IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0410

CRAZY MOUNTAIN CATTLE CO., RICHARD JARRETT, and ALFRED ANDERSON,

Plaintiffs and Appellants,

v.

WILD EAGLE MOUNTAIN RANCH, ROCK CREEK RANCH I LTD., a Texas limited partnership, YELLOWSTONE RIVER RANCH d/b/a DIANA'S GREAT IDEA, LLC, a Montana limited liability company; ENGWIS INVESTMENT COMPANY, LTD., a Montana limited partnership; R.F. BUILDING COMPANY, LP, a Montana limited partnership,

Defendants and Appellees.

APPELLANTS' OPENING BRIEF

On Appeal from the Montana Sixth Judicial District Court
Park County, Cause No. DV-2020-142
The Honorable Michael Hayworth, Presiding

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

Two issues are presented:

1. Crazy Mountain Cattle, Richard Jarrett, and Alfred Anderson's (Jarrett and Anderson) Second Amended Complaint alleges that Defendants attempted to buy Jarrett and Anderson's land to prevent a wind farm from being built. When they were not successful in buying Jarrett and Anderson's land, Defendants filed an action for a nuisance claim that they knew they could not win, with the ulterior motive to control all of Jarrett and Anderson's land. Defendants' improperly used litigation to make the project unfinanceable. The District Court held that "The alleged collateral act – coercing Plaintiffs from using their land to generate income from wind power – does not fit within precedent's collateral act requirement." Did the District Court err?

2. Jarrett and Anderson's other counts for relief were dismissed with no analysis, as derivative of the abuse of process claim. Was that error?

STATEMENT OF THE CASE

Jarrett and Anderson filed their Complaint in this action, *Jarrett, Anderson, and Crazy Mountain Cattle v. WEMR et al*, Cause No. DV-20-142, in September of 2020.[1]

[1] On remand following *Diana's Great Idea v. Crazy Mountain Wind* Cause No. DV 2018-161, appealed in *Diana's Great Idea, LLC v. Jarrett*, 401 Mont. 1, 471 P.3d 38, 2020 MT 199.

The District Court dismissed the complaint without prejudice. Jarrett and Anderson requested and were granted permission to file their Second Amended Complaint, which they did in April of 2021 bringing four substantive[2] and two remedy claims.[3]

The District Court dismissed the entire Second Amended Complaint with prejudice, finding that Jarrett and Anderson could not satisfy the elements of an abuse of process claim as a matter of law.

Jarrett and Anderson appeal the District Court's July 22, 2021 Order dismissing the Second Amended Complaint with prejudice under 12(b)(6).

STATEMENT OF FACTS

The following facts were set out in the Second Amended Complaint:

Jarrett and Anderson have owned their property in Park and Sweet Grass Counties throughout most of the 1900s until the present.[4] Jarrett and Anderson spent two decades developing a wind farm on their ranches.[5]

During the time Jarrett and Anderson were developing a wind farm, each of the Defendants bought up old Montana ranches from the Yellowstone River to and

[2] Tortious Interference with contract; Tortious Interference with economic business opportunity; Abuse of Process; and Private Property Taking (Constructive Trust and Unjust Enrichment).
[3] Count V, Prejudgment Interest; and Count VI, Punitive Damages.
[4] Appendix Document 1, Plaintiffs Second Amended Complaint, Doc. Seq. 76.000, ¶ 13.
[5] App. Doc. 1, Complaint, ¶¶18-29,

including the summits of the Crazy Mountains, leaving Jarrett and Anderson's working ranches surrounded by the Defendants' trophy conglomerates.[6]

Through the 1990s and 2000s, as the Defendants were buying old Montana ranches, Jarrett and Anderson's properties had wind easements on record.[7] These contracts are statutorily authorized.[8] Jarrett and Anderson had 60 feet tall, bright orange and white meteorologic towers marking the outermost boundaries of the wind farm, plainly visible from the county road. MET towers are.[9] Several public proceedings took place regarding the development process.[10] Defendants participated in these public proceedings, attempting to keep it from getting built,[11] but never claimed that the wind project might be a nuisance to them.[12]

In July 2014, Defendant Gordy's attorney sent an email to Jarrett stating: "the parties Devlan and I represent are interested in pursuing discussions with Mr. Jarrett to reach some long-term resolution of the overarching dispute regarding wind development on Mr. Jarrett's property."[13]

In October of 2014, Gordy again attempted to buy Jarrett's wind rights, and his attorney sent the following email: "my clients are interested in negotiating with

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[6] App. Doc. 1, Complaint, ¶¶30-37.
[7] App. Doc. 1, Complaint, ¶¶ 42-43; Exh. 38, Exh. 39.
[8] Section 70-17-401 *et seq* MCA.
[9] Doc App. Doc. 1, Complaint, ¶¶ 23-24, 45.
[10] App. Doc. 1, Complaint, ¶¶ 47-52.
[11] App. Doc. 1, Complaint, ¶¶ 47-49.
[12] App. Doc. 1, Complaint, ¶ 49.
[13] App. Doc. 1, Complaint, ¶ 16, Exhibit 24, p. 254-255; Exhibit 25.

Mr. Jarrett regarding wind development on your client's property. As your initial offer notes, there are numerous further and additional terms that must be negotiated aside from a monetary settlement figure.[14]

In September of 2015, Gordy's attorney sent another email: "Mr. Gordy (not sure if Chesnoff is involved still) with an offer of $655,000.00. I am assuming the offer for the same rights is contemplated (wind, feed lot etc.) but I do not know. All we discussed was the monetary sum."[15]

The offers to buy control over Plaintiffs' property were rejected.[16] Gordy testified: "It went on all summer of 2015, and then in September of 2015, I received an e-mail from my attorney […] informing me that Mr. Jarrett had turned down my last offer of $655,000.00 and did not want to negotiate any longer."[17]

Meanwhile, the parties were actively pursuing development for oil and gas. In 2008, WEMR executed an Oil and Gas lease for royalties covering 19,879.32 acres in Sweet Grass County.[18] Gordy was planning and developing an open pit mine in Wisconsin. Gordy acknowledged that where it suits his financial interests, he will pursue mining and oil and gas in any area.[19]

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[14] App. Doc. 1, Complaint, ¶ 16 Exh. 25 p. 4.
[15] App. Doc. 1, Complaint, ¶ 16 Exh. 25 p. 4.
[16] App. Doc. 1, Complaint, ¶¶ 16, 76, Exh. 24, p. 254-255; Exhibit 25.
[17] App. Doc. 1, Complaint, ¶ 16 Exh. 24.
[18] App. Doc. 1, Complaint, ¶ 31, Exhibit 47.
[19] App. Doc. 1, Complaint, ¶ 32.

