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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

<p>ESTATE OF JAMES D. REDD, M.D.,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>DANIEL LOVE,</p> <p style="text-align: center;">Defendant.</p>	<p style="text-align: center;">Case No. 2:11-CV-00478-RJS</p> <p style="text-align: center;">PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT LOVE'S MOTION FOR SUMMARY JUDGMENT</p> <p style="text-align: center;">Hon. Robert J. Shelby</p>
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COMES NOW the Plaintiff, by and through his undersigned counsel, pursuant to DUCivR 7-1(b) and 56.1(c), and its Response and Memorandum in Opposition to the Defendant Love's Motion for Summary Judgment as follows:

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I. Introduction Summarizing Why Summary Judgment Should be Denied.

Pursuant to DUCiv.R 56.1(c)(1), Plaintiff summarizes the reasons why summary judgment should be denied as follows:

Summary Judgment should be denied because the evidence submitted, with all reasonable inferences drawn in favor of the Plaintiff, and all doubts and inconsistencies resolved against the Movant, demonstrates that Defendant Love committed acts which amounted to a violation of Plaintiff's constitutional right to be free from the use of excessive force. Specifically, the crimes for which James and Jeanne Redd were suspected of committing were comparatively low in severity, the individuals in the Redd Residence presented no threat or danger or risk of flight, and Defendant Love, who was one of two joint commanders of the Operation, sent more than 53 and as many as 53 to 65 more (a total of 106-118), armed or heavily armed agents to the Redd Home. In addition, despite the fact that the home and its contents and residents were secure, Defendant Love summoned additional agents to the site, including SWAT/Tactical Officers. These officers were not summoned because of a surprise need to process the scene and evidence, but were simply an exercise of excessive and unnecessary force.

II. Response to Statement of Elements and Undisputed Material Facts.

a. Plaintiff's Response to Movant's Statement of Elements.

Pursuant to DUCiv.R 56.1(c)(2)(A), Plaintiff concisely responds to each legal element stated by the movant.

1. Defendant/Movant's First Stated Element: "First, the Plaintiff must demonstrate that the Defendant's actions violated a constitutional or statutory right."
Defendant's Motion, Dkt. 93 at page 9-10.

RESPONSE:

Agreed that this is an element. Plaintiff denies that Movant has established that this element has not or cannot be met, and demonstrates below that there are genuine issues of material fact such that a reasonable juror could find in Plaintiff's favor on this element.

2. Defendant/Movant's Second Stated Element: "Second, the Plaintiff must show that the constitutional or statutory rights allegedly violated were clearly established at the time of the conduct at issue."

RESPONSE:

Agreed that this is an element. Plaintiff denies that Movant has established that this element has not or cannot be met and demonstrates below that there are genuine issues of material fact such that a reasonable juror could find in Plaintiff's favor on this element.

b. Plaintiff's Response to Movant's Statement of Undisputed Material Facts.

Movants did not follow DUCivR 56.1(b)(2)(C)'s requirement that the statement of facts follow under each element. However, Movant did submit a "Statement of Undisputed Material Facts in Support of Defendant Love's Motion for Summary Judgment," at Dkt. 93-1. Plaintiff presumes that each such fact is relevant to only the first element above, whether the Defendant violated the constitutional rights of the Plaintiff.

Pursuant to DUCiv.R. 56.1(c)(2)(B), Plaintiff responds to each of these stated material facts restating each numbered paragraph from Dkt. 93-1, indicating whether each statement is disputed or undisputed, with citation to the basis for each disputed fact. Plaintiff also restates the headings and topical references contained in the Movant's Statement.

Pursuant to DUCiv.R. 56.1(f), all evidence offered in opposition to the motion is submitted in a separately filed appendix with a cover page index, entitled, "Plaintiff's Appendix

to Memorandum in Opposition to Defendant Love’s Motion for Summary Judgment,” filed at Dkt. 103.

Background

1. This lawsuit arises out of “Operation Cerberus.” *See* Dkt. No.56 (First Amended Complaint, “FAC”) at ¶ 1.

RESPONSE:

Undisputed.

2. Operation Cerberus, a joint Bureau of Land Management (BLM)-Federal Bureau of Investigation (FBI) investigation, identified a large network of illegal traffickers of Native American artifacts in Southern Utah and the Four Corners Region. Ex. 1 (Ops Plan) at FBI000012; Ex. 9 (Bretzing Decl.) at ¶ 6.

RESPONSE:

Undisputed.

To the extent this allegation suggest that James Redd was one of these illegal traffickers, that implication is denied and disputed. However, whether James Redd was, or was not, guilty of the offense with which he was charged, is not a material fact or even relevant because the Court has earlier dismissed all claims other than Plaintiff’s Third Cause of Action regarding a claim of the use of excessive force. *See* Order at Dkt. 76.

3. Operation Cerberus began in approximately October 2006. FAC at ¶ 35; Ex. 9 (Bretzing Decl.) at ¶ 8.

RESPONSE:

Undisputed.

4. Defendant Love joined Operation Cerberus in December 2006. Ex. 9 (Bretzing Decl.) at ¶ 7.

RESPONSE:

Undisputed.

5. “As a result of multiple undercover purchases throughout the Four Corners region, and an extended investigation, US Magistrate Judge Samuel Alba . . . issued 12 search warrants and 19 arrest[] warrants to be served in southern Utah.” Ex. 1 (Ops Plan) at FBI000012.

RESPONSE:

Undisputed that Judge Alba issued a search warrant for the Redd Home. The warrant is attached as Movant’s Exhibit 19 to Movant’s Appendix, Dkt. 94-19. It was based on an affidavit by Patrick Brosnan, but the affidavit was not submitted. This Affidavit is the basis for the warrant, and not the Ops Plan submitted as Exhibit 1 to the Movant’s Appendix, (Dkt. 94-1). In addition, a description of the place to be searched was attached to the warrant issued by Judge Alba as “Attachment A.” That attachment was also omitted. However, all claims related to allegedly illegal warrants, allegedly illegal search of the Redd Home, and related to the alleged provision of false information in order to obtain search warrants were dismissed in the Order at Dkt. 76. Thus, the basis for the warrants are irrelevant to the sole claim remaining in this case and at issue in this Motion, and the basis for the warrants are not “material” facts because they are not essential, or relevant, to the disposition of the sole remaining claim remaining in this lawsuit.

6. BLM and FBI executed these search and arrest warrants virtually simultaneously on the morning of June 10, 2009. FAC at ¶ 1; Ex. 1 (Ops Plan) at FBI000012; Ex. 2 (Comm Locs); Ex. 3 (Search Locs); Ex. 4 Arrest Locs); Ex. 5 (Timeline); Ex. 6 (May 26 EC); Ex. 7 (April 1 EC);

Ex. 8 (Search/Arrest Warrant Svc.); Ex. 9 (Bretzing Decl.) at ¶ 11. This was due to the fact that in the past, “when search warrants [had] been served in this community, valuable evidence was lost because subjects received advanced warning of impending search warrants.” Ex. 7 (April 1 EC) at FBI000117; *see also* Ex. 9 (Bretzing Decl.) at ¶ 11.

RESPONSE:

Undisputed, however, Plaintiff disputes any implication that James Redd or any member of his family was going to warn any subject of a warrant or investigation. The cited evidence does not support any suggestion that James Redd, or any member of his family, was suspected or warning anyone of any ongoing investigation.

7. By June 10, 2009, Defendant Love was the lead BLM case agent for Operation Cerberus and one of the two highest ranking case agents assigned to oversee activities throughout the Four Corners region. *See* Ex. 2 (Comm Locs); Ex. 9 (Bretzing Decl.) at ¶ 8.

RESPONSE:

Undisputed that Defendant Love was the lead BLM case agent for Operation Cerberus.

Disputed that Defendant Love was one of the two highest ranking case agents assigned to oversee activities throughout the Four Corners region. It is not disputed that Defendant Love was either second, or shared responsibility as the third highest ranking case agent. Whether Defendant Love was the second highest ranking case agent, or the third highest ranking agent, is not a fact that is material.

The cited evidence indicates that:

1. Defendant Love “was the lead BLM case agent for Operation Cerberus.” *See* Movant’s Exhibit 9, Bretzing Decl., Dkt. 94-9 at page 2, ¶8.

2. Movant's Exhibit 2 (Dkt. 94-2), "Command Locations," indicates that there were two higher ranking officers above Defendant Love:
 - a. United States Secretary of the Interior Kenneth Salazar. Moab BLM-Office Joint Command Post. Movant's Exhibit 2, Dkt. 94-2 at page 1 (FBI000004);
 - b. BLM Director of Law Enforcement William Woody. *Id*;
 - c. It is unknown whether Secretary Salazar and/or Director Woody were "case agents" or simply just "agents."
3. Defendant Love would therefore be the third highest ranking agent present on June 10, 2009, and he may also have been one of the two highest ranking agents with operational authority.

8. By June 10, 2009, the FBI "ha[d] assumed lead federal agency status" with respect to Operation Cerberus, and it "r[a]n the search and arrest teams, with assistance from the BLM." Ex. 7 (April 1 EC) at FBI00017; *see also* Ex. 9 (Bretzing Decl.) at ¶ 9.

RESPONSE:

Disputed. Movant does not offer an explanation of what meaning is intended by "lead federal agency status" or what it means to "run the search and arrest teams, with assistance from the BLM," but the evidence is as follows:

1. "The main CP [command post] for this operation [was] referred to as 'Area Command', at BLM headquarters in Moab, Utah. FBI SA Patrick G. Brosnan and BLM SA Daniel Love [were] assigned to the Area Command." *See* Movant's Exhibit 7, 4/1/2009 FBI Electronic Communication Re Cerberus Action, Dkt 94-7, at page 4 (FBI000118).

- a. At some point after April 1, 2009, Area Command was moved from Moab to Blanding. This fact is evident from the fact that both Defendant Love and SA Brosnan were at the Command Post in Blanding, not Moab, on June 10, 2009. See Movant's Exhibit 2, Dkt. 94-2, page 1, FBI0000004.
2. "Because of the size and nature of this jointly conducted operation, there [were] shared responsibilities between agencies for the take down." See Movant's Exhibit 7, 4/1/2009 Electronic Communication RE Cerberus Action, Dkt. 94-7, at page 2 (FBI000116).
3. As set forth in Response to Paragraph 7 above, Defendant Love was the lead BLM case agent, answering directly to the Secretary and the Director.
4. Both the BLM and the FBI shared responsibility for the "take down," and Defendant Love and SA Brosnan allegedly entered the Redd home at the same time, and likely were together. See Movant's Exhibit 38, Sign In Log for 6/10/2009, Dkt. 94-38 at page 1 (FBI000001).
5. The most reasonable inference from the above is that Defendant Love, with support and assistance from the FBI, and with command authority from both the BLM and the FBI, was responsible for, or at least shared joint responsibility for, the "take down" at the Redd home.

Search and Arrest Teams

9. Federal personnel who participated in the June 10, 2009, operations were divided into teams assigned to specific locations. See Ex. 1 (Ops Plan); Ex. 3 (Search Locs); Ex. 4 (Arrest Locs); Ex. 5 (Timeline); Ex. 6 (May 26 EC); Ex. 7 (April 1 EC); Ex. 9 (Bretzing Decl.) at ¶¶ 12-13.

RESPONSE:

Undisputed.

10. Arrest teams were made up entirely of federal law enforcement officers. Ex. 9 (Bretzing Decl.) at ¶12. They did not include non-law enforcement officers. *Id.*

RESPONSE:

Disputed, however, this is not a material fact. The cited evidence provides “At some Operation Cerberus sites, arrest warrants were served, but not search warrants. *See* Ex. 4 [Dkt. 94-4]. The teams assigned to those locations consisted solely of BLM and FBI law enforcement agencies.”

The Redd Home was a Cerberus site at which both arrest warrants and search warrants were served. *See* Movant’s Exhibit 3, Search Warrant Locations, Dkt. 94-3 at page 4 (FBI000008).

Movant’s Exhibit 4, Arrest Locations, Dkt. 94-4, does not indicate that arrest warrants were served at the Redd Home, but the record is replete with evidence that two arrest warrants were served that day, one for James Redd and one for Jeanne Redd. *See e.g.* Movant’s Exhibit 9, Bretzling Decl., Dkt. 94-9, at page 5-6, ¶¶27-30.

