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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

ESTATE OF JAMES D. REDD,)	
)	
<i>Plaintiff,</i>)	
)	
v.)	No. 2:11-cv-478-RJS
)	
DANIEL LOVE,)	
)	
<i>Defendant.</i>)	

**REPLY IN SUPPORT OF INDIVIDUAL FEDERAL DEFENDANT
DAN LOVE'S MOTION FOR SUMMARY JUDGMENT**

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**INTRODUCTION EXPLAINING WHY
SUMMARY JUDGMENT SHOULD BE GRANTED**

Only one claim remains in this lawsuit, that BLM Agent Dan Love allegedly violated the Fourth Amendment by sending “approximately 80 federal agents, mostly armed with automatic weapons,” to the Redd home on June 10, 2009, and then caused “some 140 agents [to] trample[] through the Redd home at some point during the day.” *See* Dkt. No. 56, *First Amended Complaint* (“FAC”) at ¶¶ 1, 69. No genuine issue exists as to Defendant Love’s entitlement to qualified immunity for this purported “excessive force.” *See* Dkt. No. 93 (“MSJ”); Fed. R. Civ. P. 56. The discovery to date has produced a summary-judgment record that wholly belies Plaintiffs’ overblown allegations in a number of ways, most notably in that it demonstrates that no more than 53 federal personnel visited the Redd home over the course of the entire day. *See* MSJ at 6-8 (explaining myriad ways in which the actual “show of force” used failed to comport with Plaintiffs’ allegations); *United States v. Immordino*, 534 F.2d 1378, 1383 (10th Cir. 1976) (“An accounting problem has been held especially suited to disposition by summary judgment.”).

Though Plaintiffs claim that “genuine issues of material fact” exist “such that a reasonable juror could find” in their favor, Dkt. No. 102 (“Opp.”) at 1, they neglect to identify any *particular* question precluding summary judgment.¹ Instead, they resort to a sort of “guilty until proven innocent” strategy, *Boyett v. County of Washington*, No. 2:04cv1173, 2006 WL 3422104, at *15 (D. Utah Nov. 28, 2006) (unpublished), asking the Court to assist them in poking holes in Defendant’s case by “indulg[ing]” certain unsubstantiated and conclusory allegations, improba-

¹ *See Bowden v. Kirkland & Ellis LLP*, 432 Fed. Appx. 596, 600 (7th Cir. 2011) (unpublished) (“[T]o stave off summary judgment, Bowden and Gagen had to identify a fact issue[.]”).

ble inferences, and speculation verging on the fantastic. *See* Opp. at 54.² This is a far cry from “satisfy[ing] [the] heavy two-part burden to overcome... qualified immunity,” *Novitsky v. City of Aurora*, 491 F.3d 1244, 1252 (10th Cir. 2007), particularly on summary judgment. As a federal law enforcement agent, Defendant Love enjoys protection “from harassment, distraction, and liability when [he] perform[s] [his] duties reasonably,” which denial of summary judgment would unjustifiably and irrevocably compromise. *Schwartz v. Booker*, 702 F.3d 573, 579 (10th Cir. 2012) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)); *see also* *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam) (Courts should resolve qualified immunity “at the earliest possible stage of litigation.”). The Court should grant Defendant Love’s motion, and Plaintiffs’ claims should proceed – if at all³ – against the United States under the Federal Tort Claims Act.

RESPONSE TO PLAINTIFFS’ STATEMENT OF ELEMENTS

The parties agree that Defendant Love’s entitlement to qualified immunity turns on (1) whether he personally violated any constitutional right of Dr. Redd’s, and (2) whether the constitutional right was clearly established as of June 10, 2009. *See* Opp. at 53. As explained in Defendant’s motion and reiterated below, the “excessive force” claim can clear neither hurdle.

² Pursuant to DUCiv 7-1(b)(2), this Reply covers only “matters raised in” Plaintiff’s Opposition, which neglects to address a number of issues, including: (1) the legal impossibility of holding Agent Love personally responsible for agency policies or the FBI’s decision to assemble a partial SWAT team, *see* MSJ at 4-6; (2) the fact that “force” not witnessed by Dr. Redd cannot overcome qualified immunity, *see id.* at 9; and (3) the wide latitude afforded law enforcement officers in determining how to execute warrants, *see id.* at 16-17.

³ As explained in the United States’ summary-judgment motion in the related FTCA matter, Plaintiffs’ FTCA claims fail for lack of subject-matter jurisdiction. *See Redd. v. United States*, No. 2:11-cv-01162-TS, Dkt. No. 53.

**RESPONSE TO PLAINTIFFS’
“STATEMENT OF ADDITIONAL MATERIAL FACTS”⁴**

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.”

Response: Admit that the hearing took place. Deny that the transcript is material or admissible, aside from the confirmation that the operations of June 10, 2009 “were done in accordance with the FBI and Bureau of Land Management standard operating procedures.”

84. “Attorney General Holder read a prepared statement and then offered to answer ‘any questions that [the committed] 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.”

Response: Admit that the Attorney General read a prepared statement and offered to answer questions. Deny that the transcript is material or admissible, aside from the confirmation that the operations of June 10, 2009 “were done in accordance with the FBI and Bureau of Land Management standard operating procedures.” To the extent Plaintiffs imply that the Attorney General’s prepared statement relates to the subject matter of the sole remaining count in this case in any way, deny.