In July of 2016, approval for the wind farm on Plaintiffs' land was filed as Crazy Mountain Wind with the Montana Public Service Commission. The public filing contained the location of the proposed turbines on Plaintiffs' land, as well as the power purchase agreement and its commercial operation deadlines. The PPA is the life blood of a wind farm, without which the project cannot be financed.[20] The PPA filed on the Commission's website had a Guaranteed Commercial Operation for Crazy Mountain Wind as December 31, 2019, and it if was not online by that date, NorthWestern would terminate the PPA.[21]

Defendants testified that they "monitor the Public Service Commission website." Engwis testified, "I noticed on the Public Service Commission website that there was another evolution of this Crazy Mountain Wind development."[22]

Under the terms of their Wind Lease Agreements with Crazy Mountain Wind, Jarrett and Crazy Mountain Cattle Company would realize income of $4,837,090 from the Crazy Mountain Wind project once it was operational.[23] Anderson would realize income of $4,180,925 from the Crazy Mountain Wind project once it was operational.[24]

On February 1, 2017, Engwis' attorney Stephen Woodruff wrote a letter

[20] App. Doc. 1, Complaint, ¶¶ 40, 50-52.
[21] App. Doc. 1, Complaint, ¶¶ 40, 50-52.
[22] App. Doc. 1, Complaint, ¶¶ 40, 50-52.
[23] App. Doc. 1, Complaint, ¶ 42, Exh. 38.
[24] App. Doc. 1, Complaint, ¶ 43, Exh. 39.

noting "ongoing concerns" and saying for the first time the wind project "will constitute a nuisance that adversely affects neighboring landowners."[25]

In August of 2017, Crazy Mountain Wind executed a final PPA with NorthWestern. The final PPA had the same Guaranteed Commercial Operation Date – December 31, 2019 – as the original PPA filed with the Commission and available online as of July 20, 2016.[26]

In 2018, a political operative was retained to form "stopcrazymtwindfarm" designed to agitate against Crazy Mountain Wind. Defendants formed:

> "a pro-property rights, pro-preservation group dedicated to protecting our small-town communities from the growing threat of industrialization. As neighbors, we understand that the future of our communities depends on careful stewardship of our lands and we are committed to striking a balance between responsible development and conservation."

Objections were posted to the propaganda put out by the Defendants:

> This from someone who does fracking and oil on our public lands. A case of "I wont poop in my own back yard, but I dont have any problem pooping in yours" do a little research on SG Intrests, and Russel Gordy, and decide who's best interest he is really looking out for. You will find litigation, enviromental messes, etc. [27]

On September 28, 2018, Defendants filed their anticipatory "nuisance" complaint. Defendant WEMR intervened.[28]

[25] App. Doc. 1, Complaint, ¶ 53.
[26] App. Doc. 1, Complaint, ¶ 57.
[27] App. Doc. 1, Complaint, ¶ 54.
[28] App. Doc. 1, Complaint, ¶¶ 66-68.

The hearing on the injunction was held February 21 – 23, 2019. At a break during the hearing, Chesnoff was overheard saying he knew private property rights win out in Montana, but he wanted to delay the project – by 4 to 5 months – so that they could kill it off.[29] Chesnoff is in Montana about 60 days out of the year.[30]

Gordy testified that he could not see the wind turbines from his house. When asked if he could hear the turbines Gordy said "I don't know. I'm about three miles from them, so I don't know how loud the noise is. I don't know that."[31] Just before the hearing, Mr. Gordy told the *Livingston Enterprise* that what he was really mad about was a "lack of zoning."[32]

Engwis admitted that what he wanted was to "control what goes on in and around that landmass. If you have interceding parcels, you can't control them and you're subject to the mercy of whatever goes on next door."[33] Engwis testified that he used every method at his disposal to stop the project.[34]

MacMillans did not show up for the hearing. WEMR did not put on evidence of the wind farm might be a nuisance to the MacMillans personally.[35]

In March of 2019, the District Court issued an injunction. On July 1, 2019,

[29] App. Doc. 1, Complaint, ¶ 107.
[30] App. Doc. 1, Complaint, ¶ 34.
[31] App. Doc. 1, Complaint, ¶ 83.
[32] App. Doc. 1, Complaint, ¶ 105.
[33] App. Doc. 1, Complaint, ¶ 84.
[34] App. Doc. 1, Complaint, ¶ 85.
[35] App. Doc. 1, Complaint, ¶ 108.

Crazy Mountain Wind gave the district court notice that the injunction made it impossible to obtain the necessary financing to build the wind farm. Crazy Mountain Wind cancelled its contracts with the Plaintiffs because it was not possible to finance the project with the injunction pending.[36] Defendants moved to dismiss without prejudice. Plaintiffs asked for summary judgment on all counts of the complaint, arguing that because Crazy Mountain Wind was dead, it could never be a nuisance to the Defendants.[37]

Plaintiffs appealed dismissal of their counterclaim. This Court reversed.[38] On remand the District Court dismissed Plaintiffs' complaint without prejudice. Plaintiffs filed their Second Amended Complaint. The District Court dismissed with prejudice, finding Plaintiffs failed to state a claim for relief.[39] Plaintiffs appeal the July 22, 2021, Order dismissing the Second Amended Complaint.

