the decision maker as to any of these matters.

¶2 We assert in summary fashion the following salient points:

1. The decision to close the road or bridge is exclusively up to the state and county.
2. TigerSwan had no decision-making authority as to the closure or the First Amendment issues.
3. All decisions relating to the protesters were made by Energy Transfer Partners (ETP).
4. All security work was conducted by third-party security companies hired by ETP and under the control ETP
5. TigerSwan was hired to provide consultation, and not to do security work.

Based on these facts, we assert that there is insufficient nexus between TigerSwan and the allegations of the violation of the First Amendment and travel rights of the protesters, and as such TigerSwan is not a proper party to this action. We also note that in our view, the state and county defendants properly refer to this Court's prior

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<sup>1</sup> The following is a listing of the pending motions, with reference to docket numbers, page length, and party filing the item:

1. **[48] State Motion to Dismiss** 2 pages  
Briefs: [49] 62 pages ST [62] 62 pages PL [71] 10 pages ST State Exhibits: 115 pages
2. **[51] County Motion to Dismiss** 3 pages  
Briefs: [52] 63 pages CO [61] 56 pages PL [76] 17 pages CO County Exhibits: 1259 pages
3. **[63] Plaintiffs' Motion to Strike State Extrinsic Evidence** 2 pages  
Briefs: [63-1] 8 pages PL [70] 10 pages ST [78] 9 pages PL
4. **[64] Plaintiffs' Motion to Strike County Extrinsic Evidence** 2 pages  
Briefs: [64-1] 8 pages PL [77] 5 pages CO [80] 8 pages PL
5. **[67] Plaintiffs' Motion to Dismiss TigerSwan's [2<sup>nd</sup>] Counterclaim** 3 pages  
Briefs: [67-1] 7 pages PL [73] 10 pages TS [79] 5 page PL

The totals as to just the pending motions are as follows:

<b>County:</b>	motions and briefs, 88 pages	exhibits, 1259 pages	<b>1347 pages total</b>
<b>State:</b>	motions and briefs, 84 pages	exhibits, 115 pages	<b><u>199 pages total</u></b>
	<b>State and County Total:</b>		<b>1546 pages</b>
<b>Plaintiffs:</b>	motions and briefs, <b>163 pages total</b>		

decisions in *Dakota Access, LLC v. Archambault* and *Dundon V. Kirchmeier* involving the same matters.<sup>2</sup> **Doc. 49 at 5 and Doc. 52 at 16-24.** By the same token, we incorporate by reference the exhibits already filed which specify the actions taken by state and county authorities. See Exhibits A-S, **Doc. Nos. 32-1 through 32-19.**

¶3 It is undisputed that the state and county officials are the only ones with authority to close the road.<sup>3</sup> TigerSwan had no such authority and as such cannot be held liable to the closing of the road. By the same token, TigerSwan was in no way the decision-maker as to any of the issues relating to the protests. Energy Transfer Partners and the state and local officials were in full control of all decisions made relating to actions taken relating to the protests. TigerSwan was merely a consultant hired by Energy Transfer Partners to pull together information supplied by others into a daily report and provide recommendations to Energy Transfer Partners. As such, TigerSwan cannot be held liable to any of the alleged

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<sup>2</sup> We of course have no objection to the Court taking – as it may deem necessary to resolve TigerSwan's motion to dismiss or for summary judgment – judicial notice of any the findings or documents received in *Dakota Access, LLC v. Archambault*, No. 1:16-cv-296 (D.N.D. 9-16-16) and *Dundon V. Kirchmeier*, No. 1:16-cv-406 ((D.N.D. 2-7-17), as suggested by the state at **Doc. 49 page 5**, and the County at **Doc. 52 at pages 16-24.**

<sup>3</sup> The state and county defendants properly make reference to the numerous state statutes which allow the state and county to close highway and bridges. See **Doc. 49 and 27-28, Doc.52 and 28-33, 36.** We further suggest that there is no doubt that the numerous public criminal records showing the hundreds of convictions (mostly by plea agreements) for violent actions most certainly support the decisions by the state and local authorities to take the actions they took, including closing the road and the bridge. So too do the findings of this Court in the *Archambault* and *Dundon* matters.

improper actions of Energy Transfer Partners or any third-parties under the control and direction of Energy Transfer Partners.

