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

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.	Civil No.: 1:18-cv-00212

ORDER GRANTING
PLAINTIFFS' MOTION TO DISMISS TIGERSWAN'S
SECOND COUNTERCLAIM

[¶1] THIS MATTER comes before the Court on the Plaintiffs'[1] Motion to Dismiss TigerSwan LLC's ("TigerSwan") Second Counterclaim filed on March 12, 2019. Doc. No. 67. TigerSwan responded in opposition to the Motion to Dismiss on March 28, 2019. Doc. No. 73. The Plaintiffs replied in support of the Motion on April 8, 2019. Doc. No. 79. For the reasons explained below, the Plaintiffs' Motion to Dismiss TigerSwan's Second Counterclaim is **GRANTED**.

[1] The term "Plaintiffs" refers collectively to Cissy Thunderhawk, Wašté Win Young, Reverend John Floberg, and José Zhagñay.

A. PROCEDURAL BACKGROUND

[¶2] The Plaintiffs filed a Complaint in this matter on October 18, 2018, naming TigerSwan as a Defendant. Doc. No. 1. On January 11, 2019, TigerSwan filed an Answer to the Complaint. Doc. No. 38. TigerSwan also asserted a Counterclaim against the Plaintiffs for the tort of abuse of process, seeking damages under Rule 11 of the Federal Rules of Civil Procedure Rule. Id. On February 1, 2019, the Plaintiffs filed a Motion to Dismiss TigerSwan's Counterclaim. Doc. No. 45. TigerSwan filed a Response in Opposition on February 21, 2019. Doc. No. 56. The Plaintiffs filed a Reply in Support on March 7, 2019. Doc. No. 58.

[¶3] The Plaintiffs filed an Amended Complaint on February 1, 2019. Doc. No. 44. TigerSwan filed an Answer to the Amended Complaint on February 21, 2019, asserting again a Counterclaim ("Second Counterclaim") for abuse of process and again seeking damages under Rule 11 of the Federal Rules of Civil Procedure. Doc. No. 56. The Plaintiffs' instant Motion to Dismiss concerns TigerSwan's Second Counterclaim.

B. FACTUAL BACKGROUND

[¶4] In a Complaint filed in this matter on October 18, 2018, and amended on February 1, 2019, the Plaintiffs asserted their constitutional rights were violated by several individuals and entities, including state officials, local officials, and TigerSwan. Doc. Nos. 1, 44. The Plaintiffs assert these Defendants collectively violated their constitutional rights when they denied the Plaintiffs access to a stretch of road running through North Dakota at a time when the Standing Rock Sioux Tribe and its supporters, including the Plaintiffs, were protesting the construction of the Dakota Access Pipeline ("DAPL") in the area. Doc. Nos. 1, 44. The Standing Rock Sioux Tribe is not a party to this lawsuit.

[¶5] The crux of the Plaintiffs' argument for holding TigerSwan liable for the alleged constitutional violations is that despite portraying itself as a private entity, TigerSwan acted in concert with the State and Local Defendants in such a way as to transform them into state actors acting under the color of state law. Doc. No. 44, ¶¶93-101. In response, TigerSwan asserts the Plaintiffs committed the tort of abuse of process when they named it as a Defendant. Doc. No. 56. It denies it acted under the color of state law or in concert with the State and Local Defendants. TigerSwan further avers it did not possess authority to close the area in question, maintaining only state and local officials possessed that authority. See Doc. No. 56. The Plaintiffs assert the factual allegations in TigerSwan's Second Counterclaim do not state a claim for relief for abuse of process. On this basis, the Plaintiffs assert the claim should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

[¶6] The Court accepts as true the allegations contained in TigerSwan's Second Counterclaim for purposes of ruling on the present Motion. See ADP, Inc. v. Barth-Peffer, Inc., No. 07-CV-055, 2008 WL 163632, at *1 (D.N.D. Jan. 17, 2008) ("A district court must accept the allegations contained in the [counterclaim] as true, and all reasonable inferences from the [counterclaim] must be drawn in favor of the nonmoving party."). The following facts are provided by TigerSwan in its Second Counterclaim.

