



1           **II.     ARGUMENT**

2           Defendant’s Reply contains several new arguments never raised in Defendant’s initial  
3 motion. Specifically:

- 4           a) For the first time, Defendant argues that its motion to dismiss, which was originally  
5 brought under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, should  
6 be converted to a motion to dismiss under Rule 12(b)(1) for lack of subject-matter  
7 jurisdiction. Reply at 1-2, Section I. Factual Rule 12(b)(1) challenges are governed by  
8 different legal standards than those under Rule 12(b)(6) and Rule 12(c).<sup>1</sup> Such motions  
9 dispute the truthfulness of a complaint’s allegations and shift the burden of persuasion to  
10 the plaintiff, requiring that he furnish affidavits or evidence beyond the pleadings in order  
11 to satisfy the relevant burden. *See, e.g., Leite v. Crane Co.*, 749 F.3d 1117, 1121-22 (9th  
12 Cir. 2014); *see also* Reply at 1-2. By contrast, in Defendant’s original 12(b)(6) motion,  
13 the Court was required to accept the complaint’s allegations as true and the moving  
14 party—Defendant—bore the burden of persuasion. *See, e.g., Leite*, 749 F.3d at 1121.  
15  
16           b) For the first time, Defendant argues that Mr. Vargas “cannot establish” that the false  
17 arrest and imprisonment he suffered was performed by someone for whom the United  
18 States could incur liability under the Federal Tort Claims Act. Reply at 2; *see generally*  
19 *id.* at 5-9, Section IV.  
20  
21           c) For the first time, Defendant argues that Mr. Vargas’s abuse of process claim should be  
22 dismissed because “he has not shown that an act was taken after an actual *judicial*  
23 proceeding was instituted.” Reply at 11; *see generally id.* at 9-11, Section V.  
24  
25

26  
27 <sup>1</sup> Mr. Vargas had initially believed Defendant intended its Motion under Rule 12(b)(6) as a Rule 12(c)  
28 motion since a 12(b)(6) motion may not be filed after the submission of an answer, and Defendant had previously  
filed an answer in this case. *See* Pl.’s Opp’n to Def.’s Mot. to Dismiss 4, ECF No. 19.

1 Defendant could have raised all these arguments in its Motion to Dismiss, and its untimely  
2 attempt to raise them for the first time in its Reply deprives Mr. Vargas of the opportunity to  
3 address them. As this Court has held, “arguments cannot be properly raised for the first time on  
4 reply.” *Hampton v. Allstate Corp.*, C13-0541JLR, 2013 WL 6000040, at \*6 (W.D. Wash. Nov.  
5 12, 2013) (citing *Amazon.com LLC v. Lay*, 758 F. Supp. 2d 1154, 1171 (W.D. Wash. 2010))  
6 (internal alteration omitted); *see also Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) (“The  
7 district court need not consider arguments raised for the first time in a reply brief.”) (citation  
8 omitted). Moreover, Defendant’s attempt to recast its motion under Rule 12(b)(6) as a motion  
9 under Rule 12(b)(1) improperly and unfairly imposes a new burden on Mr. Vargas without  
10 giving him the opportunity to meet it.

### 13 III. CONCLUSION

14 Accordingly, Mr. Vargas requests that the Court strike and not consider these new  
15 arguments in Defendant’s Reply. In the alternative, Mr. Vargas respectfully requests that he be  
16 afforded the opportunity to submit a full written response to these issues.

19 DATED this 25th of June, 2014.

20 Respectfully submitted,

21 s/ Matt Adams

22 Matt Adams, WSBA No. 28287

23 Glenda Aldana Madrid, WSBA No. 46987

24 Northwest Immigrant Rights Project

25 615 Second Ave., Ste. 400

26 Seattle, WA 98104

27 Telephone: (206) 957-8611

28 Fax: (206) 587-4025

E-mail: matt@nwirp.org

E-mail: glenda@nwirp.org

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Elizabeth Hawkins, WSBA No. 43187  
Bean Porter Hawkins PLLC  
2200 Sixth Ave., Ste. 835  
Seattle, WA 98121  
Telephone: (206) 522-0618  
Fax: (206) 524-3751  
E-mail: ehawkins@bphlegal.com

*Attorneys for Plaintiff Gustavo Vargas  
Ramirez*

**CERTIFICATE OF SERVICE**

I, Matt Adams, hereby certify that on June 25, 2014, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will automatically send a notification of such filing to the following CM/ECF participant:

Kristin B. Johnson  
United States Attorney's Office  
Western District of Washington  
700 Stewart Street, Suite 5220  
Seattle, WA 98101-1271  
Telephone: (206) 553-7970  
Fax: (206) 553-4073  
E-mail: kristin.b.johnson@usdoj.gov

DATED: June 25, 2014

By: s/ Matt Adams  
Matt Adams  
Northwest Immigrant Rights Project  
615 Second Ave., Ste. 400  
Seattle, WA 98104  
Telephone: (206) 957-8611  
Fax: (206) 587-4025  
E-mail: matt@nwirp.org  
WSBA No. 28287  
*One of the attorneys for Plaintiff*  
*Gustavo Vargas Ramirez*