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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court No. 20180338
Burleigh County No. 08-2017-CV-01873

North Dakota Private Investigative and Security Board,	)
Plaintiff/Appellant and Cross Appellees,	)
vs.	)
TigerSwan, LLC and James Patrick Reese,	)
Defendants/Appellees and Cross Appellants.	)

APPELLEE AND CROSS-APPELLANTS' REPLY BRIEF

Case No. 08-2017-CV-01873 before the Honorable John Grinsteiner Presiding, Burleigh County District Court, South Central Judicial District, On Cross Appeal from the Following Orders:

1) Order Denying Motion to Dismiss James Patrick Reese 4-16-18, **Docket No. 121**;

2) Order Denying Defendants' Motion in Limine 4-16-18, **Docket No. 122**;

3) Order Denying Defendants' Motion for Summary Judgment (Count I and II) 4-16-18, **Docket No. 123**;

4) Order Granting Defendants' Motion for Summary Judgment (Count III) 4-27-18, **Docket No. 132**, as to the reasoning employed;

5) Order Granting Defendants' Motion to Dismiss Counts I and II 5-30-18, **Docket No. 171**, as to the reasoning employed;

6) Order Denying Plaintiff's Motion for Reconsideration 8-6-18, **Docket No. 188**, as to the reasoning employed;

7) Order for Judgment 8-10-18, **Docket No. 192**; and

8) Judgment filed 8-10-18, **Docket No. 193**.

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¶1 ADDITIONAL ARGUMENT

¶2 Citing merely to seventeen (17) of TigerSwan's paragraphs in TigerSwan's Appellee's Brief the Board makes eight incorrect and unsupported assertions in its own brief at Para. 4. Significantly the Board totally fails to provide any reference to the record presented to the District Court supporting any on these bald assertions, and instead merely falsely claims that TigerSwan in its brief admitted" to these items. The eight assertions made by the Board are are simply untrue and a clear misstatement of TigerSwan's actions. Instead of providing some basis for these bald assertions, the Board merely "cites" to 17 paragraphs of TigerSwan's appellant's brief –which most certainly does not contain any basis whatsoever for the false assertion of supposed "admissions" by TigerSwan. TigerSwan didn't admit to any of these things as being within the realm of the applicable to the statute at issue. and then to add insult to injury, the Board and its assistant attorney general claims that the attorney general's self-serving interpretations justify its own interpretation.

¶3 So now let's look – as the District Court did – to each of the claimed violations and apply the actual statute in question. First of all, what we do know is that the record provided to the District Court included TigerSwan's detailed affidavits setting for the factual basis for the fact that

TigerSwan was not, in the state of North Dakota, doing anything that is in violation of the actual statute at issue. The Board in its response to the summary judgment motion failed to provide any counter evidence – actual evidence – to show this not to be the case. Instead of providing any actual evidence that TigerSwan violated the statute the Board instead did what it has done throughout this case: misinterpret the statements of TigerSwan that indicate that what it actually did did not violate the statute at issue. The lower court did indeed err in not determining that summary judgment against the Board was justified. It instead decided to dismiss the action.

¶4 According to the Board (again at Para. 4), TigerSwan "admits to acting as ETP's proprietary security." News to TigerSwan. Our response: We have no idea what the Board means by "proprietary" security. TigerSwan did not conduct any security function as defined by the statute. TigerSwan was hired by ETP to provide consultation and assist in coordinating those entities actually doing security. TigerSwan did not conduct security; it merely provided recommendations to ETP and ETP decided what these entities would do.

¶5 As to the Board's assertion that John Porter was employed as chief security officer for DAPL security, the fact that John Porter's title was "chief security officer" does not mean he himself conducted security. The

head of Walmart security does not conduct security; he tells those licensed to do security what to do. As TigerSwan's point man John Porter provided recommendations to ETP; ETP hired its own security companies to do the security, and those security companies were required to be licensed because they were indeed providing security. Mr. Porter provided recommendations. More importantly, if one reviews the actual text of the statute it is clear that John Porter was not conducting the activities of security.

¶6 As to the Board's assertion that TigerSwan had deployed its Guardian Angel system to protect people and property, the Guardian Angel system is nothing more than tracking a significant human asset, such as the president of ETP, while on site. This monitoring was done out-of-state from TigerSwan headquarters in North Carolina and consisted of nothing more than observing the location of that person real time. As before, the security companies actually hired to do security would intercede if necessary. Tracking someone or something from North Carolina does not fall within the confines of the statute at issue and does not constitute providing security in North Dakota. To decide otherwise would place every parent who uses an app on his or her child's phone as providing security services requiring licensure by this Board.

¶7 As to the Board's assertion that TigerSwan falls under the statute at issue by reviewing invoices to prevent fraud, reviewing invoices is an accounting function; by this logic, every accountant in North Dakota would have to be licensed by the Board. Reviewing invoices does not fall under the statute at issue.

¶8 As to the Board's assertion that TigerSwan falls under the statute at issue by conducting internet research on protestors, all internet searches were conducted from its headquarters in North Carolina; the Board simply has no jurisdiction for such activities by TigerSwan outside the state of North Dakota. By this logic, the statute requires that anyone in the State of North Dakota who uses a "search engine" (such as Google) or social media (such as Twitter) to keep up with what was happening at the protest site to be licensed by the Board.

¶9 As to the Board's assertion that TigerSwan falls under the statute at issue by supposedly "investigating" law enforcement interactions with protestors, the Board fails to provide any evidence of any investigation in the State of North Dakota by TigerSwan. Simply using the word "investigating" doesn't make it so and doesn't make the statute applicable. TigerSwan merely took the information supplied by third persons (such as

law enforcement personnel) and put that information in the daily reports; any "investigating" was done by others.