The Redd Home was a Cerberus Site at which both arrest and search warrants were served. The team assigned to the Redd Home therefore included both federal law enforcement agents and federal non-law enforcement agents.

11. Search teams included both federal law enforcement officers and unarmed civilian cultural specialists from BLM, who helped the law enforcement officers identify, catalog and safeguard artifacts. *See* Ex. 1 (Ops Plan) at FBI000016 (“There will be [evidence response team]

personnel and archeologists on scene at the search warrants.”); Ex. 9 (Bretzing Decl.) at ¶ 13; Ex. 10 (Palus Decl.) at ¶ 15.

RESPONSE:

Undisputed.

12. Each team had an Evidence Response Team (ERT) Team Leader, who was in charge of the evidence search and those personnel who participated in the search or assisted with the search by creating evidence logs, photographing evidence and similar tasks. Ex. 9 (Bretzing Decl.) at ¶ 15; *see also* Ex. 6 (May 26 EC) at FBI000034 (“These [artifacts] will be documented by the ERT personnel on laptop computers at the scene and each item will be photographed.”); Ex. 7 (April 1 EC) at FBI000117 (“There will have to be ERT teams at each search warrant scene. ... The ERT teams will have to catalog all the suspect items by photographing and recording each item into an evidence log.”).

RESPONSE:

Undisputed.

13. All teams were led by a Team Leader, a BLM or FBI law enforcement officer who reported directly to the Command Post, which was established to monitor the simultaneous execution of the warrants. *See* Ex. 2 (Comm. Locs); Ex. 3 (Search Locs); Ex. 8 (Search/Arrest Warrant Svc.); Ex. 9 (Bretzing Decl.) at ¶ 17; Ex. 10 (Palus Decl.) at ¶ 16.

RESPONSE:

Undisputed.

14. Upon service of the arrest warrants, arrestees were interviewed at the site of their arrests, taken to the BLM office in Monticello for processing, and eventually transferred to the Marshals Service for transportation to Moab for their initial appearances in criminal court. Ex. 1 (Ops

Plan) at FBI000012; *see also* Ex. 8 (Search/Arrest Warrant Svc) (“Arrested subjects will be transported to Monticello, UT by agents. They will be brought to the BLM Monticello office. Once at that office they will be turned over to U.S. Marshalls [*sic*] based at that location. The Marshalls [*sic*] will transport the subjects to Moab, UT, for their initial appearances.”).

RESPONSE:

Undisputed.

15. Upon service of the search warrants, federal personnel began to identify, inventory and photograph artifacts. Ex. 8 (Search/Arrest Warrant Svc). As teams completed their assigned duties, they “w[ere] reassigned to help with searches/arrests/transport where needed.” *Id.*; *see also* Ex. 1 (Ops Plan) at FBI000012 (“Search completed, site secured, ready for re-assignment.”); Ex. 5 (Timeline) at Redd_BLM_0242 (“[I]nitial searches concluded. Sites secured and teams reassigned to other locations.”); Ex. 9 (Bretzing Decl.) at ¶ 16; Ex. 10 (Palus Decl.) at ¶ 23.

RESPONSE:

Undisputed.

16. Teams received information regarding where assistance was needed from their assigned Command Post contact. Ex. 9 (Bretzing Decl.) at ¶ 16; Ex. 10 (Palus Decl.) at ¶ 23.

RESPONSE:

Disputed to the extent there is an implication that someone other than Defendant Love was the “assigned Command Post contact” for the search and arrest relevant to this lawsuit (the one at the Redd Home).

Movant’s Exhibit 2, Command Locations, Dkt. 94-2 at page 1, indicates that Defendant Love occupied one of Four Command Locations. Defendant Love was a Command Post Contact.

Defendant Love instructed others to come to the home of James Redd whether or not he was the “assigned” Command Post Contact. See Paragraph 103 below (Plaintiff’s Appendix at Exhibit 4, Jericca Redd Decl., at page 5, ¶6). Regardless, Defendant Love summoned others to the Redd Home at various times, and, based on Movant’s Exhibit 2, Dkt. 94-2, and the evidence cited by the Movant above (Movant’s Exhibit 9, Bretzing Decl., Dkt. 94-9 at page 4, ¶16; Movant’s Exhibit 7, 4/1/2009 FBI Electronic Communication Re Cerberus Action, Dkt 94-7, at page 4 (FBI000118)), he had the authority to do so.

Applicable BLM Agency Policies

17. BLM mandates that when its law enforcement officers are “conducting high visibility public contacts,” they wear clothing identifying them as such. Ex. 12 (BLM-Uniforms) at Redd_BLM-0142; *see also* Ex. 1 (Ops Plan) at FBI000017 (“Each law enforcement member will clearly display insignia identifying them as law enforcement.”). BLM law enforcement agents at the Redd home followed that policy. Ex. 9 (Bretzing Decl.) at ¶ 26.

RESPONSE:

Undisputed.

18. BLM law enforcement officers “who are engaged in duties that may expose them to high risk enforcement incidents such as search warrants, arrest warrants or felony vehicle stops, must wear soft body armor.” Ex. 13 (BLM-Armor) at Redd_BLM-0152. BLM law enforcement agents at the Redd home followed that policy. Ex. 9 (Bretzing Decl.) at ¶ 24.

RESPONSE:

Undisputed.

19. BLM law enforcement officers routinely carry handguns on duty. Ex. 14 (BLM-Firearms) at Redd_BLM-130. They are required to do so when performing law enforcement

duties in uniform. Ex. 12 (BLM-Uniform) at Redd_BLM-0143; *see also* Ex. 15 (DOI-Firearms) at Redd_BLM-0226 (“All persons engaged in law enforcement activities shall be properly trained, armed and equipped.”); *id.* at Redd_BLM-0227 (“When performing law enforcement duties in uniform, law enforcement officers will carry firearms.”). BLM law enforcement agents at the Redd home followed that policy. Ex. 9 (Bretzing Decl.) at ¶ 24.

RESPONSE:

Undisputed.

20. BLM does not have SWAT or tactical teams. Thomas Burr, *The Salt Lake City Tribune*, “Utah’s Stewart: BLM doesn’t need a ‘SWAT team,’” Apr. 30, 2014, *available at* <http://www.sltrib.com/sltrib/mobile3/57881083-219/blm-bundy-stewart-agencies.html.csp> (last accessed June 4, 2015); *see also* Ex. 9 (Bretzing Decl.) at ¶ 44.

RESPONSE:

Disputed.

There were no less than four, and no more than twenty two, SWAT certified officers on site at the Redd Home on June 10, 2009. Movant’s Exhibit 9, Bretzing Decl., Dkt. 94-9, at page 9, ¶45.

A SWAT team, composed of 10 SWAT members (*See* Movant’s Exhibit 7, 4/1/2009 FBI Electronic Communication Re Cerberus Action, Dkt 94-7, at page 3 (FBI000117), was deployed to execute a search warrant at one of the June 10, 2009 Cerberus Sites. Alternatively, the SWAT team was composed of 12 members. *See* Movant’s Exhibit 8, Cerberus Action Search/Arrest Warrant Service, Dkt. 94-8 at page 1 (FBI000063). Yet a third alternative is that there were two SWAT teams, one made up of 10 members, and a second made up of 12 members, for a total of 22 SWAT officers involved in Cerberus.

As set forth in Paragraph 8 above, both BLM and FBI shared responsibility for “takedown[s]” in Operation Cerberus. Both agencies shared responsibility for the takedowns, including those involving the use of SWAT teams.

In Movant’s Exhibit 9, Bretzing Decl., Dkt. 94-9, at page 4, ¶20, note 2, Bretzing states that “<https://www.fbi.go/about-us/capabilities/fbi-swat-graphic>” contains “any and all additional details about FBI SWAT.” That reference is attached to Plaintiff’s Appendix at Exhibit 5, and provides:

When there’s an extremely high-risk situation—a special mission, a dangerous takedown, a dignitary that needs protection—that is when SWAT gets the call.

A SWAT team was in use on June 10, 2009, and a four or more members of the SWAT team(s) was present at the Redd Home on June 10, 2009.

In other words, while BLM may not “have” SWAT or tactical teams, they have SWAT teams available for deployment in BLM operations, like Cerberus, and they have SWAT certified officers on scene with SWAT related equipment for use in tactical operations. This fact is a reasonable inference from the fact that SWAT officers were on scene at the Redd Home on June 10, 2009, and those officers were deployed in a tactical capacity at some point in time, and were ready for such deployment at all points in time.

Applicable FBI Agency Policies

21. According to standard operating procedure, FBI agents carrying out arrest warrants wear a bullet-proof vest (also called “soft body armor”) and carry a side arm, which is a handgun. Ex. 9 (Bretzing Decl.) at ¶ 24; *see also* Ex. 17 (FBI-Armor) at FBI000060 (“Wearing of body armor by [Special Agent] personnel is mandatory during planned arrests, execution of search warrants and surveillances which can be reasonably be expected to culminate in a confrontation with

armed and dangerous subject(s).”). FBI agents at the Redd home followed that policy. *Id.* at ¶¶ 24, 26.

RESPONSE:

Disputed. *Both* FBI agents *and* BLM agents at the Redd Home on June 10, 2009:

1. Wore bullet proof vests (soft body armor), *See* Movant’s Exhibit 9, Bretzing Decl., Dkt. 94-9, at page 5, ¶24; and
2. Carried guns, *See Id.*
3. In addition, there is no evidence that any of the persons anticipated to be present at the Redd Home on June 10, 2009 (James Redd, Jeanne Redd, Jericca Redd, and the 3 year old Redd boy), were thought to be armed or dangerous.

22. Agency policy requires FBI law enforcement officers to “be armed at all times when on official duty with the handgun secured to the Agent’s person.” Ex. 16 (FBI-Weapons) at FBI000045. “Immediate access to the handgun and security are paramount.” *Id.* FBI agents at the Redd home followed that policy. Ex. 9 (Bretzing Decl.) at ¶ 24.

RESPONSE:

Disputed. Both FBI and BLM agents were armed, and had immediate access to guns, at all times while at or near the Redd Home on June 10, 2009. *See* Movant’s Exhibit 9, Bretzing Decl., Dkt. 94-9 at page 5, ¶24.

23. “Wearing of body armor by [Special Agent] personnel is mandatory during planned arrests, execution of search warrants and surveillances which can be reasonably be expected to culminate in a confrontation with armed and dangerous subject(s).” Ex. 17 (FBI-Armor) at FBI000060. FBI agents at the Redd home followed that policy. Ex. 9 (Bretzing Decl.) at ¶ 24.

RESPONSE:

Disputed. Both FBI and BLM agents wore body armor while at the Redd Home on June 10, 2009. *See* Movant's Exhibit 9, Bretzing Decl., Dkt. 94-at page 5, ¶24.

24. FBI instructs that “[w]hen possible, emphasis must be placed on planning arrests to ensure superiority of manpower and firepower to exert maximum pressure on the individual(s) being sought, thereby reducing the opportunity for a subject to resist or flee.” Ex. 18 (FBI-Arrests) at FBI000046.

RESPONSE:

Undisputed¹.

25. FBI agents making an arrest “may draw their weapons without being confronted with a deadly force situation.” *Id.*; *see also id.* at FBI000036 (“There are many situations in which Agency personnel may draw their weapons when making an apprehension and without being confronted with existing deadly force.”).

RESPONSE:

Undisputed that FBI policy instructs agents in the manner alleged.

Disputed that to point a weapon at, or to draw a gun in the presence of, a cooperative and non-violent suspect is constitutionally permissible behavior.

26. All FBI field offices have SWAT, or “special weapons and tactics” units. *FBI SWAT*, *supra*. Each team has specialists, such as snipers, breachers, and assaulters. *See* <http://www.fbi.gov/about-us/capabilities/fbi-swat-graphic>.

RESPONSE:

¹ Movant's Exhibit 18, FBI Manual: Arrest Techniques (FBI000036-44) contains documents numbered FBI00036-44. There is no FBI000046, but if Movant's Exhibit 18, (Dkt. 94-18), included FBI000046, that document would support the fact alleged.