STANDARD OF REVIEW

This Court reviews de novo a district court's ruling on a M. R. Civ. P. 12(b) motion to dismiss.[40] A district court's conclusions of law are reviewed for correctness.[41] A complaint fails to state a claim pursuant to M. R. Civ. P. 12(b)(6)

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[36] App. Doc. 1, Complaint, ¶ 110-111.
[37] App. Doc. 1, Complaint, ¶ ¶ 115- 117.
[38] *Diana's Great Idea, LLC v. Jarrett*, 401 Mont. 1, 471 P.3d 38, 2020 MT 199.
[39] Appendix Document 2, Order Granting Motions to Dismiss (With Prejudice), Doc. Seq. 102.000.
[40] *Plakorus v. Univ. of Mont.*, 2020 MT 312, ¶ 8, 402 Mont. 263, 477 P.3d 311; *Salminen v. Morrison & Frampton, PLLP*, 2014 MT 323 ¶ 18, 377 Mont. 244, 339 P.3d 602.
[41] *Plakorus*, 2020 MT 312, ¶ 8.

if the plaintiff would not be entitled to relief based on any set of facts that could be proven to support the claim.[42] On review, this Court construes "all well-pled allegations and facts" as true and in the "light most favorable to the plaintiff."[43]

SUMMARY OF THE ARGUMENT

Issue 1. Dismissal of Count III of the Second Amended Complaint.

Dismissal of Count III (abuse of process) is reversible error for two reasons:

1. The Second Amended Complaint alleges facts that Defendants had the ulterior motive of controlling all of Jarrett and Anderson's land;
2. The Second Amended Complaint alleges Defendants filed their nuisance litigation for the improper purpose of delaying financing so it could not perform under the terms of its power purchase contract – an outcome they could not attain through legitimate means, to obtain the collateral advantage of controlling Plaintiffs' land, which they had tried unsuccessfully to buy.

Issue 2. Dismissal of Counts I, II, and IV of the Complaint.

The District Court dismissed with prejudice Counts I (tortious interference with a contract), II (tortious interference with economic business opportunities), and IV (Private Property Taking - Constructive Trust and Unjust Enrichment),

[42] *Plakorus*, 2020 MT 312, ¶ 8; *Missoula YWCA v. Bard,* 1999 MT 177, ¶ 3, 295 Mont. 260, 983 P.2d 933; *Woods v. Shannon*, 2015 MT 76, ¶ 9, 378 Mont. 365, 344 P.3d 413, citing *Meagher v. Butte-Silver Bow City-County*, 2007 MT 129, ¶ 15, 337 Mont. 339, 160 P.3d 552.
[43] *Scheafer v. Safeco Ins. Co.,* 2014 MT 73, ¶ 14, 374 Mont. 278, 320 P.3d 967; *Tally Bissell Neighbors v. Eyrie Shotgun Ranch,* 2010 MT 63, ¶ 15, 355 Mont. 387, 228 P.3d 1134.

concluding that failure of the abuse of process claim necessarily determined that these claims fail as well. These torts are distinct from the elements of proof for an abuse of process claim. The Second Amended Complaint alleged facts that establish the Defendants interfered with the Plaintiffs business contracts and economic opportunities. Defendants unjustly benefitted from their actions.

ARGUMENT

I. The complaint sets out facts to support an abuse of process claim.

Count III alleges abuse of process. The two elements of abuse of process are: 1) ulterior motive; and 2) a "willful use of process not proper in the regular conduct of the proceeding."[44] To determine when a willful use of process that is not proper has occurred courts may consider whether the process was being used to coerce another to "do some collateral thing [that he] could not be legally and regularly compelled to do."[45]

The District Court found that Jarrett and Anderson did not "identify a collateral act that Defendants sought to coerce from plaintiffs."[46] The District Court found that a "collateral act" must be an affirmative "act" – it cannot be a mere "effect" and it must be separate from the underlying end Defendants sought.

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[44] *Salminen*, 2014 MT 323 ¶ 29; *Spoja v. White*, 2014 MT 9, ¶ 19, 373 Mont. 269, 317 P.3d 153 ; *Seltzer v. Morton*, 2007 MT 62, ¶ 57, 336 Mont. 225, 154 P.3d 561.
[45] *Salminen*, 2014 MT 323 ¶ 29, citing *Judd v. Burlington Northern*, 2008 MT 181, ¶ 24, 343 Mont. 416, 186 P.3d 214.
[46] App. Doc. 2, Order p. 9:13-14.

The District Court held that forcing Plaintiffs to keep their land as it is, without a wind farm, is not a collateral advantage because it is what the Defendants could have accomplished through a proper nuisance lawsuit.[47]

A. The Complaint set outs facts establishing an ulterior purpose.

A successful claim for abuse of process depends upon proof that the defendant made a "willful use of process not proper in the regular conduct of the proceeding, and that the process was used for an ulterior purpose."[48] The District Court found that the "alleged ulterior purpose is that the Defendants sought to 'kill' the wind energy Project, causing financial harm to Plaintiffs."[49]

The District Court incorrectly set out the allegations in the Second Amended Complaint. The Complaint alleged that the Defendants filed the nuisance litigation "for the ulterior purpose of *controlling all of Jarrett and Anderson's land* and in a way they could not otherwise do."[50] The Complaint specifically alleged that the Defendants had the "ulterior purpose *of controlling Jarrett and Anderson's land* and financially squeezing Jarrett and Anderson off their land so that corporate defendants can effectively own the entirety of the old time Montana ranches in that

[47] App. Doc. 2, Order p. 9:15-20.
[48] *Salminen*, 2014 MT 323 ¶ 29, citing *Spoja v. White*, 2014 MT 9, ¶ 19, 373 Mont. 269, 317 P.3d 153; *Seltzer v. Morton*, 2007 MT 62, ¶ 57, 336 Mont. 225, 154 P.3d 561; and also citing *Brault v. Smith*, 209 Mont. 21, 29, 679 P.2d 236, 240 (1984).
[49] App. Doc. 2, Order p. 8:9-11.
[50] App. Doc. 1, Second Amended Complaint ¶ 67 (all Defendants); ¶ 82 (Chesnoff); ¶ 83 (Gordy); ¶ 85 (Engwis); ¶ 86 (WEMR); ¶ 92.

area, even though they tried to buy them and were rejected."[51] The Complaint also alleges: "Without a legal and valid means to do so, they used litigation as a tool to accomplish their ulterior purpose of controlling Jarrett and Anderson's land, and not for their stated purpose of adjudicating a nuisance and trespass action."[52]