¶4 In support of our motion for summary judgment,<sup>4</sup> we have filed an affidavit of Vice President Shawn Sweeney, a TigerSwan employee who has personal knowledge, was on site on behalf of TigerSwan throughout the times relevant to this matter, and has provided the following information in affidavit form:

1. I was assigned in September 2016, by TigerSwan to supervise the contract that TigerSwan had with Energy Transfer Partners. I remained the onsite contract supervisor from September 2016 until the week of October the 10th, including during the time Highway 1806 was closed and the bridge crossing Cantapeta Creek was blocked. I remained the off-site contract supervisor through the end of the year.

2. TigerSwan was hired by ETP management to provide consultation to ETP. We did not make ANY decisions relating to road closure, the blocking of any bridges, or when or where protesters could protest or assert their First Amendment rights.

3. As to the road closure, TigerSwan had absolutely nothing to do with the decision to close 1806 or block the bridge. This decision was made exclusively by state and local authorities. TigerSwan did not order the road to be closed or the bridge blocked. We had absolutely no authority to do either of these things. The decision to close the road and block the bridge was made by state and local authorities. TigerSwan was not even privy to the discussions relating to these two issues; we were merely told about the discussions afterwards and told about the decision when made. TigerSwan was in no way involved with any of the decisions relating to closing 1806 or relating to the bridge being closed or blocked.

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<sup>4</sup> The state and county defendants have filed substantial outside materials, yet insist that this Court not “convert the motion to dismiss into a motion for summary judgment.” **Doc. 49 at 3-4** and **Doc. 52 at 4-6**. We assume this is a strategic decision to prevent discovery against the state and county officials.

4. As to the protests and sites selected and set aside for lawful protests, TigerSwan had absolutely nothing to do with the decisions relating to when or where protesters could protest or assert their First Amendment rights. These decisions were made exclusively by state and local authorities or Energy Transfer Partners, and implemented by third-party security companies that were hired to do security on site. TigerSwan was NOT hired to do any of the security on site. In regards to the protests and protesters it was ETP and state and local authorities who made all the decisions. We had absolutely no authority to make any decisions relating to the protests, the protesters, or the time and place of any protests.

5. Although the decisions as to the protests, the protesters, or the time and place of any protests were not ours to make and were made entirely by ETP or the state and local authorities, we did provide two recommendations as to the protests and the protesters, both of which were adopted by ETP: 1) before being hired we recommended to ETP that they get rid of the dogs; and 2) that all third-party security entities and any representatives of ETP who would be interacting with the protesters have on their person a card to read to the protesters or any persons trespassing. The card read as follows:

Ladies and Gentleman

We want you to know that we support your "FIRST AMENDMENT RIGHTS" of exercising your constitutional right of free speech and peaceable assembly.

We ask that if you do want to protest and assemble that you please do so on public property and not cross onto Private Property.

Thank you for your understanding.

6. TigerSwan is a veteran's owned company. Most of our employees are disabled veterans. The owner of TigerSwan is James Reese, who had a long and distinguished career in the military.

7. The Plaintiffs have made numerous allegations against TigerSwan, all of which have been disputed in our Answer to the First Amended Complaint. (We refer the Court to our Answer and place the Plaintiffs on their proof in regards to any response to our pending dispositive motion.) Simply put, we had nothing to do with the road or bridge closure, and as to the protests and protesters we did not make any decisions relating to the protests, the protesters, or when or where

protesters could protest or assert their First Amendment rights. We did not interact with the protesters; this was done by state and local authorities, ETP, or other persons hired by ETP.

Dated this 10<sup>th</sup> day of July, 2019.