[¶7] TigerSwan asserts it did not act under the color of state law because it "provided only consultation to the owners of the pipeline Energy Transfer Partners (ETP) who made all decisions relating to the security matters." Doc. No. 56, ¶36(1)-(2). TigerSwan asserts it only provided consultation to ETP, not security, so it "was not hired by or acting in concert with any of the Defendants listed." Doc. No. 56, ¶36(3)-4),(11),(15). TigerSwan alleges ETP hired others to provide security. Doc. No. 56, ¶36(4),(10),(11). It asserts it did not coordinate the security

activities of other companies or law enforcement. Doc. No. 56, ¶36(4),(10),(11). TigerSwan asserts, "any decisions made relating to all issues raised in the Complaint were made by ETP or the authorized law enforcement authorities on site and as such TigerSwan was not responsible for any of the actions alleged in the Complaint." Doc. No. 56, ¶36(5). TigerSwan asserts, it "had nothing to do with public property or public roads; [it] only assisted ETP as to private property, generally owned by ETP." Doc. No. 56, ¶36(12). According to TigerSwan, its Liaison officer did not coordinate with State and Local Defendants, but rather with ETP. Doc. No. 56, ¶36(16). TigerSwan states on multiple occasions in the Second Counterclaim it had nothing to do with the decision to close Highway 1806 or the Backwater Bridge. Doc. No. 56, ¶36(6)-(7),(9),(24)-(25),(27). TigerSwan asserts State authorities did not close the bridge initially. Instead, it was closed because "protestors [ignited] fires on the bridge; [and] the bridge was thereafter considered unstable by the proper legal authorities." Doc. No. 56, ¶36(8),(26).

[¶8] To support the notion it only provided consultation, TigerSwan states that any reports it prepared were prepared for ETP, which then made independent decisions as to what to do with the information. Doc. No. 56, ¶36(5),(14),(19). For example, it asserts, it did not provide "evidence or other information to prosecutors; all recommendations and any information was provided to ETP[,]" which it asserts "had the right to provide whatever it wanted to provide to prosecutors." Doc. No.56, ¶36(20). TigerSwan also asserts the information in reports "did not provide misinformation or misleading information; third persons provided information and [it] merely placed it in a report that was provided to ETP." Doc. No. 56, ¶36(22). On this basis, TigerSwan notes "[a]ny reference of the actions or proclivities of the protesters was gathered and submitted by third persons and not TigerSwan." Doc. No. 56, ¶36(22). Along these same lines, TigerSwan

alleges any reference in a report it gave to ETP as to an Islamic individual was provided by a third party (including law enforcement). Doc. No. 56, ¶36(21).

[¶9] TigerSwan asserts it did not infiltrate the camps and conduct surveillance, noting it "has no idea what 'coding techniques' is." Doc. No. 56, ¶36(22)-(23). It also asserts it did not have an aircraft nor did it direct any aircraft. Instead "ETP or the other defendants might have employed aircraft," and "any reference by anyone to a 'DAPL air asset' does not relate to TigerSwan." Doc. No. 56, ¶36(17).

[¶10] Instead, TigerSwan asserts it "merely took information from third persons and placed such information into daily reports in an organized manner[,]" noting "the only 'intelligence' operations 'conducted' by [it] was the monitoring of open source information from its headquarters in North Carolina." Doc. No. 56, ¶36(13). The information TigerSwan gathered was "the observation and collection of social media postings made by the protesters, which are public record and not a discriminatory act." Doc. No. 56, ¶36(21). In addition, TigerSwan alleges it did not create "folders on any persons but merely provided lists of persons who were on site and trespassing or had been arrested, all of which was derived from open source information that indicated proposed illegal action." Doc. No. 56, ¶36(18).

[¶11] TigerSwan asserts it has been damaged in having to defend this action, and the damages are a proximate cause of the Plaintiffs' actions and misconduct. Doc. No. 56, ¶37. TigerSwan requests an award of attorney fees and costs for having to defend against this action. Id.