The ulterior purpose is not as the District Court characterized it (to 'kill' the wind energy Project, causing financial harm to Plaintiffs) but to control the Plaintiffs' land. This Court address the "ulterior purpose" element of abuse of process claims in *Salminen v. Morrision*. In *Salminen*, Centennial Contracting obtained a writ of execution against the Salminens. Centennial seized virtually everything in the Salminen's home. Afterward, the district court found the personal property in the home exempt.[53]

Salminen's brought an abuse of process claim. The ulterior motive was to "coerce them to come up with money to satisfy the civil judgment in order to get their exempt personal property back [....]."[54] The District Court dismissed Salminen's abuse of process claim, finding that Centennial and its attorneys were seeking to satisfy a civil judgment.[55]

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[51] App. Doc. 1, Second Amended Complaint ¶¶ 109, 112.
[52] App. Doc. 1, Second Amended Complaint ¶ 114, see also ¶¶ 65, 115, 121, 128, 129, 130, 131, 138, 139, 140-142, 146, 149.
[53] *Salminen*, 2014 MT 323 at ¶¶ 4-16.
[54] *Salminen*, 2014 MT 323 at ¶ 28.
[55] *Salminen*, 2014 MT 323 at ¶ 30.

The Supreme Court reversed, finding that Salminen's were not contending there was an abuse of process because Centennial had executed a warrant. Rather, the contention was that Centennial had wrongfully obtained a warrant authorizing entry into Salminen's home, and once inside, they seized clearly exempt property. The Court found the allegations supported an abuse of process claim, because they alleged Centennial was using the process as a threat or club to deprive the Salminens of their personal property.[56]

Similarly, Plaintiffs are not contending that the Defendants' ulterior motive is to 'kill' the wind energy Project, causing financial harm to Plaintiffs, as the District Court characterized. Rather, Plaintiffs are contending that the ulterior motive is to control their land, after being unable to buy it. Here, as in *Salminen*, the ulterior purpose is to gain control of something otherwise unattainable.

When considering the allegations of the Complaint in the light most favorable to plaintiffs, a reasonable inference from that evidence is that Defendants wanted to use the cancellation of the project as a means to not only control Plaintiffs' land, but to financially devastate their ranches, forcing them into a sale of their ranches to the Defendants, an act that they could not otherwise accomplish – and had tried, and failed, to do. Considering that Defendants previously made offers to purchase Plaintiffs' land, and in light of the fact that the Plaintiffs' stood

[56] *Salminen*, 2014 MT 323 at ¶ 31.

to gain several million dollars of revenue from the wind project, Defendants knew that the loss of that revenue for these old Montana ranches would put them in dire financial conditions. That would potentially result in their need to sell the ranches, or at least put them in a situation that would make the Defendants' offers to purchase them more palatable. Those are outcomes that the Defendants desired in the first place, but could not otherwise obtain. Thus, the Defendant's ulterior motive was to accomplish something they could not get from legitimate litigation.

The District Court erred in re-framing the alleged ulterior motive as being to "kill" the wind project, which is not what the Complaint alleges. The District Court not only failed to meet the 12(b)(6) standard, but it also actually re-wrote the Complaint.

Defendants used the nuisance litigation as a threat or club to extort from Plaintiffs complete control over their private property – control that Plaintiffs had refused to sell, and which Defendants could not otherwise lawfully obtain. Engwis testified what he really wanted was to "control what goes on in and around that landmass." Defendants sought to buy Plaintiffs' land. They were unsuccessful. Unable to control Plaintiffs' land through legal means, they filed a nuisance suit they could not win to control land they did not own.

The District Court erred in re-writing the Complaint. The Defendants had the ulterior motive of controlling land they were not able to buy, and applying the

correct standard, dismissal under 12(b)(6) was erroneous.

B. Count III alleges an improper purpose to gain a collateral advantage.

The District Court found: "Under Montana law, a viable abuse of process claim requires Plaintiffs to identify 'a willful act in the use of process not proper in the regular conduct of the proceeding' which, requires a qualifying collateral act."[57] The District Court found that the mere "collateral effect" of controlling Plaintiffs' land does not constitute abuse of process. Under the District Court's framework the Plaintiffs must prove that they were forced to *do* some affirmative act – recant an opinion, or turn over customer records – they otherwise had no legal obligation to do. A collateral *effect* – getting arrested after appearing for a deposition, or having your personal items seized – does not qualify.

The District Court's application of abuse of process case law errs in requiring a "*qualifying* collateral act." The District Court concluded that "The alleged collateral act – coercing Plaintiffs from using their land to generate income from wind power – does not fit within precedent's collateral act requirement."

The leading case on abuse of process in Montana is *Seltzer v. Morton*[58] finding "an abuse of process entails 'an attempt by the plaintiff to use process to coerce the defendant to do some collateral thing which he could not be legally and

[57] App. Doc. 2, Order p. 10:4-7, quotations in original.
[58] *Seltzer v. Morton*, 2007 MT 62, 336 Mont. 225, 154 P.3d 561.

regularly compelled to do.'"[59] Morton's *stated purpose* in suing Seltzer was "to seek adjudication on the merits" as to whether Morton's painting was an authentic Russell and whether Seltzer's opinion to the contrary was incorrect.[60] But, Seltzer had shown that what Morton really wanted was for Seltzer to lie about his professional opinion under oath.[61] Morton was using *"*the suit as an instrument of coercion, *rather than a legitimate means to resolve a genuine dispute*."[62]

The District Court found the "collateral advantage" being gained requires something *more* and *different from* using litigation for an improper purpose. The fact that the nuisance lawsuit might have had the same outcome as the "collateral act" that they were trying to force the Plaintiffs to take before they filed the suit, is not determinative. If that were the standard, the *Seltzer* claim could never have been brought. According to the District Court's improper purpose rationale, the improper purpose to which Seltzer claimed the Defendants put the litigation would not have carried the day because it was "no different" than what was sought in the litigation. That outcome is clearly wrong under the current law.

The District Court compared the facts in this case to those in *Bull Mountain*

[59] *Seltzer v. Morton*, 2007 MT 62 at ¶ 57, citing *Brault v. Smith*, 209 Mont. 21, 28-29, 679 P.2d 236, 240 (1984).
[60] *Seltzer v. Morton*, 2007 MT 62 at ¶ 62, ¶ 44.
[61] *Seltzer v. Morton*, 2007 MT 62 at ¶ 62.
[62] *Seltzer v. Morton*, 2007 MT 62 at ¶ 58, emphasis added.

