

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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**MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS TIGERSWAN'S COUNTERCLAIM**

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By: Noah Smith-Drelich  
Bernard E. Harcourt  
Columbia Law School  
435 W. 116th St.  
New York, NY 10027  
(605) 863 0707  
nsmith-drelich@law.columbia.edu

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## I. BACKGROUND

The present dispute arises from a lawsuit filed on October 18, 2018<sup>1</sup> against state and local officials and TigerSwan LLC, a private security company, for several related constitutional violations that resulted from a five-month discriminatory closure of an important thoroughfare at the height of the Standing Rock Sioux Tribe’s opposition to the Dakota Access Pipeline. In that lawsuit, Plaintiffs have alleged, among other things, that TigerSwan was working in close coordination with state and local officials to encourage and support the closure in question.

On January 11, 2019, TigerSwan filed an Answer and Counterclaim. The Answer consists of twenty-four numbered paragraphs denying the allegations in the Complaint (¶¶1-24) and ten numbered paragraphs baldly listing affirmative defenses (¶¶25-34). The Counterclaim incorporates these denials and defenses while adding, all within a single paragraph (¶35), a non-numbered list of factual allegations and legal conclusions. The remainder of the Counterclaim consists of a claim for damages (¶36), a prayer for relief asking for dismissal and attorneys fees under Rule 11 and, separately, an “award [of] judgment against each of the plaintiffs individually and jointly for the amount of attorneys fees and costs incurred” (¶37), and a demand for jury trial (¶¶38-39).

The gist of the Counterclaim appears to be that TigerSwan disputes Plaintiffs’ allegations and, as a result, does not believe that it should have been named in this action. Although TigerSwan has not clearly explicated the specific legal basis for its Counterclaim, it appears from the final four bullets listed under paragraph 35—which simply restate parts of legal standards verbatim—that TigerSwan is seeking damages under Rule 11 and for abuse of process.

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<sup>1</sup> Plaintiffs amended their complaint yesterday, January 31, 2019.

Because the Counterclaim does not state a legally plausible claim for relief, it must be dismissed.

## II. LEGAL STANDARD

“When deciding on a motion to dismiss, the issue for the Court is not whether the counterclaimant will ultimately prevail but rather whether the counterclaim is legally sufficient.” *ADP, Inc. v. Barth-Peffer, Inc.*, No. 07-CV-055, 2008 WL 163632, at \*1 (D.N.D. Jan. 17, 2008). Thus, the Court must accept as true all factual allegations in the counterclaim and view them in the light most favorable to the nonmoving party. Fed. R. Civ. P. 12(b)(6); *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007). Nevertheless, mere “[t]hreadbare recitals of the elements of a cause of action . . . will not suffice” to state a claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). An action fails to state a claim upon which relief can be granted if it does not plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

## III. ARGUMENT

Because TigerSwan’s Counterclaim fails to comply with the provisions of Rule 11 of the Federal Rules of Civil Procedure, and because it does not include sufficient factual allegations to state a claim for relief for Rule 11 sanctions, abuse of process, or anything else, it should be dismissed under Rule 12(b)(6).

### 1. Any Counterclaim Asserted Under Rule 11 Must Be Dismissed

Rule 11 imposes a number of requirements on any party seeking sanction. Pertinently, Rule 11(c)(2) requires that “[a] motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b).” Moreover, Rule 11(c)(2) requires that such a motion “must not be filed or be presented to the court if the

challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets.” These provisions “provide[] a type of ‘safe harbor’ against motions under Rule 11 in that a party will not be subject to sanctions on the basis of another party’s motion unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation.” Note to Fed. R. Civ. P. 11.

TigerSwan is seeking Rule 11 sanctions here as part of its Answer and Counterclaim. As an initial matter, this Court should dismiss TigerSwan’s Rule 11 claims because an Answer and Counterclaim is not a motion, let alone a separate motion, as required under Rule 11(c)(2). *See* Rule 11(c)(2); Rule 13 (characterizing Counterclaims as pleadings).