¶10 As to the Board's assertion that TigerSwan falls under the statute at issue by directing the deployment of aerial surveillance and compiling the data collected, there is no proof in the record that TigerSwan did any "aerial surveillance" – the photos taken from the air by law enforcement or third party entities were not done by TigerSwan; the information was provided to TigerSwan to put in its reports, but TigerSwan did not conduct any "aerial surveillance" and the Board has provided no proof of TigerSwan doing so. Putting false and unsupported assertions in a brief should not be used to justify the complete lack of evidence to the contrary. Where no counter evidence is provided, summary judgment should have been granted.

¶11 As to the Board's assertion that TigerSwan falls under the statute at issue by collecting and compiling information collected from other security providers, TigerSwan didn't "collect" information and the Board has no proof whatsoever that it did so. TigerSwan received information from third parties authorized to gather such information – including law enforcement and actual security entities – and placed that information in an organized report. A careful reading of the statute clearly demonstrates that

taking information from those who actually fall under the statute and turning it into an organized daily report does not fall under the statute.

¶12 As to the Board's discussions relating to the standard for issuing an injunction under N.D.C.C. § 43-30-10 versus N.D.C.C. Chapter 32-06 (Para. 6 of Boards brief) TigerSwan has already addressed in our previous brief this issue and those arguments will not be repeated here except insofar as pointing out that the lower court properly rejected the Board's attempt to create new law by its assertion that all the other injunctive relief standards should be rejected and supplanted by the Board's very own self-created injunctive relief standards supposedly existing within the statute relating to the Board having the option to go to court and ask for an injunction. The Board's attempt to throw out all injunctive relief standards by creating a distinction between a temporary and permanent injunctive relief should be rejected.

¶13 As to the Board's assertion that TigerSwan claims the District Court properly denied the Board's Rule 56(f) motion because the Board chose not to conduct discovery (Para. 9 of Boards brief), it is the District Court that made this point and this claim. This finding of fact should not be set aside by this court. Moreover, the Board asserted in its original document [Docket No. 2 – verified complaint and request for injunction]

that it presently – at the time of bringing this civil action – had sufficient basis to obtain injunctive relief. Why then does it need any discovery? either it has the goods, or it doesn't. And it didn't. At Paragraph 9 the Board stated that TigerSwan created situation reports, but doing so is not a violation of the statute at issue. At Paragraph 10 the Board provides a litany of supposed TigerSwan activities that it considered violations of the statute, and yet when TigerSwan by proper proof through affidavit stated under oath that its activities do not fall under the statute at issue, the Board suddenly had no real proof and wanted to avail itself of discovery against TigerSwan to force it to provide evidence against itself. Instead of providing specific and direct proof of any actual violation, the Board filed thousands of pages of documents, making the District Court a ferret seeking out any justification for the Board's many assertions that TigerSwan was in some way violating the statute at issue. The best the Board could do is try to twist the statement of James Reese when TigerSwan – at the demand of the Board – applied for a license even though it didn't believe it needed one because its activities did not fall under the statute at issue. TigerSwan merely asserted – and continues to assert – that if the Board doesn't have the evidence to obtain an injunction on day one, then it shouldn't have brought the request for injunctive relief. Discovery should not have been necessary or allowed.

You don't bring a suit for injunctive relief hoping that you will eventually find a proper basis for such relief. The Board most certainly should not be able to use a request for injunctive relief as the means to actually discover evidence of the need for such an injunction. That alone, as indicated by TigerSwan, is a complete abuse of process.

¶14 As to the issue raised by the Board relating to the District Court only having jurisdiction to issue an administrative fee if the court first issues an injunction (Para. 13 of its brief), TigerSwan has already addressed in our previous brief this issue and those arguments will not be repeated here except to point out that making an administrative agency use its own administrative procedure first (before bringing in the courts when not necessary) is not "absurd" and actually makes perfect sense. The only reason there is a need to "relitigate" the issue is because the administrative entity improperly rushed into the courts instead of doing its job as an administrative body.

¶15 In regards to the assertion by the Board that the doctrines of "abstention," "separation of powers," "judicial economy," and "inverse exhaustion of remedies" were indeed raised below (Para. 14 of its brief), this is simply not true. These issues were raised in the following TigerSwan briefs submitted to the District Court: see TigerSwan Briefs Docket No. 135,

¶5, Docket No. 168, ¶15, Docket No. 169, ¶15. The issue was indeed raised, and one need not provide numerous citations to the simple assertion that an administrative agency should first use its own procedures before improperly and unnecessarily running to the judicial branch. Counsel for TigerSwan has most certainly provided in the briefs to this court substantial citation to authority relating to this issue, see appellant's brief dated 12-17-18.

¶16 CONCLUSION

¶17 For the reasons stated above, TigerSwan and Reese request that this Court reverse the District Court for its failure to applying some form of abstention doctrine and dismiss the action due to the fact that the Board is required, where there is insufficient basis to request an injunction to the District Court, to proceed first administratively, and separately affirm the lower court's decision to dismiss based on abstention, inverse exhaustion of remedies, or primary jurisdiction doctrines.

Dated this 25th day of January, 2019.

/s/ Lynn M. Boughey
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APPELLEE AND CROSS-APPELLANTS CERTIFICATE OF SERVICE

¶1 Defendants/Appellees and Cross Appellants, TigerSwan, LLC and James Patrick Reese, have served the following documents:

1. Appelles and Cross Appellants Reply Brief 1-25-19; and
2. Certificate of Service 1-25-19

The aforementioned documents were served on the 25th day of January, 2019 by email to:

Monty Rogneby	mrogneby@vogellaw.com
Justin Hagel	jhagel@vogellaw.com

¶2 Dated this 25th day of January, 2019.

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