Sanitation.[63] Allied Partners opposed Bull Mountain entering the garbage hauler business. Allied's *stated* purpose was to contest the Certificate issued to Bull Mountain. Bull Mountain claimed that Allied's ulterior motive was to gain its customer records. The Court found that Bull Mountain alleged facts to support an inference that Allied initiated judicial proceedings to force Bull Mountain out of business and to turn over its customer base.

The District Court applied *Bull Mountain* to find that there must be some external thing the other party is being forced to do, like turn over customer records. While the *Bull Mountain* defendants may have been more subtle than the Seltzer defendants, the motives – and not the egregiousness of a prior demand – are what drives the analysis. Here, as in *Seltzer* and in *Bull Mountain*, Plaintiffs allege that the Defendants were using a legitimate claim to achieve an illegitimate end.

The District Court likened the Plaintiffs' complaint to the allegations in *Dubray v. Schroder*. But *Dubray* is distinguishable on its facts. In *Dubray*, Magistrate Anderson noted that the Complaint's allegations of improper use of process all fell within abusive discovery and motions tactics, and without more, did not support an abuse of process claim.[64] The Second Amended Complaint alleges

[63] *Bull Mountain Sanitation, LLC, v. Allied Waste Services of North America et al,* CV 18-147-BLG-SPW-TJC (D.Mont. 2019).
[64] *DuBray Land Services v. Schroder Ventures US, et al*, Cause No. CV 05-130-BLG-RWA (D.Mont. 2006).

that Defendants targeted their land in an effort to control it, and used litigation under the guise of a nuisance claim to encumber the financing of the project that would delay it long enough to kill it completely. *Dubray* is not controlling here.

The District Court found the Second Amended Complaint alleges actions that are "proper in the regular course of nuisance litigation" such as killing the wind project as a nuisance.[65] The District Court found the allegations do not support abuse of process claims like those in *Hopper v. Drysdale*[66] and in *Salminen v. Morrison*.[67] But the Complaint alleges much more than that: It alleges that what the Defendants really wanted – and had not been able to buy – was control over Plaintiffs' land.

The District Court re-framed the Complaint, finding that the "alleged collateral act – coercing Plaintiffs from using their land to generate income from wind power – does not fit within precedent's collateral act requirement." But the allegations supporting Plaintiffs' claim, which must be accepted as true, include:

1. Defendants wanted to buy control over Plaintiffs' property and were not successful.
2. Defendants admitted at the injunction hearing that they knew they would lose but sought to delay it long enough to kill it completely.

[65] App. Doc. 2, Order p. 8:23-25, quotations omitted.
[66] *Hopper v. Drysdale,* 524 F.Supp. 1039 (D.Mont. 1981).
[67] *Salminen v. Morrison & Frampton, PLLP*, 2014 MT 323 ¶ 18, 377 Mont. 244, 339 P.3d 602.

3. Defendants had access to the turbine configuration and the power purchase agreement, along with its deadlines, in July of 2016.
4. Defendants threatened a nuisance action in February of 2017.
5. Defendants began a propaganda campaign against the wind farm.
6. Defendants threatened to build their own windfarm to suck up all the wind.[68]
7. Defendants testified that they could not see the turbines, and that they are not in Montana often.
8. Defendants built their trophy homes after the wind project was in an advanced development phase and came to any "nuisance."

The Complaint's allegations bring this case out of the framework of *Dubray* and aligns it with the facts in *Hopper* and *Salminen*. By willfully using the process in a way it was not intended, Defendants were able to gain control over Plaintiffs' *entire* ranches – an outcome they could not have otherwise obtained.

As in *Bull Mountain* and in *Seltzer*, the objective was to use "the suit as an instrument of coercion, *rather than a legitimate means to resolve a genuine dispute*."[69] Defendants initiated a baseless nuisance claim to force the Plaintiffs to turn over control of their land. Applying the correct 12(b)(6) standard, Plaintiffs'

[68] App. Doc. 1, Second Amended Complaint, Exh. 24 p. 443:12-15.
[69] *Seltzer v. Morton*, 2007 MT 62 at ¶ 58, emphasis added; *Bull Mountain*, citing *Seltzer.*

sufficiently allege the Defendants' initiation of judicial proceedings constituted "the use of process as a threat or a club."[70]

In *Ammondson v. NorthWestern Corp.,* internal emails and corporate communications, as well as the testimony from attorneys and corporate agents, supported an abuse of process claim.[71] In *Seipel v. Olympic Coast*, where the record established that an abuse-of-process plaintiff based his claim on the defendant's *purpose* in bringing the prior suit, as well as the conduct of utilizing the suit as an instrument of coercion, the defendant was not entitled to summary judgment.[72]

Notably, *Ammondson*, like *Seltzer*, involved challenges after a jury trial – distinct from a 12(b)(6) motion to dismiss. Taking all allegations in the complaint as true, Defendants were trying to control Plaintiffs' land – after being unsuccessful in earlier attempts to purchase it. The Defendants were not merely seeking to adjudicate a nuisance, they were seeking to financially devastate the Plaintiffs to force them into a compromised position and potential sale of their ranches.

Defendants *stated* purpose was to adjudicate an "anticipatory" nuisance. But Defendants had the chance for, and Plaintiffs requested, a final decision on the

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[70] *Bull Mountain*, citing and quoting *Hughes*, 164 P.3d at 918.
[71] *Ammondson v. Northwestern Corp*., 2009 MT 331, 220 P.3d 1, 353 Mont. 28 ¶ 59 citing *Hughes v. Lynch*, 2007 MT 177, ¶ 21, 338 Mont. 214, 164 P.3d 913 (quotation omitted).
[72] *Seipel v. Olympic Coast Inv.*, 188 P.3d 1027, 2008 MT 237, 344 Mont. 415, *Seltzer*, ¶¶ 57-60.

merits and Defendants ducked, avoiding an outcome they never actually wanted to obtain. Plaintiffs could have located the wind farm where it would not be a "nuisance" to the Defendants.[73] In an "anticipatory" claim, relocation would have resolved any legitimate problem before the wind project was built.[74]

The District Court erred in its interpretation and application of Montana law, and in its reading of the facts alleged in the Second Amended Complaint. The Complaint sets out facts that Defendants used legal process as an instrument of coercion and not as *a legitimate means to resolve a genuine dispute*.[75]

The dismissal of the complaint should be reversed.