Moreover, TigerSwan has not given Plaintiffs an opportunity, let alone the 21 days required by Rule 11(c)(2), to cure any alleged defect. *See* Rule 11(c)(2). Even had TigerSwan properly moved for sanctions under Rule 11—and it did not—Plaintiffs must be afforded the opportunity to correct whatever sanctionable conduct TigerSwan identifies.

Finally, TigerSwan does not adequately identify what specifically violates Rule 11(b) in its request for Rule 11 sanctions. *See* Rule 11(c)(2). Instead, TigerSwan simply repeats the language of Rule 11(b)(2) and 11(b)(3). *See* ¶ 35, bullet 10 (“The claim against TigerSwan is not warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.”); ¶35, bullet 11 (“The factual contentions made against TigerSwan do not have evidentiary support or did not likely have evidentiary support after a reasonable opportunity for further investigation or discovery”). These bare recitations of selected legal elements of Rule 11 are inadequate under both Rule 11 and Rule 12(b)(6). Rule 11(c)(2); *Iqbal*, 556 U.S. at 678.

For each of these three reasons, TigerSwan's Counterclaim for Rule 11 sanctions should be dismissed as improper under Rule 11 and Rule 12(b)(6). *See, e.g. Rondolino v. Provident Life & Acc. Ins. Co.*, No. 92-1010-CIV-T-17A, 1994 WL 143066, at \*2 (M.D. Fla. Apr. 11, 1994) (dismissing motion for Rule 11 sanctions for failure to comply with Rule 11's procedural requirements).

## **2. Any Counterclaim Resting on Abuse of Process Must be Dismissed**

TigerSwan's claim of abuse of process is similarly conclusory and must therefore also be dismissed.

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).

TigerSwan alleges, in the twelfth and thirteenth bullet points of paragraph 35, that "[t]he bringing of this action against TigerSwan constitutes misconduct that was for an ulterior purpose" and "[t]he bringing [sic] this action against TigerSwan constitutes a willful act in the use of the process not proper in the regular conduct of the proceeding." ¶35, bullets 35-36.

TigerSwan also alleges in paragraph 36 that "it has been damaged by the Plaintiffs bringing this action, that these damages are a proximate cause of the Plaintiffs actions and misconduct, and that TigerSwan should be awarded attorney fees and costs for having to defend against this

action.” ¶36. This is the extent of TigerSwan’s allegations, factual or legal, that bear on the question of abuse of process.

These allegations are nothing more than “threadbare recitals of the elements of [the] cause of action.” *Iqbal*, 556 U.S. at 678. TigerSwan has simply repeated the legal elements of its claim (without, ironically, identifying the claim by name). This is insufficient for purposes of Rule 12(b)(6) and this claim should likewise be dismissed.

#### IV. CONCLUSION

It is plain from TigerSwan’s Answer and Counterclaim that TigerSwan disagrees with Plaintiffs’ characterization of its involvement with the NoDAPL movement in North Dakota: it has denied virtually every single one of Plaintiffs’ allegations (including, based on its lack of “sufficient knowledge or information,” that either Jack Dalrymple or Doug Burgum was or is governor of the state, *see* Answer ¶6). But a genuine dispute of facts, or of governing law, cannot be the basis for either Rule 11 sanctions or an abuse of process Counterclaim.

Indeed, to allow Counterclaims of this nature to proceed would expose nearly every plaintiff in every suit to fee-shifting liability, thereby broadly discouraging legitimate litigation. TigerSwan, of course, understands this, which is exactly why TigerSwan also makes the extraordinary request for this Court to “award[] judgment against each of the *plaintiffs individually* and jointly for the amount of attorney fees and costs incurred in having to defend this action,” ¶37, 7 (emphasis added).

Regardless, because TigerSwan has not complied with Rule 11’s requirements or stated any cognizable claim to relief under Rule 12(b)(6), its Counterclaim must be dismissed.

Dated: February 1, 2019



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Respectfully Submitted

By:

Noah Smith-Drelich  
*Counsel of Record*  
Bernard E. Harcourt  
Columbia Law School  
435 W. 116th St.  
New York, NY 10027  
(605) 863 0707