Undisputed. The reference (<http://www.fbi.gov/about-us/capabilities/fbi-swat-graphic>) is attached in full as Exhibit 5 to Plaintiff's Appendix. It notes that a SWAT Specialist (Assaulter) is equipped with, among other things, an H&K (Heckler and Koch) MP5 submachine gun, which can be set to fire one shot (semi automatic), a two shot burst (something between semi automatic and fully automatic), or fully automatic. *Id.*

The Redd Warrants and Team

27. The Operations Plan for the Redd home indicates that 11 law enforcement officers (a team leader, assistant team leader, 5 "searchers," a "searcher/finder," a "searcher/interviewer," a person responsible for the "ERT catalog," and a photographer) and one archeologist were initially assigned to be among the first to arrive at the Redd home on June 10, 2009. Ex. 1 (Ops Plan) at FBI000016.

Movant's Note 1 (to allegations in paragraph 27): The "Search Warrant Locations" document confirms that 11 law enforcement officers and one archeologist were initially assigned to the Redd home. *See* Ex. 3 at FBI00008-9. However, it apportions the duties among the law enforcement officers slightly differently, designating a team leader, assistant team leader, 6 "searchers," "a single "finder," one person assigned to "ERT catalogue," and one photographer. *Id.*

RESPONSE:

Undisputed that the Operations Plan so indicates.

Disputed that only 11 law enforcement officers were present at the Redd Home, or "initially present" at the Redd Home.

Plaintiff sets forth its evidence regarding the number of agents present in Paragraphs 86-88, 104 and 106-107, and in Response to Paragraphs 27, 35 and 47, and provides citation to the basis for the contention in those paragraphs.

It is also unclear what is meant by "initially assigned." See Response to Paragraph 47 below (Agent Vander Veer arrived as late as 6:54 a.m., to arrest James Redd at 6:55 a.m., thus,

she was not “initially assigned”). Regardless, Plaintiff asserts that approximately 50 agents were present during the morning, prior to noon, that were visible from the Piano Room (the room in which Jericca Redd was sequestered). See Plaintiff’s Appendix at Exhibit 4, Jericca Redd Decl. at page 5, ¶6(c).

28. The Redd search warrant authorized officers to:

- A. Search for and seize “[a]ll records relating to ... trafficking in illegally obtained artifacts ..., theft/retention of stolen property ..., [e]mbezzlement theft from Indian tribal organizations, and/or ... illegal trafficking in sacred objects and or items of cultural patrimony,” as well as “[a]ny and all artifacts or items relating to” such violations; and
- B. “[S]eek the assistance of an archeologist or cultural artifact expert solely to assist in identifying and authenticating items to be seized.”

See Ex. 19 (search warrant).

RESPONSE:

Undisputed that the Warrant so indicates. However, in its Order at Dkt. 76, at page 9, the Court dismissed all of Plaintiff’s claims based on an allegedly invalid warrant.

29. On June 10, 2009, Dr. and Mrs. Redd were also to be arrested, pursuant to felony warrants issued after they were indicted for stealing and illegally selling artifacts. *See* Ex. 20 (Dr. Redd indicted for “theft of tribal property; aiding and abetting; [and] forfeiture”); Ex. 21 (Mrs. Redd indicted for “trafficking in stolen artifacts; theft of government property; [and] aiding and abetting”).

RESPONSE:

Undisputed.

30. “[T]he U.S. Government knew that [officers] would encounter three [adult] persons in the Redd Home” on June 10, 2009: “[Dr. Redd], Jeanne Redd and Jerrica Redd.” Ex. 36 (Pls’ Answers to the USA’s First Interrogatories) at 6. A young boy also lived in the home. *Id.* at 14.

RESPONSE:

Undisputed. In addition, the officers were also aware that the “young boy” was three years old and presented no threat to officer safety. See Movant’s Exhibit 1, Operations Plan, Dkt. 94-1 at page 1 (FBI000012).

31. Dr. Redd was a hunter. *See id.* at 19 (“My Dad and I spent many days together hunting.”).

RESPONSE:

Undisputed that Dr. Redd was a hunter. Disputed that his being a hunter was sufficient to cause concern for officer safety, or did cause concern for officer safety. See Paragraph 99, below; Jericca Redd Decl., attached to Plaintiff’s Appendix as Exhibit 4, at page 6, ¶ 9.

32. The Redds kept firearms in their home. *See id.* at 3 (“Dad eventually went into the house and made arrangements to have someone keep his guns while he was on pre trial release.”); *id.* at 4 (“I spoke with my Dad on the phone as he was returning from Moab. He told he [*sic*] was going to make arrangements to take his guns to Jon’s house and that is where they would be.”).

RESPONSE:

Undisputed. However the implication is that the Defendant or the other agents knew that Dr. Redd had guns in his home and perceived some sort of threat as a result. All guns were kept and possessed lawfully. None were accessible or easily accessible to the Redd’s at the time the Agents entered the home. The Cited evidence is to statements that were made after the arrest, appearance, and release of James and Jeanne Redd. During the search, no effort was made to secure or seize the guns, and no guns were seized. Nowhere in the Movant’s Appendix is there an indication that anyone in the Redd Home might be armed or might use guns. See Paragraph 99, below; Jericca Redd Decl., attached to Plaintiff’s Appendix as Exhibit 4, at page 6, ¶ 9.

Relative Size of the Redd Team

33. In addition to the Redd home, federal personnel executed search warrants at approximately 11 other locations in southern Utah on the morning of June 10, 2009. Ex. 4 (Search Locs) at FBI00005.

RESPONSE:

Undisputed².

34. A SWAT team was specifically assigned to one of these locations, but not to the Redd home. Ex. 5 (Timeline) at Redd_BLM-0241 (“Swat service at target residence” scheduled for 6:01 a.m.; “Warrant service initiated in ... Blanding” scheduled for 6:45 a.m.); Ex. 6 (May 26 EC) at FBI000034 (“The first subject to be served will be [redacted] ... This will be a SWAT operation. ... A portion of the SWAT SAs will deploy to Blanding after their operation to provide backup to any areas that are problematic.”); Ex. 9 (Bretzing Decl.) at ¶ 20.

RESPONSE:

Disputed. It is not material whether the Redd Home was the first location to which SWAT deployed. It is material whether SWAT was deployed at the Redd Home at any time.

1. Regardless of where the SWAT team went at 6:01 a.m., “...a portion of the SWAT SA’s will deploy to Blanding after their operation to provide backup to any areas that are problematic.” Movant’s Exhibit 6, Electronic Communication Re Cerberus Action, Dkt. 94-6, at page 2 (FBI000035).

² Movant’s Exhibit 4, Arrest Locations, Dkt. 94-4, does not contain a document labeled FBI00005. That document is found at Movant’s Exhibit 3, Search Warrant Locations, Dkt. 94-3 at page 1. It provides, as alleged, that there were exactly 11 other locations, and the Redd Home made 12 locations total. The fact is undisputed.

- a. This reference creates an inference that the SWAT team went to a site other than Blanding at 6:01 a.m. so that they could “rally” in Blanding afterwards. Movant’s Exhibit 8, Cerberus Action Search/Arrest Warrant Service, Dkt. 94-8 at page 1 (FBI000063).
2. Two (2) more SWAT officers joined the ten (10) member SWAT team sometime before or during the 6:01 a.m. search, and returned to Blanding to assist as needed. See Movant’s Exhibit 8, Cerberus Action Search/Arrest Warrant Service, Dkt. 94-8 at page 1 (FBI000063)(referencing a 12 Member team).
 - a. The reference is to a 12 member team, which is 2 more than the original number of 10 in Movant’s Exhibit 7, 4/1/2009 FBI Electronic Communication Re: Cerberus Action, Dkt. 94-7 at page 3 and 4, (FBI000117 and 118)).
 - b. Alternatively, there was a second 12 member SWAT team, in addition to the 10 Member SWAT team that conducted the 6:01 a.m search, that returned to Blanding to assist as needed.
3. No fewer than four SWAT team officers, or SWAT certified officers, were on site at the Redd Home on June 10, 2009, by 9:52 a.m. Movant’s Exhibit 9, Bretzing Decl., Dkt. 94-9, at page 9, ¶45.
4. Additional SWAT officers (more than 100), or Officers dressed in such a way that they would be perceived as SWAT officers, were present on June 10, 2009. See Paragraph 86 below.

35. The number of people initially assigned to the Redd team – 12 – did not significantly exceed the number initially assigned to any of the other locations, where the Redds did not live, *see* Ex. 9 (Bretzing Decl.) at ¶ 19:

- A. 82 Dodge Point (Blanding) – 21 officers and an archeologist. Ex. 3 (Search. Locs.) at FBI00006;
- B. 2089 B-N Reservoir Road (Blanding) – 11 officers and an archeologist. *Id.* at FBI00008.
- C. 208 West 200 North (Moab) – 9 officers and an archeologist. *Id.* at FBI00006.
- D. 216 South 100 West (Monticello) – 9 officers and an archeologist. *Id.* at FBI00007.
- E. 165 East North (Monticello) – 9 officers and an archeologist. *Id.*
- F. 36-10 North Reservoir (Blanding) – 9 officers and an archeologist. *Id.*
- G. 495 South 200 West (Blanding) – 9 officers and an archeologist. *Id.* at FBI00008.
- H. 434 West 200 South (Blanding) – 9 officers and an archeologist. *Id.* at FBI00009.
- I. 1100 South 300 West (Blanding) – 9 officers and an archeologist. *Id.* at FBI000010.
- J. 90 West 100 South (Blanding, first team) – 8 officers and an archeologist. *Id.* at FBI00009.
- K. 90 West 100 South (Blanding, second team) – 8 officers and an archeologist. *Id.* at FBI00009.

RESPONSE:

Disputed.

First, the number of agents at other locations is not material, or relevant, to the issue presented to this Court.

Second, the Movant's numbers do not add up. Based on paragraph 35(A) through 35(K) above, there were 91 federal agents involved in Cerberus. However, based upon other evidence submitted by the Movant, the following is demonstrated:

1. The April 1, 2009 Electronic Communication Re: Cerberus Action (FBI0000115-122) demonstrates:
 - a. There were 85 or more FBI agents "providing the following support," See Movant's Exhibit 7, 4/1/2009 FBI Electronic Communication Re: Cerberus Action, Dkt. 94-7 at page 3 (FBI000117):
 - i. A minimum of 10 SWAT Officers, and a maximum of 22 SWAT officers (See Response to Paragraph 34 above);
 1. 10 SWAT officers: Movant's Exhibit 7, 4/1/2009 FBI Electronic Communication Re: Cerberus Action, Dkt. 94-7 at page 3 and 4 (FBI000117 and 118)
 2. 12 SWAT officers: Movant's Exhibit 8, Cerberus Action Search/Arrest Warrant Service, Dkt. 94-8 at page 1 (FBI000063).
 - ii. 40 ERTs, See Dkt. 94-7 at page 4 (FBI000118);
 - iii. 35 SAs (including one ASAC and 2 tech agents). *Id*;
 - iv. This evidence indicates there were at least 85, and perhaps as many as 97 FBI agents, plus additional BLM agents and non-law enforcement employees of either or both agencies.
 2. Eight (8) additional Non-FBI agents are identified in Movant's Exhibit 2, Command Locations, Dkt. 94-2 (FBI000004).

- a. This evidence indicates there were 93 to 105 total agents, plus additional cultural specialists and archeologists.
3. The FBI issued a press release on June 17, 2009. See Exhibit 3 to Plaintiff's Appendix, June 17, 2009 FBI Press Release. In that statement, the FBI stated:
 - a. The "operation was conducted on June 10, 2009 by approximately 150 agents and employees from the FBI and the BLM." See FBI Press Release, Exhibit 3 to Plaintiff's Appendix, at page 1.
 - b. If there were between 85-97 FBI agents, there were approximately 53-65 more BLM agents and non-law enforcement employees of the FBI and/or BLM.
4. Movant's allegation in Paragraph 35 above fails to account for no less than 53, and as many as 65 (or more) agents. Each of these 53-65 agents were at the Redd Home, or one or more of the locations identified in Paragraphs 35(A) through (K).