C. The Complaint identifies "qualifying" process.

The District Court found that the Second Amended Complaint does not identify a "legally qualifying "process" i.e., identification of exactly what elements of the judicial machinery (court powers) are alleged to have been improperly invoked and abused."[76] The District Court found that the Complaint did not allege a "qualifying" event.

The District Court read *Hughes v. Lynch* as requiring some form of outright

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[73] Section 27-30-103, MCA.
[74] *Burley v. Burlington Northern & Santa Fe Ry. Co.*, 273 P.3d 825, 364 Mont. 77, 2012 MT 28 (Mont. 2012), citing and quoting *Burk Ranches v. State of Montana*, 242 Mont. 300 at 306-07, 790 P.2d 443,447 (1990).
[75] *Seltzer v. Morton*, 2007 MT 62 at ¶ 58, emphasis added.
[76] App. Doc. 2, Order p. 4:16-20 (quotations in original).

blackmail to support an abuse of process claim, and errs in blending abuse of process with malicious prosecution. In dismissing the Complaint, the District Court created a "strict liability" standard: If the underlying litigation is colorable on its face, that is an absolute defense to an abuse of process claim. The District Court incorrectly stated the law on what constitutes process. This Court has explained:

> In the context of the abuse of process tort, process may refer to summons, subpoena, attachments, garnishments, replevin or claim and delivery writs, arrest under a warrant, injunctive orders, and other order directly affecting obligations of persons or rights and property. *See* Dobbs, *The Law of Torts* § 438 at 1235-36 (West 2001). Some courts also take process to include all the procedures in the litigation process. See Dobbs, *The Law of Torts* § 438 at 1236. However, 'merely filing a complaint in court does not institute any process.' See Dobbs, *The Law of Torts* § 438 at 1235.[77]

The quote from Dobbs, *The Law of Torts,* is incomplete. The quote states:

> […] some courts have said that merely filing a complaint in court does not institute any process, although procuring a summons does…[78]

After *Hughes*, the Montana Supreme Court recognized that an abuse of process claim may be predicated on the "filing" of a baseless lawsuit when done for the purpose of utilizing it as an instrument of coercion.[79] The Court held:

> As we recently clarified, where the record establishes that abuse-of-process plaintiff based his claim on the defendant's purpose in bringing the prior suit, as well as the conduct of utilizing the suit as an instrument of coercion, the defendant is not entitled to summary judgment.[80]

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[77] *Hughes v. Lynch*, 2007 MT 177 ¶ 23, 338 Mont. 214, 164 P.3d 913.
[78] Dobbs, *The Law of Torts* § 594, Abuse of Process (2nd Ed.).
[79] *Seipel v. Olympic Coast Investments*, 2008 MT 237, ¶¶ 25-28, 344 Mont. 415, 188 P.3d 1027.
[80] *Seipel*, ¶ 25, citing *Seltzer*, 2007 MT 62, ¶ 57, 336 Mont. 225, ¶ 57, 154 P.3d 561, ¶ 57.

The Court went on:

> […] Use of the court system to file a baseless legal claim may constitute an abuse of process.[81]

In *Seipel*, the Court considered whether the mere filing of an unfounded lawsuit can establish abuse of process.[82] The Court allowed the claim to proceed, noting that the plaintiff "based his claim on the Defendants' purpose in bringing the suit, as well as their conduct of utilizing the suit as an instrument of coercion, rather than a legitimate means to resolve a genuine dispute."[83]

In *Ammondson* a jury instruction that "[t]he filing of a lawsuit in a forum which the party knows to be wrong constitutes an abuse of process" was held to be an accurate statement of the law.[84] In *Boyne US.A., Inc. v. Spanish Peaks Development, LLC* the Court recognized that the filing of a counterclaim in a lawsuit that was inconsistent with claims filed in other cases by the same litigant, in an effort to try to force an individual to transfer a parcel of property, constituted an abuse of process.[85]

Montana District Courts have followed that conclusion. Judge Fagg in *Bragg*

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[81] *Seipel*, ¶ 26, citing *Leasing, Inc. v. Discovery Ski Corp.,* 235 Mont. 133,136, 765 P.2d 176, 178 (1988).
[82] *Seltzer v. Morton*, et al., 2007 MT 62, ¶¶ 58-59, 336 Mont. 225, 154 P.3d 561.
[83] *Seltzer*, 2007 MT 62, ¶ 58.
[84] *Ammondson v. Northwestern Corp.*, 2009 MT 331, ¶¶60 and 63, 353 Mont. 28, 220 P.3d. 1; accord *Leasing*.
[85] *Boyne USA, Inc. v. Spanish Peaks Dev., LLC*, 2013 MT 1 ¶78 - ¶82, accord, *State ex rel. Porter v. First Jud. Dist.*, 123 Mont. 447, 215 P.2d 279, 284 (1950).

v. Hilten, noted: "Upon review, the Court concludes Montana law allows an abuse of process claim arising from the filing of an underlying complaint despite the fact a summons was not served."[86]

The Plaintiffs allege more than that the Defendants "merely filed a complaint." Plaintiffs allege that *Diana's Great Idea et al* was filed and prosecuted and then dismissed without prejudice to allow Defendants control over all of Plaintiffs' land. Defendants purposefully avoided adjudication of whether a wind farm is or ever could be a nuisance as to them personally. Defendants engaged the "judicial machinery" to defeat the financing for Crazy Mountain Wind and control Plaintiffs' land in a way that they could not otherwise achieve.[87]

Plaintiffs allege that Defendants intentionally misused the civil process by intentionally delaying filing of an "anticipatory" nuisance claim for nearly two years; taking five months to delay the hearing on the "urgent" injunction request, and then, after the injunction was issued, representing to this Court that the injunction "does not directly enjoin" Plaintiffs "in any way"; and seeking dismissal without prejudice rather than adjudication and resolution of an "anticipatory" nuisance in a way that would have released Plaintiffs' land from the permanent hold Defendants had achieved through their improper use of litigation.