C. STANDARD OF REVIEW

I. RULE 12(b)(6)

[¶12] Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a pleading to contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ.

P. 8(a)(2). Rule 12(b)(6) of the Federal Rules of Civil Procedure mandates the dismissal of a claim if there has been a failure to state a claim upon which relief can be granted. In order to survive a motion to dismiss under Rule 12(b)(6), a complaint must contain "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal quotations omitted). A plaintiff must show that success on the merits is more than a "sheer possibility." Id. A complaint does not need detailed factual allegations, but it must contain more than labels and conclusions. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

[¶13] The Court must accept all factual allegations of the complaint as true, except for legal conclusions or "formulaic recitation of the elements of a cause of action." Iqbal, 556 U.S. at 678. A complaint does not "suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" Id. However, the determination of whether a complaint states a claim upon which relief can be granted is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. at 679. Dismissal will not be granted unless it appears beyond doubt the plaintiff can prove no set of facts entitling him to relief. Ulrich v. Pope Cty., 715 F.3d 1054, 1058 (8th Cir. 2013). The burden is on the moving party to prove that no legally cognizable claim for relief exists. 5B Wright & Miller, Federal Practice and Procedure § 1357 (3d ed. 2004); Mediacom Se. LLC v. BellSouth Telecomms., Inc., 672 F.3d 396, 399 (6th Cir. 2012) (the moving party bears the burden on a Rule 12(b)(6) motion).

(1). Timeliness of TigerSwan's Answer to the Plaintiffs' Amended Complaint and Second Counterclaim.

[¶14] The Plaintiffs assert TigerSwan's Answer to the Amended Complaint and its Second Counterclaim were untimely and should therefore be dismissed. Doc. No. 67-1, p. 4. The Plaintiffs assert TigerSwan had fourteen (14) days to file an Answer to its Amended Complaint while

TigerSwan asserts it had twenty-one (21) days. Because the Answer and Second Counterclaim are in response to an amended pleading, Rule 15 of the Federal Rules of Civil Procedure applies.

[¶15] The Plaintiffs filed an Amended Complaint in this matter On February 1, 2019. Doc. No. 44. Rule 15(a)(1)(3) mandates "[u]nless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later." Fed. R. Civ. P. 15(a)(1)(3). Here, there was no time remaining to respond to the original pleading. The Plaintiffs filed their original Complaint on October 18, 2018, and TigerSwan filed its first Answer and Counterclaim on January 11, 2019. Doc. Nos. 1, 38. Therefore, pursuant to Rule 15(a)(1)(3), TigerSwan's answer to the Amended Complaint was due fourteen days after it received service of the Amended Complaint, or February 15, 2019. Federal Rule of Civil Procedure 6(b)(1), however, allows for the Court to extend response deadlines in certain instances.

[¶16] Rule 6(b)(1) provides "[w]hen an act may or must be done within a specified time, the court may, for good cause, extend the time:

> (A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or
> (B) on motion made after the time has expired if the party failed to act because of excusable neglect.

Fed. R. Civ. P. 6(b)(1)(A)(B).

[¶17] The only instances where the Court is not allowed to enlarge deadlines pertains to those matters proceeding pursuant to Rules 50(b),(d), 52(b), 59(b),(d), and 60(b). Fed. R. Civ. P. 6(b)(2). Otherwise, "[d]istrict courts have broad discretion in establishing and enforcing deadlines[.]" In re Baycol Prod. Litig., 596 F.3d 884, 888 (8th Cir. 2010). "[T]here is a general principle that the procedural rules relating to computation of time are to be construed liberally so as to permit the

parties the broadest opportunity for an adjudication of contested issues on the merits." In re Antell, 155 B.R. 921, 931–32 (Bankr. E.D. Pa. 1992)

[¶18] "Federal Rule of Civil Procedure 6(b) authorizes courts to accept late filings where the failure to timely file is the result of "'excusable neglect.'" Deloach v. Standard Ins. Co., 224 F. Supp. 3d 823, 825 (E.D. Mo. 2016). "Excusable neglect is an 'elastic concept' that empowers courts to accept, 'where appropriate . . . late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." Chorosevic v. MetLife Choices, 600 F.3d 934, 946 (8th Cir. 2010) (citing Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 392, 388 (1993)).