Arrival at the Redd Home

36. Federal personnel began to arrive at the Redd home at approximately 6:40 a.m. on June 10, 2009. FAC at ¶ 60; Ex. 25 (Narrative) at FBI000020; Ex. 26 (Admin Worksheet) at FBI000021.

RESPONSE:

Undisputed.

37. That initial group consisted of 12 law enforcement officers and one unarmed cultural specialist. They were:

- A. 10 BLM and FBI law enforcement officers with specific roles as to the Redd arrests and search (team leader, assistant team leader, 4 "transport" officers, "photographer," "photo log," and evidence response team leader"), Ex. 26 (Admin Worksheet) at 1;

Note 2 to Movant's Statement Undisputed Material Facts, filed at Dkt. 93-1, at Paragraph 37: *See also see also [sic]* Ex. 28 (302) at 1 (identifying the roles of the law enforcement officers as: "team leader/interview," "assistant team leader/interview," "transport/search/interview," "communications/search," "transport/search/interview," "transport/search," "photographer," "photo log," and "ERT leader"); Ex. 39 (Initial Arrival) at lines 1-8 and 10-13

- B. The FBI Agent serving as co-case agent with Defendant Love, *see* Ex. 39 (Initial Arrival) at line 3;
- C. Defendant Love, *see id.* at line 7; and
- D. One unarmed archeologist, *see id.* at line 9.

Note 3 to Movant's Statement Undisputed Material Facts, filed at Dkt. 93-1, at Paragraph 37: One document prepared later indicates that two (rather than one) archeologists were present at 6:40 a.m. *See* Ex. 28 (302). This appears to be a mistake, as one archeologist signed in at 6:45 a.m., and the second archeologist did not sign in until 7:45 a.m. *See* Ex. 40 (9:30 Total), lines 13, 17. Additionally, cultural specialists did not participate in initial entries into homes and had been instructed not to enter any site until the premises were secure. Ex. 10 (Palus Decl.) at ¶ 12

Disputed. *See* Paragraph 35 above, Paragraph 106 below.

- 38. Mrs. Redd and one of the Redds' adult daughters were home. Ex. 25 (Narrative) at FBI20; Ex. 26 (Admin Worksheet) at FBI21.

RESPONSE:

Undisputed. The daughter was Jericca Redd. *See* Exhibit 4 to Plaintiff's Appendix, Jericca Redd Declr., at page 1, ¶2.

- 39. Dr. Redd was not. FAC at ¶ 61.

RESPONSE:

Undisputed that Dr. Redd was not home when the Agents entered the Home. Dr. Redd arrived subsequent to their entry. When he did so, there were Agents outside the home who arrested him, who had not signed the sign in log, and who, by Movant's computation method, were not present. *See* Response to Movant's Paragraph 47 and Plaintiffs' Paragraph 106 below.

40. Approximately four law enforcement officers approached the front door, knocked and announced a police search. Ex. 25 (Narrative) at FBI000020; Ex. 26 (Admin Worksheet) at FBI000022); Ex. 9 (Bretzing Decl.) at ¶ 28.

RESPONSE:

Undisputed. However, Plaintiff submits that they did not “knock,” but rather, pounded or beat on the door. See Exhibit 4 to Plaintiff’s Appendix, Jericca Redd Decl. at page 2, ¶2(e).

41. Mrs. Redd answered the door and was arrested without incident. Ex. 25 (Narrative) at FBI20; Ex. 26 (Admin Worksheet) at FBI000022; Ex. 9 (Bretzing Decl.) at ¶ 28.

RESPONSE:

Undisputed. It is noted that Jeanne Redd offered no argument or resistance or attempt to flee. These facts are a reasonable inference from the fact that she was arrested “without incident.”

42. Mrs. Redd was advised of her rights at approximately 6:48 a.m. Ex. 32 (Mrs. Redd Interview).

RESPONSE:

Undisputed.

43. Mrs. Redd consented in writing to “answer questions without a lawyer present” at 6:50 a.m. Ex. 31 (Mrs. Redd Advice of Rights).

RESPONSE:

Undisputed. In addition, it is noted that Mrs. Redd was cooperative.

44. Mrs. Redd was questioned until about 9:22 a.m., spoke with her attorney on the phone, and then terminated the interview at about 9:56 a.m. Ex. 32 (Mrs. Redd Interview) at 3.

RESPONSE:

Undisputed.

45. Mrs. Redd left the home no later than 10:34 a.m. *See* Ex. 27 (Transport Log) at FBI000019.

RESPONSE:

Undisputed.

Arrest, Questioning, and Departure of Dr. Redd

46. Dr. Redd returned home shortly after his wife's arrest, at about 6:55 a.m. FAC at ¶ 61; Ex. 25 (Narrative) at FBI000020; Ex. 26 (Admin Worksheet) at FBI000021; Ex. 28 (302).

RESPONSE:

Undisputed.

47. At this point, there were still 12 law enforcement officers and one unarmed cultural specialist at the Redd home. *See* Ex. 39 (Initial Arrival).

RESPONSE:

Disputed.

It is undisputed that there were 12 Agents/officers inside the residence conducting a search.

It is disputed that there were only 12 Agents/officers at the site of the Redd Home. For example, Agent Vander Veer was not accounted for in the sign in log at Movant's Exhibit 39, Dkt. 94-9 (the sole basis for Movant's count of agents), but was obviously present and admittedly participated in the arrest and interrogation of James D. Redd at or about 6:55 a.m. and continuing to 9:30 a.m. *See* Movant's Exhibit 28, FD-302 by D.E. Kisabeth, Dkt. 94-28, at page 1 (Redd_BLM-0243)(arrival time); Movant's Exhibit 29, Advice of Rights: James Redd, Dkt.

94-29, page 1 (witness signature); Movant's Exhibit 30, Memorandum of Interview: Dr. Redd, Dkt. 94-30, at page 1 (Redd_BLM-0217),(participants).

Agent Vander Veer signed in at 9:52 a.m. Movant's Exhibit 38, Sign in Log, Dkt. 94-38, at page 1 (FBI000001), but she was present from the time of arrival of the initial agents until signing in.

“Other search teams arrived through the day and assisted with the search...” at the Redd Home. See Movant's Exhibit 28, FD-302 by D.E. Kisabeth, Dkt. 94-28, at page 1 (Redd_BLM-0243).

The most reasonable inference for Plaintiff from these facts is that only those agents who entered the residence signed the sign in log. Additional agents were present, such as Vander Veer, who did not enter the residence and thus did not sign in. In addition, the SWAT team that executed the 6:01 a.m. search was one of the “other search teams” and there was no less than 4 SWAT team members at the residence at or before 12:00 noon on June 10, 2009. Plaintiff submits that the inferences is that one or more SWAT teams were among those other search teams who came to the house to “assist.”

48. Officers arrested Dr. Redd in the driveway without incident. Ex. 11 (Narrative) at FBI20; Ex. 12 (Admin Worksheet) at FBI21; *id.* (Admin Worksheet) at FBI22; Ex. 9 (Bretzing Decl.) at ¶ 29.

RESPONSE:

Undisputed. It is noted that Dr. Redd offered no argument or resistance or attempt to flee. These facts are a reasonable inference from the fact that he was arrested “without incident.”

49. Dr. Redd was taken to the garage and searched for weapons at about 7:05 a.m. FAC at ¶ 62; Ex. 22 (Dr. Redd Interview) at 1; Ex. 9 (Bretzing Decl.) at ¶ 29.

RESPONSE:

Undisputed. It is also noted that no weapons were located on Dr. Redd.

50. At approximately 7:10 a.m., officers “read and explained” an Advice of Rights, which Dr. Redd stated he “understood.” Ex. 22 (Dr. Redd Interview) at 1; Ex. 21 (Dr. Redd Advice of Rights).

RESPONSE:

Undisputed.

51. Dr. Redd then consented in writing to “answer questions without a lawyer present.” Ex. 21 (Dr. Redd Advice of Rights).

RESPONSE:

Undisputed. It is noted that Dr. Redd was cooperative.

52. Dr. Redd was “sequestered” in the garage for questioning until about 9:30 a.m. FAC at ¶ 62; Ex. 22 (Dr. Redd Interview) at 1.

RESPONSE:

Undisputed.

53. By the end of Dr. Redd’s questioning, at 9:30 a.m., a *total* of 18 federal personnel had been to the Redd home. Ex. 40 (9:30 Total).

A. Two of the 18 were unarmed archeologists. *Id.* at lines 13, 17.

B. Four of the 18 had left after spending less than 15 minutes at the site. *Id.* at lines 7, 8, 10, 11.

Note 4 to Movant’s Statement Undisputed Material Facts, filed at Dkt. 93-1, at Paragraph 53: Two of these officers returned for longer time periods after the Redds had left the home. *See* Ex. 47 (5:00 Present) at lines 30, 32.

C. Fourteen of the 18 were still at the home as of 9:30 a.m. *See* Ex. 41 (9:30 Present).

RESPONSE:

Disputed.

Plaintiff sets forth its evidence regarding the number of agents present in Paragraphs 86-88, 104 and 106-107, and in Response to Paragraphs 27, 35 and 47, and provides citation to the basis for the contention in those paragraphs.

54. Dr. Redd left the home no later than 10:34 a.m. *See* Ex. 22 (Transport Log).

RESPONSE:

Undisputed.

55. By the time Dr. Redd left, a *total* of 22 federal personnel had been to the Redd home. *See* Ex. 42 (10:34 Total).

A. Two of the 22 were unarmed archeologists, *see id.* at lines 16, 21;

B. Six of the 22 had left after spending less than 15 minutes at the site, *id.* at lines 7, 8, 10, 11, 12, 14.

Note 5 to Movant's Statement Undisputed Material Facts, filed at Dkt. 93-1, at Paragraph 55: This includes the two officers who returned later in the day. *See id*

C. Sixteen of the 22 were still at the home as of 10:34 a.m. *See* Ex. 43 (10:34 Present).

RESPONSE:

Disputed.

Plaintiff sets forth its evidence regarding the number of agents present in Paragraphs 86-88, 104 and 106-107, and in Response to Paragraphs 27, 35 and 47, and provides citation to the basis for the contention in those paragraphs.

Search of the Redd Home

56. On June 10, 2009, federal personnel took entry photos of the Redd home from about 7:14 a.m. to 7:50 a.m. Ex. 26 (Admin Worksheet) at FBI000022.

RESPONSE:

Undisputed

57. The search itself began at approximately 7:57 a.m. *Id.* at FBI000022.

RESPONSE:

Undisputed that no searching took place until 7:57 a.m. However, Plaintiff submits that the search began when the Agents entered the home and announced that they had a Search Warrant and sequestered the inhabitants, including Jericca Redd for whom there was no arrest warrant, in the Piano Room. See Plaintiff's Appendix at Exhibit 4, Jericca Redd Decl., at page 2, ¶2(e).

58. It soon became apparent that the personnel assigned to the Redd home would need help identifying and cataloging the great volume of artifacts found there. Ex. 9 (Bretzing Decl.) at ¶ 33; Ex. 10 (Palus Decl.) at ¶ 23.

RESPONSE:

Disputed.

See Paragraphs 104-105 below.

59. Over the course of the day, additional federal personnel arrived to assist as operations at other locations concluded. Ex. 26 (Admin Worksheet) at FBI000022; Ex. 9 (Bretzing Decl.) at ¶¶ 16, 34, 35; Ex. 10 (Palus Decl.) at ¶¶ 23-24.

RESPONSE:

Undisputed that additional agents and personnel were summoned to the scene. It is disputed that these agents were called to the scene based on an alleged unanticipated need to execute the search warrant or assist with the collection of items. See Paragraphs 104-105 below.

60. Defendant Love left the Redd home at noon. *See* Ex. 44 (12:00 Total) at line 9.

RESPONSE:

Undisputed that Defendant Love exited the Redd residence at or around noon. Disputed whether he left the Redd property, or his command post. See Response to Paragraphs 62 and 67 below.

If Defendant Love left the Redd home at noon, then one or both of the voice mails in paragraph 62 were left before noon. This fact does not appear in dispute.