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[86] *Bragg v. Hilten*, Cause No. DV-12-1362 at p. 10:25 – 11:6; see also *Ervin v. Tungsten Holdings, Inc.*, Cause No. DV 16-101 (2017).
[87] App. Doc. 1, ¶ 148, ¶¶ 145 – 151, e.g.

Plaintiffs' claim that Defendants' *use* – and *abuse* – of the legal process was to delay resolution, making the project unfinanceable, to obtain something they could not otherwise have: control over Plaintiffs land.

The District Court's rejection of both a "wide range of events" and a "filed complaint" imposes a false constraint.

II. The District Court erred in dismissing Plaintiffs' other claims.

The District Court concluded that "the viability of Plaintiffs' other claims hinge on the viability of the Abuse of Process claim." No analysis was provided. This is an improper application of Rule 12(b)(6) and Rule 8.[88]

A. Counts I and II are not predicated on abuse of process.

The District Court dismissed Counts I and II, concluding that tortious interference "requires acts that were without cause" and "without abuse of process" that element is not met.[89]

The elements for Counts I and II, are identical, except no contract is required for Count II.[90] Tortious interference requires Plaintiffs to show acts that:

(1) Were intentional and willful;
(2) Were calculated to cause damage to Plaintiffs in their business;

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[88] *Castillo v. Franks*, 690 P.2d 425, 428, 213 Mont. 232, 239, 41 St.Rep. 2071 (Mont. 1984).
[89] App. Doc. 2, Order p. 9:21-25.
[90] *Associated Mgmt. Servs., Inc. v. Ruff*, 392 Mont. 139, 424 P.3d 571, 2018 MT 182 ¶ 69, citing *Maloney v. Home & Inv. Ctr., Inc.*, 2000 MT 34, ¶ 41, 298 Mont. 213, 994 P.2d 1124; see also *Morrow v. FBS Ins. Montana-Hoiness Labar, Inc.* (1988), 230 Mont. 262, 749 P.2d 1073, ¶ 41; *Sebena v. American Auto. Ass'n* (1996), 280 Mont. 305, 309, 930 P.2d 51, 53; *Bolz v. Myers* (1982), 200 Mont. 286, 295, 651 P.2d 606, 611.

(3) Were done with the unlawful purpose of causing damage or loss, without right or justifiable cause; and
(4) Resulted in actual damage or loss.

The gravamen of the action is a breach of a legal duty rather than a breach of a contract, and so it is a tort.[91] The legal inquiry focuses on the intentional acts of the "malicious interloper" (the defendants) in disrupting a business relationship (Plaintiffs' development of a wind farm), without justification, causing damages.[92] Under this theory, "a person who is involved in an economic relationship with another, or who is pursuing reasonable and legitimate prospects of entering such a relationship, is protected from a third person's wrongful conduct which is intended to disrupt the relationship."[93] The Court explained that the plaintiff's "business" includes "reasonable expectation of entering into a valid business relationship."[94]

The District Court held tortious interference "requires acts that are without cause. Here, without abuse of process, that element is not met." No analysis was provided. The District Court's dismissal of the abuse of process claim turned almost entirely on its conclusion that there was no "qualifying collateral act" under Montana case law. The District Court's conclusion that the collateral "effect" of

[91] *Plakorus v. Univ. of Mont.*, 2020 MT 312 ¶22, 402 Mont. 263, 477 P.3d 311
[92] *B.Y.O.B. Inc. v. State* 2021 MT 191 ¶ 35, citing *Grenfell v. Anderson*, 2002 MT 225, ¶ 64, 311 Mont. 385, 56 P.3d 326; see also *Maloney*, 2000 MT 34, ¶ 42, citing and quoting *Buckaloo v. Johnson* (1975), 14 Cal.3d 815, 122 Cal.Rptr. 745, 537 P.2d 865, 869.
[93] *Maloney*, 2000 MT 34, ¶ 42, citing *Ellis v. City of Valdez* (Alaska 1984), 686 P.2d 700, 707.
[94] *Maloney*, 2000 MT 34, ¶ 42, citing *Cook v. Winfrey* (7th Cir.1998), 141 F.3d 322, 327.

killing off a wind farm was not abuse of process – even if correct, which Plaintiffs do not concede – does not absolve the Defendants from defending against an allegation that they acted with the unlawful purpose of causing damage or loss, without right or justifiable cause.

The unlawful purpose does not have to be a stand-alone illegal act that would qualify as a collateral act under the District Court's (new) framework. Rather, improper actions like frustrating a parties' efforts to pursue business opportunities, such as were present in *Emmerson v. Walker*, satisfy this element of an acting without a justifiable cause.[95] The unlawful purpose element of tortious interference is satisfied when someone unlawfully attempts to cause damage.[96] Interfering with the power purchase agreement for the sake of causing delay is an act that unlawfully caused damage to Plaintiffs, regardless of the nuisance claim.

The Second Amended Complaint alleges that Defendants acted with an unlawful purpose when they filed their nuisance action without a valid claim, for the purpose of defeating the financing for the project. Taking the allegations as

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[95] *Wagner v. MSE Tech. Applications, Inc*., 2016 MT 215 ¶ 19, 384 Mont. 436, 383 P.3d 727, citing *Bolz v. Meyers*, 200 Mont. 286, 295, 651 P.2d 606, 611; *Emmerson v. Walker*, 2010 MT 167, ¶ 23, 357 Mont. 166, 236 P.3d 598.

[96] *Emmerson*, 2010 MT 167 ¶ 24, citing Restatement (Second) of Torts § 767.4 See also *Bolz*, 200 Mont. at 294-95, 651 P.2d at 610-11; *Stokes v. State*, 2007 MT 169, ¶ 13, 338 Mont. 165, 162 P.3d 865; *Farrington v. Buttrey Food and Drug Stores Co.*, 272 Mont. 140, 143, 900 P.2d 277, 279 (1995), *Maloney*, 2000 MT 34, ¶¶ 41-42; *Pospisil v. First Nat'l Bank*, 37 P.3d 704, 707, 307 Mont. 392, 396-97 (Mont. 2001).

true, Defendants interfered with Plaintiffs' right to use their private property and to use the wind flowing over their private property. Dismissal is not warranted.