[¶19] "The determination of whether neglect is excusable is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." Id. (citation omitted). "Four factors inform this decision: (1) the possibility of prejudice to the opposing party; (2) the length of delay and the possible impact of the delay on judicial proceedings; (3) the party's reasons for delay, including whether the delay was within the party's 'reasonable control'; and (4) whether the party acted in good faith." HSK, LLC v. United States Olympic Comm., 248 F. Supp. 3d 938, 942 (D. Minn. 2017) (citing Chorosevic, 600 F.3d at 946).

[¶20] TigerSwan asserts the Answer to the Amended Complaint and its Second Counterclaim were not untimely, but even if they were, it would not prejudice the Plaintiffs. First, it asserts its counsel contacted the Clerk of Court to ascertain when the Answer to the Amended Complaint was due. Doc. No. 73, p. 7. It asserts the Clerk of Court advised the Answer to the Amended Complaint was due within twenty-one days and the document should be named "Answer to First Amended Complaint." Id. TigerSwan also states its counsel contacted the Plaintiffs' counsel to

relay his understanding that TigerSwan had twenty-one days to respond to the Amended Complaint. Id. at p. 8.

[¶21] The Court acknowledges that "[m]iscalculation of a filing deadline can constitute excusable neglect, even though failure to comply with a deadline is within the party's own control." HSK, LLC, F. Supp. 3d at 942 (citing Sugarbaker v. SSM Health Care, 187 F.3d 853, 856 (8th Cir. 1999)). Here, TigerSwan asserts it took proactive steps to ensure its Answer and Second Counterclaim were timely filed. While TigerSwan's counsel failed to read and understand the deadline himself, the Court finds TigerSwan's mistake is excusable in this instance. This is not a case where TigerSwan failed to file its Answer altogether. However, the Court does not find excusable neglect on this fact alone in this case. Taking into account all the circumstances of this situation, the Court also finds the Plaintiffs have not been prejudiced by a seven-day delay in the filing of an Amended Answer and Counterclaim.

[¶22] TigerSwan asserts its Second Counterclaim is identical to its Counterclaim raised in its first Answer and Counterclaim filed on January 11, 2019. Doc. No. 73, p. 7; see also Doc. No. 38. On this basis, it asserts there is no harm to the Plaintiffs in the Answer to the Amended Complaint and Second Counterclaim being filed on the twenty-first day rather than the fourteenth. While the Court notes the first Counterclaim and the Second Counterclaim are not identical in that the Second Counterclaim incorporates more facts, the Court agrees the Plaintiffs were not prejudiced in this instance. The Plaintiffs were on notice of the legal basis for TigerSwan's Counterclaim, a claim for abuse of process. This is not an instance where TigerSwan alleged a new claim completely unrelated to the previous claim. Additionally, a mere seven-day difference in filing of a substantially similar claim does not result in prejudice to the Plaintiffs. The Court finds TigerSwan has shown excusable neglect in its late filing of the its Answer and Second Counterclaim.

[¶23] Thus, the Court finds TigerSwan's Answer to the Amended Complaint and its Second Counterclaim are considered timely filed due to excusable neglect. TigerSwan's Answer and Second Counterclaim [Doc. No. 56] shall remain as filed in the record. On this basis, the Court will now determine whether TigerSwan's Second Counterclaim states a plausible claim for abuse of process.

(2). TigerSwan's Second Counterclaim of abuse of process.

[¶24] Generally, an "[a]buse of process occurs when a person uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed." PHI Fin. Servs., Inc. v. Johnston Law Office, P.C., 2020 ND 22, ¶ 8, 937 N.W.2d 885, 888. "The two 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. at 889. "In cases involving abuse-of-process claims," there must be "some overt act akin to extortion or attempting to obtain a collateral advantage beyond the issuance of the formal use of process." Id. It also "requires more than the formal use of process itself," which may include:

> Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions. The 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. There is, in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort.