If Defendant Love inquired of Jericca Redd as to how to get on the roof of the home, then he passed on this information to the SWAT team agents who got on the roof before he left 550 Sante Fe Heights in Blanding (the Redd Home and surrounding property). Defendant Love remained on the premises, albeit outside the home, long enough to convey information and instruction to the SWAT agents who subsequently took up tactical positions on the roof.

61. By the time Defendant Love left the Redd home, a *total* of 38 federal personnel had been there. *Id.*

- A. Four of the 38 were unarmed archeologists. *See id.* at lines 16, 32, 36, 37.
- B. Six of the 38 had left after spending less than 15 minutes at the site. *See id.* at lines 7, 8, 10, 11, 12, 14.

Note 6 to Movant's Statement Undisputed Material Facts, filed at Dkt. 93-1, at Paragraph 61: This includes the two officers who returned later in the day.

- C. Thirty-two of the 38 were still at the home as of noon. Ex. 45 (12:00 Present).

RESPONSE:

Disputed.

Plaintiff sets forth its evidence regarding the number of agents present in Paragraphs 86-88, 104 and 106-107, and in Response to Paragraphs 27, 35 and 47, and provides citation to the basis for the contention in those paragraphs.

62. While at the Redd home, federal personnel overheard several voicemails left on the Redds' answering machine, two of which appeared to be directed to the search team, Ex. 33 (Typed Notes) at Redd_BLM_0121:

- A. At approximately 11:55 a.m., one message was left saying: "Is anybody there? I know somebody's there. A whole bunch of you. You gonna pick up the phone? All right. I'll be in there in a little bit. Be ready." *Id. see also* Ex. 34 (Handwritten Notes) at FBI000025.
- B. At approximately 1:13 p.m. a second message was left, saying: "Hey, you guys still too scared to answer the phone? Don't touch anything of mine. Trust me. You don't want to." Ex. 33 (Typed Notes) at Redd_BLM_0121; *see also* Ex. 34 (Handwritten Notes) at FBI000025.

RESPONSE:

Undisputed.

63. Officers believed that these messages were left by one of the Redds' adult sons and interpreted them as threats. Ex. 9 (Bretzing Decl.) at ¶ 42.

RESPONSE:

Disputed.

It is not known what the agents believed or thought, nor is the affiant Bretzing competent to opine in that regard, but:

1. The voicemails are not characterized as "threatening" in any Government document (other than by counsel for the Movant in its Appendix at Dkt. 94).

2. No action was ever taken against any member of the Redd family, male or female, based on any allegation of threatening a federal officer.
3. No investigation was conducted into the identity of who left the message at or near June 10, 2009, or at any time other than discovery in this suit and/or related litigation.
4. The first message was left from a phone number registered to someone other than anyone associated with this case, Dan Fessia/Roofer's Supply, in Cedar City, Utah. See Movant's Exhibit 33, Typed Notes on Threatening³ Voicemails, Dkt. 94-33, at page 1, Redd_BLM-0121.
5. The second message was also from a Cedar City phone number. *Id.*
6. It does not appear in Movant's Exhibit 33 (Dkt. 94-33) that the messages were perceived as threatening, and the language in the messages themselves are equivocal regarding the intent of the caller.

64. It has subsequently come to light that those messages were, in fact, left by one of the Redds' adult sons. Ex. 37 (Pls' Resp. to the USA's RFAs) at 5.

RESPONSE:

Disputed. The citation does not support the allegation.

The U.S. Government sent a Rule 36 Request to Admit to the Plaintiffs in Redd et. al. v. United States, United States District Court for the District of Utah, Case No. 2:11-cv-01162-TS. The Plaintiffs in that action are Jeanne Redd, Jay Redd, Jericca Redd, Javalan Redd, Jasmine Redd and Jamaica Redd. In that discovery response, attached as Movant's Exhibit 37, Dkt. 94-37, the response is summarized as follows:

³ This title was given to the document by Counsel for the Movant. It appears nowhere in the document, nor is the word "threatening" or "threat" used in the document or by anyone other than counsel.

Jay Redd: Denies leaving the message himself. He does not know if Javalan Redd left the message. See Response to Request to Admit Nos. 1 through 4 (Jay Redd does not know if Javalan Redd left the messages) and Response to Request to Admit Nos. 5-8 (Jay Redd denies it was Jay Redd who left the message).

Javalan Redd: Asserts his Fifth Amendment Privilege to refuse to answer whether he left the message or not. *Id.*

All other Plaintiffs: The other Plaintiffs in that case do not know who left the messages. *Id.*

The most reasonable inference from these facts, and those in Paragraph 63 above, are that an unidentified person from Cedar City left the messages, which were not perceived as threats, and not investigated as threats and whoever left the message(s), it was not Jay or Javalan Redd.

65. Because of the threat, FBI began to enlist the assistance of members of an FBI SWAT team, who (in their primary role as FBI agents) happened already to be at the residence assisting in the evidence search, to shift gears into protecting the residence so the agents could continue their safe and cautious processing of the search. Ex. 9 (Bretzing Decl.) at ¶ 43.

RESPONSE:

Disputed.

There is no evidence that the messages were interpreted as threats. The word “threat” was never used to characterize the messages until the Movant’s employed it in its Memorandum and supporting documents.

It is undisputed that FBI SWAT team members were present and properly (SWAT) equipped at the Redd Home on June 10, 2009.

It is disputed that these SWAT Team agents were something other than SWAT Team agents until after they “shifted gears.” The most reasonable inference available to the Plaintiff is that these officers were SWAT team agents when they arrived on June 10, 2009, especially if they were among those in the 10 member SWAT team that conducted the 6:01 a.m. search earlier in the day. They were SWAT team agents while present at the Redd Home on June 10, 2009, and they were SWAT team agents when they left the Redd home on June 10, 2009.

66. This required them to stop assistance with the search, the reason for which they initially responded to the residence, and transform into a protective role whereby they acquired long guns from their vehicles and took up tactical positions at or around the residence to ensure that no one could approach undetected in a hostile manner. *Id.*

RESPONSE:

Disputed. See Paragraph 65 above.

There is also no evidence submitted by Movant that the SWAT officers were summoned to the residence to assist in the search. Defendant Love summoned many agents to the Redd Home as set forth in Paragraph 104 below.

The following is undisputed: Undisputed that SWAT team agents had long guns and other equipment with them, or accessible to them, at all times present at the Redd home.

67. Agent Love did not participate in the decision to enlist the assistance of SWAT team members. *Id.* at ¶ 44.

RESPONSE:

Disputed.

Defendant Love summoned various agents to the scene after they were through with their other duties. See Paragraph 104 below.

The SWAT agents were deployed onto positions, at least two of which were on the roof. Movant's Exhibit 9, Bretzing Decl., Dkt. 94-9, at page 9, ¶46.

Defendant Love asked Jericca Redd to advise him on the best method to get on the roof of the Redd Home. See Paragraph 97 below. The most favorable inference to the Plaintiff is that he asked because he did not already know how to get on the roof, and that he wanted to assist in deploying Agents onto the roof.

If the first call came in at 11:55 a.m., and Defendant Love left at 12:00 p.m., and Defendant Love conversed with Jericca Redd about how to get on the roof either before or after signing out, the most reasonable inference is that Defendant Love participated in the decision to deploy SWAT team members (who just happened to be present and who just happened to have Sniper Rifles with them), onto the roof. While he may have left the confines of the Redd residence at or about 12:00 noon, he remained on the premises/property until such time as he could convey the roof access information to the SWAT officers who used it to access the roof. In addition, Defendant Love was the lead BLM agent and was one of the two command officers on scene at the time of the SWAT deployment. See Response to Paragraphs 7 and 8 above.

68. The four agents who performed SWAT team duties were FBI law enforcement officers. *Id.* at ¶ 43.

RESPONSE:

Undisputed, but Movant plays a semantic game. All FBI SWAT team officers perform regular FBI law enforcement duties. “[SWAT] team members must pass rigorous fitness tests and be expert marksmen—in addition to carrying out their regular investigative duties as agents.” See Exhibit 5 to Plaintiff's Appendix, at page 1. Thus, while the four agents who performed SWAT duties were also FBI law enforcement officers, this fact is true of each and every FBI

SWAT team officer in the United States of America, including those who did the 6:01 a.m. search, regardless of whether they are performing SWAT duties, or “regular” FBI duties. In addition, because all SWAT team members perform regular FBI duties, any, or all, of the 85-97 FBI agents involved in June 10, 2009 Cerberus Raids could have been SWAT certified as well. See Response to Paragraph 37 for computation of 85-97.

69. The four agents who performed SWAT team duties retrieved their rifles. *Id.* at ¶ 46. Two positioned themselves on the roof of the house so that they could see any person approaching the home. *Id.* at 46.

RESPONSE:

Undisputed, but the four agents who performed SWAT team duties were SWAT officers at all relevant times.

Dr. Redd’s Alleged Return to the Home

70. One of Dr. Redd’s adult daughters has contended that she and her parents returned to the Redd home and parked outside at “about 5:00 p.m.” Ex. 36 (Pls’ Answers to the USA’s First Interrogatories) at 3.

RESPONSE:

Undisputed.

71. This contention is not supported in the documentary records from that day. *See* Ex. 25 (Narrative) (“SSRA John Wright was advised by Redd’s attorney Rod Snow, that the Redds would return after the agents left the scene.”); Ex. 26 (Admin Worksheet) at FBI000021 (same).

RESPONSE:

Disputed.

James, Jeanne and Jericca Redd did return home on June 10, 2009 (but did not enter the residence immediately), and saw that the agents were still at their home. They waited outside the home, until after they believed that all agents had left. See Plaintiff's Appendix at Exhibit 4, Jericca Redd Decl. at pages 6-7, ¶¶11-12.

In fact, the Defendant admits, in Movant's Exhibit 47, Federal Personnel [admittedly] Actually Present at the Redd Home at 5:00, Dkt. 94-47, that "it is unclear when [33 agents] left the site." (the Redd home). According to the Errata at Dkt. 99-1, Supplemental Decl. of Gregory Bretzing, there were at least 35 Agents, 2 of whom were cultural specialists (non-law enforcement), rather than just 33.

It is undisputed that it was the intent and desire of James Redd, Jeanne Redd and Jericca Redd, to return home only after all federal agents had left.

72. At 5:00 p.m., "[a]gents were still at the home," Ex. 36 (Pls' Answers to the USA's First Interrogatories); *see also* Ex. 47 (5:00 Present).

- A. No more than 33 federal personnel were there at the time the family allegedly returned. *See* Ex. 47 (5:00 Present).
- B. Two of the 33 were unarmed cultural specialists. *See id.* at lines 8, 27.

RESPONSE:

Undisputed that there were Agents still at the Redd Home at 5:00 p.m. The reference to Plaintiff's Answers to the USA's First Interrogatories should be to Jericca Redd's Response to Interrogatory No. 2, pages 3 (at Dkt. 94-36 page 3) If the Defendant is asserting that no more than 31/33 federal agents, and 2 additional non law enforcement agents, were present at the Redd home at the time of the return of James, Jeanne and Jericca Redd on the evening of June 10, 2009, that fact is not disputed either.

73. The Redds did not go inside or interact with any agents. *See* Ex. 36 (Pls' Answers to the USA's First Interrogatories) at 3 ("Dad was on the phone until the Agents left.").

RESPONSE:

Undisputed.

CONCLUSION

74. By 5:15 p.m., the search concluded. Ex. 25 (Narrative) at FBI000020.

RESPONSE:

Disputed.

See below at paragraph 75 and 76. The final survey and exit photography was part of the search, albeit not defined as such by the Movant. Nevertheless, the Agents were present in the home searching or not searching, under the ostensible authority granted by the search warrant. Plaintiff contends the search did not conclude until 5:36 p.m., but admits that the agents had completed their search prior to 5:36 p.m.

75. Federal personnel then conducted a final survey and took exit photos. *Id.*; Ex. 26 (Admin Worksheet) at FBI000022.

RESPONSE:

Undisputed.

76. All federal personnel left the Redd home by approximately 5:36 p.m. Ex. 25 (Narrative) at FBI000020; Ex. 26 (Admin Worksheet) at FBI000022; Ex. 27 (Transport Log).