\_\_\_\_\_/s/  
Shawn Sweeney

¶5 In accordance with Local Rule 7.1(A)(2), we hereby provide a recitation of the material facts that TigerSwan claims are uncontested:

1. Road and bridge closer exclusively up to state and county [**Sweeney Affidavit at ¶3**]
2. TigerSwan was not hired to do any of the security work on site, including dealing with the protesters [**Sweeney Affidavit at ¶4**]
3. TigerSwan was hired by ETP to provide consultation and prepare daily reports [**Sweeney Affidavit at ¶2**]
4. TigerSwan had no decision-making authority as to road or bridge closure [**Sweeney Affidavit at ¶2-3**]
5. TigerSwan had no decision-making authority as to the protests or the protesters [**Sweeney Affidavit at ¶4**]
6. TigerSwan had nothing to do with the closure of the road or bridge [**Sweeney Affidavit at ¶7**]
7. TigerSwan did not interact with the protesters, this was done by law enforcement, ETP, or other persons hired by ETP [**Sweeney Affidavit at ¶7**]
8. TigerSwan had no significant contact or interaction<sup>5</sup> with the protests, the protesters, and had no decision-making authority relating to when or where

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<sup>5</sup> As indicated in Shawn Sweeney's affidavit, TigerSwan – prior to being hired by ETP – suggested that ETP get rid of the dogs, and once TigerSwan was hired by ETP TigerSwan suggested that ETP instruct security personnel to carry with them a card that indicated to the protesters an acknowledgment of their First Amendment rights and requesting that the protesters not commit trespassing and instead protest at the designated area.

the protesters could protest or assert their First Amendment rights [**Sweeney Affidavit at ¶7**]

We also note that by definition TigerSwan, LLC is a private entity and therefore any of its actions or the actions of its employees do not constitute state action. Nor do we believe that there is sufficient evidence to support any allegation that TigerSwan acted in concert with the state or county actors as to the claims alleged, and we put the plaintiffs to their proof in this regard.

¶6 Based on the briefs submitted by the state and county defendants,<sup>6</sup> we assume that this Court will conclude that the closure of the road and the bridge was a decision that could only be made by the state and local officials, and that that decision was for valid safety reasons and was not a pretext for limiting or abridging the First Amendment rights (or the right to travel) of the protesters. Upon reaching such a decision that the state and county had exclusive decision-making authority as to the closure of the road or bridge, we are of the opinion that no case relating to the closure can remain against any private entity, including TigerSwan. The same is true as to the First Amendment and travel allegations.

¶7 In the event the Court would prefer to dismiss TigerSwan under Rule 12(b)(6), we hereby assert (in the alternative) that the following rationale would

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<sup>6</sup> We find the length and breadth of the briefs and exhibits submitted by the state and county defendants to be overwhelming. Although it is clear that the state and county did not violate the plaintiffs First Amendment or travel rights, we cannot help but wonder if the purpose of providing 172 pages of briefs relating to just the pending motions and the filing 1537 pages of exhibits is truly necessary.

apply in regards to dismissing TigerSwan as a matter of law based on the following undisputed facts or points which would result in justifying dismissing TigerSwan from this matter:

- 1) It is undisputed that the road or bridge closure is within the exclusive authority of state and local authorities.
- 2) It is undisputed that TigerSwan has no control or decision-making authority as to any restrictions on First Amendment rights of the protesters, and as such TigerSwan cannot be held liable for any supposed violation of the protesters First Amendment or travel rights.
- 3) It is in undisputed that the private entities, private landowners, and state and local authorities provided a safe and appropriate area for the protesters to protests, and as such
  - A) the plaintiffs are barred from asserting a First Amendment violation at any location outside the area set aside for the exercise of their First Amendment rights;
  - B) the plaintiffs are barred from asserting that the road or bridge closure was a pretext for a violation of their First Amendment rights;
  - C) the defendants, the private entities, and the landowners are immune from any liability for any First Amendment violations alleged by the plaintiffs.
- 4) It is undisputed that TigerSwan was hired by ETP as a consultant and did not make any decisions relating to the road or bridge closure or the protests, and as such any action in regards to any violation of the First Amendment rights or the right of travel must be made against the state and local authorities, ETP, or the third-party security entities providing security services – and not against TigerSwan.