Id.

[¶25] A Plaintiff "must show actual damages suffered as a result of the abuse of process." Wachter v. Gratech Co., 2000 ND 62, ¶ 34, 608 N.W.2d 279, 288. "Good faith is a defense." Id. "The gist of the tort of abuse of process is the misuse or misapplication of the legal process to

accomplish an end other than that which the process was designed to accomplish, and it is the purpose behind the use of the legal process that is controlling." Id.

[¶26] After review of the pleadings, the Court concludes TigerSwan has failed to state a cognizable counterclaim for abuse of process. The crux of TigerSwan's abuse of process claim is TigerSwan did not possess authority to close Highway 1806 and the Backwater Bridge. So, the Plaintiffs' claim against TigerSwan for violation of their constitutional rights is frivolous and constitutes an abuse of process. Doc. No. 56, p. 6. As support of this contention, TigerSwan points to facts in its Second Counterclaim stating it was Energy Transfer Partners who handled interactions with government officials. Doc. No. 73, p. 7. This fact does not support a claim for abuse of process, however. Upon the Court's review of all factual allegations alleged in TigerSwan's Second Counterclaim, the Court finds there are no additional facts to support a claim for abuse of process.

[¶27] Nowhere in TigerSwan's twenty-seven paragraph Second Counterclaim do they allege facts to suggest the Plaintiffs had an ulterior purpose in bringing suit against them. TigerSwan's Second Counterclaim largely rests upon statements supporting its purported defense that it was not intertwined with state and local officials in such a way as to transform it into a state actor, thus opening it up to liability under § 1983. Without facts to support it, the Court cannot conclude that the Second Counterclaim alleges facts showing the Plaintiffs' had an ulterior motive.

[¶28] Likewise, TigerSwan fails to allege facts to show the Plaintiffs committed an "overt act akin to extortion or attempting to obtain a collateral advantage beyond the issuance of the formal use of process." The mere filing of the Complaint cannot be basis of the improper act. See Zuffa, LLC v. Kamranian, No. 1:11-CV-036, 2011 WL 3627301, at *3 (D.N.D. Aug. 17, 2011) ("It is generally accepted that the filing of a complaint is insufficient to establish the tort of abuse of

process."). Instead, TigerSwan must show the Plaintiffs committed an improper act either before the Complaint was filed or after. Stoner v. Nash Finch, Inc., 446 N.W.2d 747, 752 (N.D. 1989); see also Riemers v. Hill, 2016 ND 137, ¶ 23, 881 N.W.2d 624, 632 ("A demand for collateral advantage that occurs before the issuance of process may be actionable, so long as process does in fact issue at the defendant's behest, and as a part of the attempted extortion.").

[¶29] TigerSwan has failed to allege *any* facts to support this claim. TigerSwan has not alleged the Plaintiffs engaged in some sort of coercion or extorsion to obtain a collateral advantage from TigerSwan or to get TigerSwan to surrender property or money. See Watcher, 608 N.W.2d at 287-88 ("Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions."). TigerSwan's overall basis for the abuse of process claim is that it did not possess the actual authority to close Highway 1806 and the Backwater Bridge. On this basis alone, TigerSwan asserts the Plaintiffs committed the tort of abuse of process by naming it as a Defendant. Without a showing that the Plaintiffs had an ulterior motive and committed some overact akin to extortion, the claim for abuse of process must be dismissed.

D. CONCLUSION

[¶30] The Court **GRANTS** the Plaintiffs' Motion to Dismiss TigerSwan's Second Counterclaim [Doc. No. 67] without prejudice. As a result, the Court **FINDS AS MOOT** the Plaintiffs' Motion to Dismiss TigerSwan's original Counterclaim [Doc. No. 45].

[¶31] **IT IS SO ORDERED.**

DATED September 1, 2020.

Daniel M. Traynor, District Judge
United States District Court