RESPONSE:

Undisputed. Once the agents were gone, and off the premises, the search was over.

77. Over the course of the entire day, a total of 53 federal personnel had visited the Redd home. *See* Ex. 46 (5:00 Total).

- A. Seven of the 53 were unarmed cultural specialists, *id.* at lines 16, 28, 32, 36, 37, 38, 41.
- B. Thirty-three of the 53 were still there at the end of the day. Ex. 47 (5:00 Present).
- C. The total number of federal personnel at the home at any one time never exceeded 45. *See* Ex. 38 (Log).

RESPONSE:

Disputed.

Plaintiff sets forth its evidence regarding the number of agents present in Paragraphs 86-88, 104 and 106-107, and in Response to Paragraphs 27, 35 and 47, and provides citation to the basis for the contention in those paragraphs.

More than 800 artifacts were ultimately seized from the Redd home. *See* Ex. 22 (Bill of Particulars).

RESPONSE:

Undisputed that 800 items were seized.

78. All told, the complete set of items seized from the Redd home took up more than 112 boxes. *See id.*

RESPONSE:

Undisputed.

79. All of the artifacts at the Redd home required special handling. Ex. 10 (Palus Decl.) at ¶33. Given their age – some 100 to 1,000 years old – and the nature of the materials, including plant fibers, ceramics, and shell, these ancient items were quite fragile and delicate. *Id.*; *see also*, *e.g.*, National Park Service, *Museum Handbook* 7:32 (“Treat collections subject to [the Native American Grave Protection and Grave Repatriation Act] with great sensitivity, because of their cultural significance, sacred importance to descendants, tribal leaders, elders, and traditional

religious leaders.”), *available at* <http://www.nps.gov/museum/publications/MHi/CHAP7.pdf> (last accessed February 20, 2015); Wyoming Department of State Parks and Cultural Resources, *Wyoming State Museum Collections Care Manual 7* (describing the care required to pack and transport artifacts), *available at* <http://wyospcr.state.wy.us/Intranet/WSM%20Collections%20Care%20Manual.pdf> (last accessed February 20, 2015).

RESPONSE:

Disputed.

Not every single item required special handling. This fact is not a material fact, but the lack of required special handling is most obvious from the lack of special care and handling exercised by the Confidential Informant who handled the same or similar artifacts. See e.g. Plaintiff’s Appendix at Exhibit 6, undercover video-tape.

80. Some of the items located at the Redd home were of especially great delicacy and cultural significance. Ex. 10 (Palus Decl.) at ¶ 36. These included an Apache Gan mask that was crudely hung on a wall with fishing line; a cradleboard used to carry an infant that journals indicated had been taken from a child’s burial site, which had been spotted under a bed; and human remains that were found in a box in the basement with an assemblage of random artifacts.

Id.

RESPONSE:

Undisputed. These are not material facts.

81. Mrs. Redd pleaded guilty to two counts of theft of government property, three counts of theft of tribal property, and two counts of trafficking of tribal property. Ex. 23 (Mrs. Redd Judgment).

RESPONSE:

Undisputed.

82. The Redds' adult daughter also pleaded guilty to related charges. Ex. 24 (Jerrica Judgment).

RESPONSE:

Undisputed.

c. Plaintiff's Statement Of Additional Material Facts.

Pursuant to DUCiv.R 56.1(c)(2)(C), Plaintiff makes a statement of additional material facts relevant to show that there is a genuine issue of material fact for trial.

i. Additional Facts Relevant to Element One, Conduct Violative of Constitutional Rights.

Number of Agents and Manner in Which They Were Equipped

83. On June 17, 2009, the U.S. Senate Judiciary Committee conducted an oversight hearing at which Eric H. Holder, the Attorney General of the United States (on June 17, 2009) testified. See Oversight of the U.S. Department of Justice, Hearing before the Committee on the Judiciary, United States Senate, 111th Congress, First Session, June 17, 2009, attached to Plaintiff's Appendix as Exhibit 1. See Also, Oversight Committee Hearing video excerpts, attached to Plaintiff's Appendix as Exhibit 2.

84. Attorney General Holder read a prepared statement and then offered to answer "any questions that [the committee] might have." Plaintiff's Appendix at Exhibit 1 (page 13 of the exhibit, page 9 of the transcript). (The Prepared Statement is found at page 133 of the exhibit, page 129 of the transcript).

85. Senator Orin G. Hatch from Utah was a member of the Committee on the Judiciary on June 17, 2009, and he asked Attorney General Holder questions about the June 10, 2009 raids.

The relevant colloquy was as follows (all emphasis is supplied, no emphasis is in the original):

Senator Hatch:

Welcome, General. We are happy to have you here. We know you have a difficult job, and we always want to be helpful to you if we can. There is something that really bothers me over this last weekend. After a 2-year investigation, the FBI, in cooperation with the Department of Interior, arrested 19 Utahans trafficking in Indian artifacts from Federal lands. **Now, I am extremely concerned by the manner in which these warrants were executed. They came in in full combat gear, SWAT team gear, like they were going after, you know, the worst drug dealers in the world** and in the process—now, I do not believe anybody should be taking Indian artifacts, to establish that right off. But in the process, **one of the leading figures in the whole county down there who is a leading doctor**, had delivered almost everybody who lived in the county as a doctor, committed suicide. **He was by all intents and purposes an upstanding member of the community, a decent, honorable man**, critical to the community from a health and welfare standpoint. And the way they came in there—I mean, you know, I have no problem with going after people who violate the law. But **they came in there like they were the worst common criminals on Earth**, and in the process this man—it became overwhelming to him, I suppose—a really strong individual, a good person, goes out and commits suicide. Now, you know, this bothered me.

Now, media reports state that over 100 Federal agents were used in this operation, and that extreme show of force and presence has been perceived by the community out there and the civic leaders in San Juan County as not only unnecessary but brutal...

The offenses for which these warrants were issued were nonviolent offenses...

Can you just explain to me what, if any, factors were used to measure the appropriate level of force and personnel for the Utah operation?

To which Attorney General Holder responded:

...The arrests that were done were felony arrests, and as best as I can tell, they were done in accordance with the FBI and Bureau of Land Management standard operating procedures. When arrests are made in even cases that seem to be nonviolent, there is always a danger for the law enforcement officer who is effecting that arrest, and it is a difficult thing to ask them to assume certain things as they are—

Senator Hatch:

I am with you on that, but in this case, **this is a doctor who everybody respected, everybody loved in the community.** I am just centering on his case since he was so overwrought by it he took his life. And that community—you know how hard it is to get upstanding doctors to move into some of these rural communities and do what this man was doing. Now, again, I do not justify stealing or taking Indian artifacts, if that is what happened here, but I would, I guess—nor do I want to put you through a lot of pain here. I hope you will do something about that type of activity in the future. You can bring all the force you want against drug dealers and people who clearly are violent felons where our people might be in danger. But in this case, **there was not the slightest possibility anybody could have been in danger down in that county.**

Attorney General Holder:

Well, we want to use the appropriate amount of force that is necessary, but we also want to keep in mind the protection—the responsibility I have to make sure that the lives of law enforcement officers engaged in these operations are not put at risk...

See Plaintiff's Appendix at Exhibit 1, Pages 31-33 of the Exhibit, pages 27-29 of the transcript.

86. Mr. Holder did not deny that (1) The agents were in body armor; (2) Most or all of the officers were dressed in combat or SWAT team gear; (3) James Redd was an “upstanding member of the community, a decent, honorable man.” (4) there were in excess of 100 federal agents used in the Operation. *Id.*

- A. As noted in Response to Paragraph 68 above, all SWAT team officers perform regular FBI duties. Any or all of the 85-97 FBI officers involved in the June 10, 2009 operation and on site of the Redd Home would be deemed FBI officers whether or not they were SWAT certified and equipped (except the 10-12 member SWAT team that executed the 6:01 a.m. search).
- B. Four or more SWAT team members were on site at the Redd Home at or about noon. Response to Paragraphs 65-69 above.
- C. In Plaintiff's Appendix at Exhibit 4, Jericca Redd Decl., at page 4, ¶5(a), Plaintiff presents evidence that the agents who entered the Redd Home at or about 6:40 a.m.

looked like the officer in the photograph attached as to Plaintiff's Appendix at Exhibit 5, page 1, and referenced by the Movant in Paragraph 26 above, and at Movant's Exhibit 9, Bretzing Decl. at page 4, note 2, except that they did not have helmets and goggles.

D. The Agents who entered the home at 6:40 a.m. had guns like the gun in the same photo (a firearm with fully automatic capability). Plaintiff's Appendix at Exhibit 4, Jericca Redd Decl., at page 4, ¶5(a)(iii).

87. Also on June 17, 2009, the same day as Mr. Holder was answering Senator Hatch's questions, the FBI issued a press release in which confirmed that the number of agents involved in the June 10, 2009 operation included "approximately 150 agents and employees from the FBI and BLM." The number of additional non-employees, such as cultural specialists, was not offered in the press release. *See* Plaintiff's Appendix at Exhibit 3, FBI June 17, 2009 press release.

88. The sole justification for the force exercised on June 10, 2009 offered by Attorney General Holder was the safety of the officers involved in executing the warrants. *See* Plaintiff's Appendix at Paragraph 86, above; Exhibit 1 at pages 31-33.

89. Attorney General Holder never said that Media Reports, or the FBI press release, or Senator Hatch's numbers were exaggerated. Attorney General Holder never said anything like:

- A. There were only 10 SWAT Agents, and they were not at the Redd Home.
- B. None of the other agents were in combat gear.
- C. There were slightly fewer than a hundred agents involved in the operation, not over a 100 and not approximately 150 FBI and BLM agents combined, plus additional private individuals.

D. Not only was officer safety a concern, but the volume of material that needed to be handled, catalogued, inventoried and seized required additional manpower.

E. The SWAT agents were not really SWAT agents, they just happened to be SWAT certified regular FBI agents, performing FBI agent duties only and who were not wearing SWAT gear, but they just happened to be on site helping collect evidence but had to unexpectedly transform into a SWAT role.

90. Similarly, the June 17, 2009, FBI press release makes no allegation similar to those set forth in paragraph 90(A) through 90(E) above.

Level of Threat Anticipated and Experienced at the Redd Home by Law Enforcement Offices

91. The Redd family members in the Redd Home on June 10, 2009, were respected members of the community with no known history of violence. This is especially true of James Redd. Plaintiff's Appendix at Exhibit 4, Jericca Redd Decl., at pages 5-6, ¶8; Plaintiff's Appendix at Exhibit 1, at Pages 31-33 of the Exhibit, pages 27-29 of the transcript; *See Also* Paragraph 86 above (Statements by Senator Hatch).

92. At the time the Arrest and Search Warrants were executed, James Redd was at work at his Blanding medical clinic. Plaintiff's Appendix at Exhibit 4, Jericca Redd Decl., at page 2, ¶2(c).

93. Upon entry into the Redd Home, the Redd family members were sequestered in separate rooms. See above at Response to Paragraphs 52 and 57; *See Also*, Plaintiff's Appendix at Exhibit 4, Jericca Redd Decl., at page 2, ¶¶2(f)-2(g).

94. Jeanne Redd was ordered to open the door, and she complied. Plaintiff's Appendix at Exhibit 4, Jericca Redd Decl., at page 2, ¶¶2(e)-2(g).

95. When Jeanne Redd was arrested, she offered no violence and she was cooperative. She answered questions even though she did not have to do so. See Response to Paragraphs 41, 44.

96. When Jericca Redd was taken to a room (the Piano Room), she was cooperative and offered no violence or argument or attempt at flight. She was polite and cooperative. When asked a question, she answered it. When asked for help or assistance, she provided it. For example, Defendant Love asked Jericca Redd how to access the roof and she told him how to do it. Plaintiff's Appendix at Exhibit 4, Jericca Redd Decl., at page 2, ¶3 and page 3, ¶4(c).

97. The agents were not afraid of Jericca Redd. They left her alone in her room when she asked for permission to get dressed for the day. The agents were not worried that she would access a weapon or use one if given the opportunity. Plaintiff's Appendix at Exhibit 4, Jericca Redd Decl., at page 3, ¶4(d).