¶8 It is black-letter law “that the state may place reasonable time, place, or manner restrictions on speech that takes place in the public forum, but these regulations must be implemented without regard to the content of the speech.”



Nowak, Rotunda, Young, CONSTITUTIONAL LAW HORNBOOK SERIES 977 (2<sup>nd</sup> ed. 1983), citing *Madison School District v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 176 (1976). In the case at hand, it is essential to note that the protesters had refused to protest at the venue set up by ETP, the private landowners, and state and local authorities. Where such steps are taken to provide the protesters an appropriate venue to exercise their First Amendment rights, any alleged violation of those rights outside that forum should fail. Instructive to this point is the case of *Adderly v. Florida*, 385 U.S. 39 (1966). In *Adderly* the protesters were on jailhouse grounds, a location normally not open to the public. *Id.* at 41. In deciding against the protesters and upholding the trespassing convictions, The United States Supreme Court “appeared to simply treat jailhouse property as private property.” Nowak , *supra*, at 980.

¶9 Because the state has the authority to place reasonable time, place, or manner restrictions on speech, and in situations where the state – in conjunction with private landowners – have set aside a safe and appropriate venue for the exercise of First Amendment rights, we assert that any alleged violation of First Amendment rights that took place outside the venue provided for the use of the protesters are barred as a matter of law. In the alternative, we assert that by setting aside a safe and appropriate venue for the protesters to exercise their First Amendment rights, the protesters may not survive any motion for summary

judgment (or motion to dismiss) unless they demonstrate by admissible evidence, and not mere conjecture, that the venue selected was incapable of providing the protesters a viable venue to exercise their First Amendment rights, and that the closing of the road and bridge was not for safety reasons, but was a mere pretext for the purpose and with the intent to improperly restrict the protesters rights to protest. Such a burden shift seems especially appropriate when the state or private landowners have created a viable option by providing the protesters a proper venue, particularly when the rights of the private landowners and the safety of all concerned is being facilitated by the establishment of a safe and appropriate location for the protesters to exercise their First Amendment rights<sup>7</sup>

## ¶10 Conclusion

¶11 For the reasons listed above, TigerSwan, respectively request that this Court grant its motion for summary judgment and dismiss TigerSwan from this action, or in the alternative that the Court grant TigerSwan's motion to dismiss.

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<sup>7</sup> For purposes of our motion to dismiss, TigerSwan – in so much as these arguments might potentially apply to TigerSwan – adopts and incorporates the state and county's positions that the plaintiffs various claims fail as to Count I (right to speak), **Doc. 49, at 25-40, Doc. 52 at 40-51**, fail as to Count II (right to free exercise), **Doc. 49 and 40-42, Doc. 52 at 40-51**, fail as to Count III (right to travel), **Doc. 49 at 42-46, Doc. 76 at 9-11**, fail as to Count IV (restriction on commerce), **Doc. 49 at 46-52, Doc. 52 at 54-57, Doc. 76 at 11-12**, fail as to Count V (retaliation), **Doc. 49 and 52-54, Doc. 52 at 51-52, Doc. 76 at 12-13**, fail as to Count VI (policies, customs, or practices), **Doc. 49 at 55-56, Doc. 52 at 58-59, Doc. 76 at 13**, fail as to Count 7 (training, supervision, or discipline), **Doc. 49 at 56-58, Doc. 52 at 55-59**, and fail as to privileges and immunities, **Doc. 52 at 57-58**.

¶12 Dated this 10<sup>th</sup> day of July, 2019.

\_\_\_\_\_/s/\_\_\_\_\_  
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### **CERTIFICATE OF SERVICE**

I hereby certify that on July 10<sup>th</sup>, 2019, a true and correct copy of the foregoing document was filed electronically with the Clerk of Court through ECF, and that ECF will send a Notice of Electronic Filing (NEF) to the Following:

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Dated this 10<sup>th</sup> day of July, 2019.

\_\_\_\_\_/s/\_\_\_\_\_  
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