B. The District Court erred in dismissing Count IV.

The District Court dismissed Count IV saying only: "Unjust enrichment requires circumstances which would render a situation inequitable. Here, without abuse of process, such inequity is not supported by the SAC."[97]

To prevail on this claim Plaintiffs must prove three elements:

(1) a benefit conferred upon a defendant by another;
(2) an appreciation or knowledge of the benefit by the defendant; and
(3) the acceptance or retention of the benefit by the defendant under such circumstances that would make it inequitable for the defendant to retain the benefit without payment of its value.[98]

Two critical legal elements require reversal of the District Court's holding.

First, this Court has held that an equitable remedy may be imposed "to prevent the recipient from unjustifiably gaining or retaining something of value, regardless of whether the claimant suffered a corresponding loss."[99] Where the circumstances warrant, "restitution is measured according to the recipient's gain and the claimant "need not necessarily have been deprived of something in order to

[97] App. Doc. 2, Order p. 9-10.
[98] *Mont. Digital, LLC v. Trinity Lutheran Church*, 401 Mont. 482, 473 P.3d 1009, 2020 MT 250 ¶ 10, citing *Associated Mgmt. Servs. v. Ruff*, 2018 MT 182, ¶ 64, 392 Mont. 139, 424 P.3d 571.
[99] *Mont. Digital*, 2020 MT 250 ¶ 10, citing *N. Cheyenne Tribe v. Roman Catholic Church*, 2013 MT 24, ¶¶ 36-39, 368 Mont. 330, 296 P.3d 450.

recover."[100] The measure is taken of the Defendants' *gain*.

Defendants have clearly received something of value – indeed, something that they were willing to pay for. They have the Plaintiffs' property in their control, and no wind farm will ever get built so long as the threat of a nuisance lawsuit hangs in the air – which it does, and will, since the underlying lawsuit was dismissed without prejudice at Defendants' request. Meanwhile, Defendants themselves are free to engage in the very development they oppose, which is an inequitable result.[101] The Defendants have not only accepted, but retain indefinitely control of the Plaintiffs' land.

The Defendants have effectively zoned the Plaintiffs property to their liking, while the Defendants' own property remains free from such restrictions. In fact, Defendants could build a wind farm on their own properties if their financial circumstances changed. Defendants threatened to "suck up" all the wind, indicating that they are not adverse to the wind turbines, they just don't want the Plaintiffs' to benefit financially from them, and prefer a situation where Plaintiffs' are so compromised that they are forced to sell to the Defendants. Defendants are getting a benefit they should pay for, in order to retain it.

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[100] *Mont. Digital*, 2020 MT 250 ¶ 10, citing and quoting *Mt. Water Co. v. Mont. Dep't of Rev*, 2020 MT 194, ¶ 15, 400 Mont. 484, 469 P.3d 136; see also Restatement (Third) of the Law 3d, Restitution and Unjust Enrichment, § 1 (Am. Law Inst. 2011).

[101] *Darty v. Grauman*, 2018 MT 129 ¶ 12, 419 P.3d 116, 391 Mont. 393; *Volk v. Goeser*, 2016 MT 61, ¶ 45, 382 Mont. 382, 367 P.3d 378, citing *N. Cheyenne Tribe*, ¶ 39.

Second, the District Court's conclusion is reversible error because a claim of unjust enrichment "does not necessarily require demonstrating misconduct or bad faith on behalf of the recipient."[102] In *Northern Cheyenne Tribe*, the Court clarified that "Montana law no longer requires some wrongful act on the part of the defendant in order to establish a constructive trust."[103] Restitution is contingent upon Plaintiffs' showing that Defendants' have been unjustly enriched – not that they have engaged in some wrongdoing.[104]

The Plaintiffs have a right of possession to their property. Unjust enrichment does not depend on a "collateral act" that the District Court found a necessary component of an abuse of process claim. Unjust enrichment is an equitable remedy available when a legal remedy does not exist. In circumstances where there is no abuse of process, and yet the Defendants have gained something of value, a claim for unjust enrichment is proper. Unjust enrichment is intended to remedy injustice when other areas of the law do not, and is a flexible and workable doctrine.[105]

The District Court's determination that there can be no inequity in the absence of an abuse of process claim is incorrect. Unjust enrichment focuses on the

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[102] *Mont. Digital, LLC*, 2020 MT 250 ¶ 10, citing *Mt. Water Co.*, 2020 MT 194, ¶ 15.
[103] *N. Cheyenne Tribe v. Roman Catholic Church*, 2013 MT 24 ¶ 29, citing *In re Est. of McDermott*, 2002 MT 164, ¶¶ 25-26, 310 Mont. 435, 51 P.3d 486.
[104] *N. Cheyenne Tribe*, 2013 MT 24, ¶¶ 29-39.
[105] *A.C.I. Constr. v. Elevated Prop. Invs*, 2021 MT 246, ¶23, citing N. *Cheyenne Tribe*, ¶ 36 (quoting *Rawlings v. Rawlings*, 240 P.3d 754, 763.

outcome and benefit to the Defendants, not the improper purpose and conduct that gives rise to an abuse of process claim. Separating the elements in these two distinct torts, the District Court's Order is reversible error.

The allegations supporting Count IV establish that not only are Plaintiffs unable to build Crazy Mountain Wind, and harmed from that loss, they cannot build any wind farm. Defendants have control over Plaintiffs' property – without paying for it, with an appreciation of its benefit. That is unjust enrichment.

The District Court erred in finding that the unjust enrichment claim depends on the abuse of process claim. Plaintiffs have alleged facts that, taken as true and considered in the light most favorable to the Plaintiffs, will allow them to recover on an unjust enrichment and constructive trust claim.

CONCLUSION

The District Court dismissed the Plaintiffs' Second Amended Complaint based on an erroneous application of the law. The Order should be reversed and this case remanded for trial.

Respectfully submitted this 23rd day of November, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count including footnotes as calculated by Microsoft Word for Mac is less than 10,000 words, excluding the certificate of service and certificate of compliance.

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