98. With regard to weapons, at no time did the Agents appear to be searching for weapons. Guns were in the house, but no Agent every seized a gun or secured a gun during the course of the search. Plaintiff's Appendix at Exhibit 4, Jericca Redd Decl., at page 6, ¶9. None of the Agents seemed worried about, or interested in, any guns that might be in the house. *Id.*

99. When James Redd arrived home he was arrested "without incident." He offered no violence or resistance or attempt at flight. He was cooperative and answered the officers' questions even though he did not need to do so. See Response to Paragraphs 48-52 above.

Additional Actions and Authority Exercised by Defendant Love

100. Defendant Love was the lead BLM case agent for Operation Cerberus prior to the time of the events giving rise to this lawsuit (prior to June 10, 2009). Defendant Love had been working in Operation Cerberus since December 2006. See Response to Paragraph 7 above.

101. Cerberus was a joint investigation by the FBI and BLM. Movant's Exhibit 7, Dkt. 94-7, at page 1, FBI000115 ("Details"). "Because of the size and nature of this jointly conducted operation, there [were] shared responsibilities between agencies for takedown." *Id.* at page 2, FBI000116.

A. The inference most favorable to the Plaintiff from these facts is that this operation was not, as alleged by movant, entirely the responsibility of the FBI. The FBI indicates there were shared responsibilities with the BLM for "takedowns." Thus the BLM, and the FBI, shared responsibility for takedowns, and Plaintiff's decedent was taken down on June 10, 2009.

B. In addition, Defendant Love was the highest ranking member at the Blanding Command Location. See Movant's Exhibit 2, Command Locations, Dkt. 94-2, with Command Authority.

102. There was a main command post for the June 10, 2009 operation, referred to as "Area Command." It was to be located at BLM headquarters in Moab, Utah, and FBI Special Agent Patrick Brosnan and BLM Special Agent Defendant Love were assigned to the Area Command. 94-7, at page 4, FBI000118. However, Movant's Exhibit 2, Dkt. 94-2, indicates that Defendant Love and SA Brosnan were at a Command Post in Blanding, Utah. See Movant's Exhibit 2, Dkt. 94-2, page 1, FBI0000004. In addition, the evidence is that Defendant Love spent most, or all, of the morning inside the Redd Residence. See Movant's Exhibit 38, Sign in Log, Dkt. 94-38, at page 1 (9th line down). SA Brosnan spent the entire day there. *Id.* (3d line down).

A. The most reasonable inferences available to Plaintiff from these facts is that Defendant Love and SA Brosnan moved Area Command to Blanding.

B. Defendant Love and his co-commander Brosnan could conduct their command duties from their telephone or by other remote means without being physically present in the Command Location. Alternatively, the Command Post was moved to the Redd Home.

103. While Defendant Love was present in the home, Jericca Redd heard him talk on his telephone and he summoned more and more agents to the Redd Home. He gave this instruction on several occasions throughout the day while in the presence of Jericca Redd. After each such occasion that he did so, more agents showed up inside or outside of the house. Plaintiff's Appendix at Exhibit 4, Jericca Redd Decl., at page 5, ¶6. See Also Response to Paragraph 16 above.

Defendant Love and Operation Cerberus's Anticipation and Expectation Regarding
the Volume of Material to be Searched

104. The FBI and BLM began organizing resources and assets, including manpower and funding, on or before April 1, 2009. See Movant's Exhibit 7, Dkt. 94-7 at page 1, FBI000115. The confidential informant had been inside the Redd Home, and at the site of other targets, on several occasions, and took video footage of same. See Plaintiff's Appendix at Exhibit 6, Undercover Footage.

105. Contrary to the allegations of the Movant that there was a surprise with regard to the volume of artifacts at the Redd Home, and the allegation that the need for additional manpower to collect the evidence was unanticipated, the Joint Operation originally contemplated the following:

- A. Handling precautions might be necessary; Movants Exhibit 7, Dkt. 94-7, at page 2;
- B. Persons with special skill, Archaeologists, would be needed to properly process each scene. Movants Exhibit 7, Dkt. 94-7, at page 2;

- C. There would be a large volume of artifacts. Movants Exhibit 7, Dkt. 94-7, at page 3;
- D. Many of the artifacts would remain at the home of the subjects, and the agents would “freeze” all artifacts not seized, to keep them in place until the close of the case. Movants Exhibit 7, Dkt. 94-7, at page 3. See also, Movants Exhibit 8, Dkt. 94-8, at page 1.

Accuracy of the Sign In Log

106. The Sign In Log, filed at Dkt. 94-38, indicates only those agents who entered the Redd Residence, but not those who were at the home or on the premises, but not in the Residence. This fact is demonstrated as follows:

- A. SA Bretzing declares that “the FBI and BLM law enforcement officers who arrived at and departed from the Redd residence over the course of the day on June 10, 2009 signed in and out on a log...” Movant’s Exhibit 9, Bretzing Decl., Dkt. 94-9, at page 5, ¶22;
- B. Agent Vander Veer did not sign in until 9:52 a.m., but she was “present” at the time of arrival at 6:40 a.m. to arrest James Redd and/or to search the Redd “Residence.” See Movant’s Exhibit 1, Operations Plan, Dkt. 94-1, at page 5, FBI000016 (Vander Veer assigned as Searcher); Movant’s Exhibit 3, Search Warrant Locations, Dkt. 94-3 at page 4, FBI000008 (Vander Veer as Finder); Movant’s Exhibit 28, Dkt. 94-28 at page 1, Redd_BLM-0243 (Vander Veer alleged to arrive on scene at 640 a.m. and designated as a transporter/searcher/interviewer);

- C. Agent Vander Veer was present at 6:40 a.m., and she assisted in the arrest and interview of James D. Redd. This took place not in the Redd “Residence,” but in the driveway and garage. Movant’s Exhibit 28, Dkt. 94-28, at page 1 (“James Redd drove up at 6:55 a.m.”); See Also Movant’s Exhibit 31, Dkt. 94-31, at page 1, Redd_BLM-0217 (“Time [of interview of James Redd]: 7:05 a.m. to Approximately 9:30 a.m.”);
- D. The most reasonable inference from these facts is that FBI and BLM agents did not sign in (or out) of the log at Exhibit 38, unless and until they entered the residence;
- E. There were lots of agents besides just Vander Veer who did not enter the residence, but who were present at the Redd Home and exercising force or a show of force.
 - 1. This fact is evident from above;
 - 2. See Also, Plaintiff’s Appendix at Exhibit 4, Jericca Redd Decl., at page 3, ¶¶4(a) and 4(b).

107. Defendant Love does not appear on any Government document as having been assigned to the Redd Home, either as an arrest team member, or a search team member. See Movant’s Exhibit 3, Search Warrant Locations, Dkt. 94-3, at page 4 (B8)(Search team); Movant’s Exhibit 4, Arrest Locations, Dkt. 94-4 (James and Jeanne Redd are not listed). But Defendant Love, and many others, signed in and out of the Redd Home.

- A. A reasonable inference from these facts is that there are individuals who went to the Redd Home who were not “assigned” to go to Redd Home.
- B. The government documents do not identify all the agents present at the Redd home (or in the June 10, 2009 operation).

Other Relevant Facts

108. Most of the agents who entered the home first appeared to be armed and dressed like the agent in the picture referenced in Movant's Exhibit 9, Bretzing Decl., Dkt. 94-9, at page 4, ¶20, note 2, and attached to Plaintiff's Appendix at Exhibit 5, except that they were not wearing goggles or hats. Plaintiff's Appendix at Exhibit 4, Jericca Redd Decl., at page 4, ¶5.

- A. Additional Agents entered the home, or walked around outside of it. These agents were not as heavily armed as the initial set of agents, but they were armed and they all had guns. *Id.* at page 5, ¶5(b). They were also all wearing body armor. See Response to Paragraphs 18, 19, 21-215 above;
- B. Yet more additional Agents stayed outside the home and never entered the residence itself. *Id.* at page 3, ¶4.
- C. There were Agents inside the house, outside the house, and far away from the house (but on the property). They were everywhere. *Id.* at page 3, ¶4(a).
- D. If the Agents were on site, but did not enter the residence, they did not sign in the sign in log. See Paragraphs 106-107 above.

III. Argument.

Pursuant to DUCiv.R 56.1(c)(3), Plaintiff explains why, under the applicable legal principles, summary judgment should be denied.

This Court previously allowed the claim subject to this motion to proceed beyond a Rule 12(b)(6) in its Order at Dkt. 76, Section IV, pages 9-14. Presuming the Court will employ the same analysis, albeit modified in consideration of the differences between Rule 56 and Rule 12(b)(6), the Plaintiff addresses the following issues: (1) whether Agent Love's actions implicate a constitutional right, See Order at Doc. 76, § IV(A), page 10; (2) Whether Plaintiff has demonstrated adequate facts that would support a claim for a violation of a constitutional right, *Id.*, and; (3) whether the constitutional right was clearly established at the time of the challenged conduct. *Id.*

As set forth above, the Parties are in agreement that there are two elements: (1) whether the Defendant's actions violated a constitutional or statutory right and (2) whether the constitutional or statutory rights violated were clearly established at the time of the conduct (June 10, 2009). Plaintiff submits that the first two elements set forth by the Court in its Order at Doc. 76, § IV(A), page 10, represent a two part analysis of the determination of whether the Defendant Love's acts violated a constitutional right.

a. Different Standards Apply On This Rule 56 Motion Than Applied On The Previous Rule 12(b)(6) Motion.

In ruling on a motion for summary judgment, the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986). In addition, all doubts must be resolved against the non-movant, all evidence must be construed in favor of the non-movant, and all reasonable inferences must be

drawn in favor of the non-movant. *Hunt v. Cromartie*, 526 U.S. 541, 550-555, 119 S.Ct. 1545, 1551-1552, 143 L.Ed.2d 731 (1999).

With regard to what inferences are “reasonable,” so long as more than one reasonable inference can be drawn, and one or more inferences creates a genuine dispute of material fact, the trier of fact is entitled to decide which inference to believe, and summary judgment is not appropriate. *Hunt, supra*, 526 U.S. at 552. Thus, the inferences to which the non-movant is entitled to on summary judgment need not be more likely, or more probable, than other inferences. The inference favorable to the non-movant need only be reasonable, and if so, the non-movant is entitled to those inferences.

Second, while a district court should be demanding in its examination of a Rule 56 Movant’s papers, it should treat a Rule 56 opponent’s submissions “indulgently.” *Lew v. Kona Hospital*, 754 F.2d 1420, 1423 (9th Cir. 1985) *citing* 10A C.Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2738 at 484 (1983)⁴. In ruling on a Rule 56 motion, a district court does not weigh the evidence or find facts or determine the credibility of witnesses. *Anderson, supra*, 477 U.S. at 255. Evaluating credibility, weighing evidence, and identifying which factual inferences to draw are all functions reserved for the jury. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-151, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000); *Anderson, supra* 477 U.S. at 255.

The standard on Rule 12(b)(6), and applied by the Court in Dkt. 76, was an assumption of “the truth of the plaintiff’s well pleaded factual allegations” which were viewed “in the light most favorable to the plaintiff” to determine whether there were “enough facts to state a claim to relief that is plausible on its face.” Order at Dkt. 76 at page 6, *citing Bell Atlantic v. Twombly*,

⁴ The reference is found in the most current edition at 10B Wright, Miller, & Kane, Federal Practice & Procedure Civil 3d. § 2738, (note 27).

550 U.S. 544, 570 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Notably, the Court did not accept the Complaint's legal conclusions. *Id.* at note 6, citing *Ridge at Red Hawk, LLC v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007).

Thus, the Court's legal analysis as set forth in its order at Dkt. 76 is still applicable, but there is a difference as to what facts it must now apply to that analysis now that the case is presented on a Rule 56 motion. Those facts are set forth above in Section II(b), all of which must be viewed in a light most favorably to the Plaintiff. Plaintiff is also entitled to all reasonable inferences available from those facts and to have all doubts resolved against the Movant.

b. The Defendant's Acts Violated a Constitutional Right of the Plaintiff.

i. Defendant Love's Actions Implicate a Constitutional Right.

For the reasons set forth in the Court's Order at Dkt. 76, § IV(A)(1), pages 10-11, a district court, in the 10th Circuit, must examine the reasonableness of the Defendant's plan for executing the warrant, his decision to deploy heavily armed agents, and the number of those heavily armed agents, to the Redd home, and the manner in which the arrest of Dr. Redd was carried out. 268 F.3d 1179 (10th Cir. 2001). Plaintiff notes at the outset that the Redd "Home" includes both the residence, and the real estate immediately outside and around the residence. Force was exercised and experienced both within and without the walls of the residence.

The Court in its Order at Dkt. 76 found that the Plaintiff's allegations were adequate to implicate a constitutional right, but in particular, the Court mentioned the allegation of the decision to employ 80 to 140 agents to the Redd home was particularly significant. Order at Dkt. 76 at page 11. Plaintiff demonstrated in its Response to the Movant's Statement of Undisputed Material Fact, that the number was admittedly no less than 53⁵, and as great as 118⁶.

⁵ Movant admits it the number of agents was at least 53. See Movant's Exhibit 46, Dkt. 94-46.

This Court also held that Defendant's decision to deploy over 80 heavily armed agents, and to call more to the scene after the scene was secured, would constitute excessive force. Order at Dkt. 76 at page 14. The facts demonstrated that there were at least 50 agents on the scene by the time that Jericca Redd was secured in the Piano Room⁷, and that more and more search teams were summoned by Defendant Love after the scene was secured, and they in fact arrived throughout the day⁸. While the Order appears to presume 80 in the initial arrival, it made no legal finding that 79 or fewer agents would be constitutionally permissible. The facts as they presently stand indicate that 50 or more was excessive and unreasonable and simply unnecessary.

This Court also saw fit to note that Plaintiff had alleged that the agents were "heavily armed." See Dkt. 76 at page 11. The present facts indicate that the Agents who entered were "heavily armed⁹." Those Agents who entered later and who walked around outside the residence without entering were also heavily armed, albeit not as heavily armed as the entry group. These Agents were wearing body armor and had guns, and 4 or more were SWAT team members who had sniper rifles, or "long guns."¹⁰

The Court found that these facts implicated Dr. Redd's Fourth Amendment protection from the use of excessive force, and given that, the Court found it necessary to determine whether the facts amounted to a violation of that protection. See Order at Dkt. 76 at page 11. In addition to the number of agents, Plaintiff demonstrated the following:

1. The Agents, whether SWAT or otherwise, were dressed like SWAT officers, except that they did not have helmets and goggles. See Section II(b), Paragraph 86 above.

⁶ Plaintiff computes the maximum number as 53 (the number of agents admitted by Movant) plus 65 more (the number of unaccounted for agents involved in the June 10, 2009 Cerberus Operation. See Section II(b) above at Response to Paragraph 35 .

⁷ See Section II(b), Response to Paragraph 27 above.

⁸ See Section II(b), Paragraph 103 and Response to Paragraph 47

⁹ See Section II(b), Paragraph 108.

¹⁰ See Section II(b), Response to Paragraphs 65-69 and 86-89.

2. The alleged evidence gathering need was not present. The Agents knew what they would encounter and had also made arrangements to “freeze” items rather than seize them. See Section II(b), Paragraph 104-105 above.
3. The Redds presented no threat of violence or danger, nor were they anticipated to do so. See Section II(b), Paragraph 91-99 above.
4. The Agents did not appear concerned about guns in the house, nor did they seize or even secure the guns present in the home. See Section II(b), Paragraph 98 above.

Based on the above, the acts of Defendant Love implicate a constitutional right of the Plaintiffs, the right to be free from excessive force as guaranteed by the Fourth Amendment to the United States Constitution.

ii. The Plaintiff Has Identified Adequate Facts that Would Support a Claim for a Violation of a Constitutional Right.

This Court previously found that “the ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” Order at Dkt. 76 at page 11-12 *citing Graham v. Connor*, 490 U.S. 386, 397 (1989) (See Note 21 of Doc. 76). The Court then considered the three factors set forth in *Graham*: (1) “the severity of the crime at issue”; (2) “whether the suspect poses an immediate threat to the safety of the officers or others”; and (3) “whether he is actively resisting arrest or attempting to evade arrest by flight.” *Id. quoting Graham*.

1. The Severity of the Crime at Issue

The severity of the crime at issue, and the facts underlying the charge, have not changed since the Court originally considered them in its Order at Dkt. 76. In other words, the facts alleged in the Amended Complaint and reviewed on Rule 12(b)(6) is the same as the facts

presented in the matter now presented on Rule 56. See Section II(b), Response to Paragraph 29, 81 and 82 above.

...[T]he single felony charge against Dr. Redd, and the alleged facts underlying the charge, compel the conclusion that in the overall scheme of federal criminal conduct, the crime with which Dr. Redd was charged is of comparatively low severity.” Dkt. 76 at page 12.

...[T]he crime Dr. Redd was accused of committing was nonviolent and posed no immediate threat to anyone. Nothing about the Native American artifact trafficking charge at issue could objectively cause anyone to believe that Dr. Redd had the disposition to engage in a violent standoff with officers. Nothing about the alleged facts underlying the charge would suggest to a reasonable officer that 80 to 140 heavily armed agents in flak jackets were necessary to subdue and arrest Dr. Redd, an aged community physician who had served the Blanding area for over 30 years. *Id.* at 12.

In addition, neither Attorney General Holder, nor the Senate Oversight Committee, deemed the alleged crimes as “severe” or suggestive of any danger to officers involved. See Section II(b), Paragraph 86 above. Plaintiff submits that the “severity of the crime at issue” was, and still is, “of comparatively low severity.” Order at Dkt. 76 at page 12. These facts indicate a lesser need for force.

2. Safety of the Officers and Others

Similarly, the Court concluded on Rule 12(b)(6) that “nothing about the alleged circumstances here suggest that Dr. Redd posed an immediate threat to the safety of law enforcement officers or others at the time Agent Love decided to execute the warrant.” Order at Dkt. 76, at page 12-13. Nothing in the facts presented on summary judgment suggest any different conclusion is appropriate. As noted, Dr. Redd was a respected doctor in the community with no known history of violence¹¹. Nothing in the record suggests agents believed Dr. Redd was engaged in criminal activity when the warrant was executed in the early morning hours of June 10, 2009. And while Dr. Redd arrived at his home shortly after agents began the raid, he

¹¹ See Section II(b), Paragraph 86 and 91 above.

was returning only from a morning visit to his clinic—not from any alleged criminal activity.” Dkt. 76 at 12-13; See Section II(b), Paragraph 86, and above; See Also Plaintiff’s Appendix at Exhibit 4, Jericca Redd Decl., at page 2, ¶2(c). More facts were presented on summary judgment than were presented on Rule 12(b)(6) that further support the conclusion that neither Dr. Redd, nor his family, posed any threat to the officers. Senator Hatch characterized Dr. Redd as “an upstanding member of his community, a decent, honorable man...” whom “everybody respected [and] everybody loved.” See Section II(b), Paragraph 86 above. This characterization was not challenged or corrected by Mr. Holder, and has been confirmed in Section II above. The circumstances of Dr. Redd’s arrest demonstrate that Dr. and Mrs. Redd surrendered without violence or attempt at flight, and he immediately agreed to a lengthy interview at which he was cooperative with the investigating agents. See Section II(b), Paragraph 95 and 99 above. Jericca Redd was compliant and polite. See Section II(b), Paragraph 96 above.

Movant offers an after the fact justification that Dr. Redd was a known hunter, and hunters own firearms. As noted by the Court, this fact, “alone is not enough to suggest any immediate threat to the officers’ safety.” Order at Dkt. 76 at page 13. Moreover, as set forth above¹², once inside the home, the Agents made no effort to secure the guns which allegedly gave them so much concern, even with an individual in the home who was allowed to move around from time to time such that she might access a gun. Jericca Redd was allowed to be alone in a room to change clothes and dress for the day when the home ostensibly had an unknown number of guns in unknown locations. While there were guns in the home, the Agents were not concerned about them at any time on June 10, 2009.

Last, the Court noted that, it was “unreasonable” (under the facts alleged in the Complaint, which are substantially the same as now as it pertains to the Plaintiff’s Third Cause

¹² See Section II(b), at Paragraph 98 above.

of Action) “for Agent Love to call more agents to Dr. Redd’s home after he and his family were already sequestered, and posed no danger to anyone.” Order at Dkt. 76 at page 13. The evidence demonstrates that Defendant Love summoned more agents to the Redd Home throughout the morning. See Section II(b), at Paragraphs 103 and Response to Paragraph 47. Whenever he did so, more agents showed up at or around the Redd Home. *Id.* at Paragraph 47. In addition, Government documents confirm more and more search teams arrived throughout the day at the Redd home. The purported reason for needing more agents, to gather and catalogue evidence, is not supported by Mr. Holder’s responses (officer safety only), to the Senate’s questions regarding the basis for the force, and is not supported by the evidence. See Section II(b), at Paragraphs 104-105. The agents had originally planned on simply freezing evidence in place pursuant to a court order, and had also anticipated a large amount of material would need handling. *Id.* at Paragraph 105(D). Moreover, the SWAT agents, while they had special training, were not trained in the handling or cataloguing of evidence (See Plaintiff’s Appendix at Exhibit 5), and they did not need tactical weapons to assist the handling or cataloguing artifacts.

Viewing the evidence in a light most favorable to the Plaintiff, and making all inferences in favor of the Plaintiff, the evidence is the same or sufficiently similar to the facts alleged in the complaint, such that a reasonable jury would be authorized to find in favor of the Plaintiff and summary judgment should be denied.

iii. The Constitutional Right was Clearly Established on June 10, 2009.

The Court previously held that,

...the Tenth Circuit has clarified that for a right to be clearly established, “the contours of a right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This means that there need not be precise factual correspondence between earlier cases and the case at hand.... A general constitutional rule

that has already been established can apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful.” NOTE 24. Moreover, “when an officer’s violation of the Fourth Amendment is particularly clear from *Graham* itself, we do not require a second decision with greater specificity to clearly establish the law.” NOTE 25

Here, since the *Graham* factors weigh so heavily in favor of finding a violation of Dr. Redd’s constitutional protection against excessive force, it was evident that sending so many heavily armed agents to arrest Dr. Redd and search his home violated the Fourth Amendment. In light of the clarity and force of the *Graham* analysis here, the court concludes that Agent Love knew or should have known, even absent a more factually similar case on point, that his decision to deploy over 80 heavily armed agents in such a raid, and to call more to the scene after agents had already secured Dr. Redd, his family, and his home, would constitute excessive force under the circumstances.

NOTE 24: *Anderson v. Blake*, 469 F.3d 910, 913-914 (10th Cir. 2006).

NOTE 25: *Morris v. Noe*, 672 F.3d 1185, 1197 (10th Cir. 2012).

Id. at 14

The facts presented on Rule 56 are the same or substantially similar as those presented on Rule 12(b)(6). The Court found it worthwhile to particularly note the following facts: (1) it was unreasonable to call more agents to the scene after the family was sequestered and (2) it was unconstitutional to deploy 80 heavily armed agents to the scene. Those facts are demonstrated and discussed above (see notes 5-7, number of agents; notes 9-10, nature of arming of agents).

The legal conclusions by the Court with regard to whether this conduct and these facts gave rise to a constitutional violation was a legal conclusion by the Court, not a factual assertion by the Plaintiff entitled to an assumption of truth. Legal conclusions in the Complaint were not accepted by the Court, but rather, were made by the Court as appropriate. See Order at Dkt. 76 at note 6, *citing Ridge at Red Hawk, LLC, supra*. Thus, because the facts are substantially similar on this Motion as they were on the Rule 12(b)(6) motion, the Court should conclude, as it did in its order at Dkt. 76, that the rights violated by the Defendant Love were clearly established on June 10, 2009.

IV. Conclusion

Based on the facts set forth above, and the argument presented, the Court should deny the Defendant's Motion for Summary Judgment.

Dated: September 3, 2015

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