⁴ By responding to Plaintiffs’ “facts,” Defendant neither concedes the materiality of any particular statement nor makes any admissions for trial.

85. “Senator Orin G. Hatch from Utah was a member of the Committed 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 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 country down there who is a leading doctor**, had delivered almost everybody who lived in the country 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 here – I mean, you know, I have no problem with going after people who violate the law. But **they came in here 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 civil 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 country.

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."

Response: Admit that Plaintiffs accurately quote the transcript. Deny that the transcript is material or admissible, aside from the confirmation that the operations of June 10, 2009 "were done in accordance with the FBI and Bureau of Land Management standard operating procedures."

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.*"

Response: Admit that the Attorney General made no remarks concerning what agents wore, Dr. Redd's standing in the community, or the total number of agents involved in Operation Cerberus on June 10, 2009. Deny that the transcript is material or admissible, aside from the con-

firmation that the operations of June 10, 2009 “were done in accordance with the FBI and Bureau of Land Management standard operating procedures.”

86A. “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.).”

Response: Admit that the “regular FBI duties” of SWAT-certified FBI agents may involve participating in SWAT as well as non-SWAT operations. *See* Ex. 9 (Bretzing Decl.) at ¶ 43. Deny that Plaintiffs have accurately computed the number of “FBI officers involved in the June 10, 2009, operation and on site of the Redd Home.” *See* Ex. 46 (Full Headcount). It is unclear what Plaintiffs mean by “deem[ing]” someone an “FBI officer.” To the extent that they imply that anyone who was part of the relevant SWAT team was not an FBI agent, deny. *See* Ex. 6 (May 26 EC) at 1, Ex. 7 (Apr 1 EC) at 3, Ex. 9 (Bretzing Decl.) at ¶ 43.

86B. “Four or more SWAT team members were on site at the Redd Home at or about noon. Response to Paragraphs 65-69 above.”

Response: Admit that four members of the one FBI SWAT team that assisted with Cerberus were on site at the Redd home at or about noon. Deny that “more” than four members of that team were present. *See* Ex. 9 (Bretzing Decl.) at ¶ 45-47. Deny that the four SWAT team members who happened to be at the home took any actions that could reasonably be construed as part of a SWAT operation prior to the receipt of threatening voicemail. *See id.* at ¶¶ 20, 43.

86C. “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.”

Response: Admit that Jericca Redd’s Declaration states that “[t]he Agents who entered our home first ... did not have on helmets or goggles, but they otherwise looked like” the FBI SWAT team member pictured on the FBI’s webpage, in an unspecified way or ways. *See* Dkt. No. 103-4 (“Jericca Decl.”) at ¶ 5(a)(ii); *but see* Ex. 61 (Bivens Rogs) at 14 (“Jerrica thinks the BLM had BLM clothes, and the FBI were in plain clothes[.]”). Deny that her testimony in this regard is competent summary-judgment evidence. *See, infra*, at 11-12. Deny that any of the 12 law enforcement officers who arrived at the Redd home at approximately 6:40 a.m. was outfitted in the manner of the FBI SWAT team member pictured in Plaintiffs’ exhibit. *See* Ex. 9 (Bretzing Decl.) at ¶ 24 (“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.”); *id.* (“BLM law enforcement officers at the Redd home also wore soft body armor and carried handguns.”).⁵ Deny that the one cultural specialist who was at the Redd home at the beginning of the day carried any type of weapon or wore anything that might have been mistaken for body armor. *See* Ex. 10 (Palus Decl.) at ¶ 21. (“On June 10, 2009, I was dressed in casual clothing. I was unarmed and wore no body armor or

⁵ *See also id.* at ¶ 44 (explaining that BLM does not have SWAT teams); *see also* Ex. 1 (Ops Plan) at 6 (“Casual clothing.”); Opp. at 11 (“Undisputed” that BLM agents wore soft body armor as required by agency policy.); *id.* (“Undisputed” that “BLM law enforcement officers ... are required to [carry handguns] when performing law enforcement duties in uniform” and that “BLM law enforcement agents at the Redd home followed that policy.”).

anything that might have been mistaken for body armor. This was true of every other cultural specialist I encountered that day.”⁶

86D. “The Agents who entered the house 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).”

Response: Admit that Jericca Redd’s Declaration says:

The guns that [the first agents] had looked like machine guns, but they were definitely guns. They were not pistols or rifles. I am not a gun expert,⁷ but I know what a gun looks like and the agents I saw (among the first set of Agents who entered our home first) all had guns. They looked similar to the gun held by the” FBI SWAT team member on the FBI’s website.

Jericca Decl. at ¶ 5(a)(iii); *but see* Ex. 62 (Bivens RFAs) at 5 (“Plaintiff is without sufficient information to admit or deny” that “no member of the team of federal personnel that knocked on the Redds’ door at approximately 6:40 a.m. on June 10, 2009, carried an automatic weapon.”). Deny that the Declaration supports the proffered fact or is competent summary-judgment evidence in this regard. *See, infra*, at 11-12. Jericca Redd does not specify the manner in which she thinks the guns she saw at 6:40 a.m. resembled “the gun in the same photo,” but deny that any law enforcement officers present at the time carried weapons other than handguns. Ex. 9 (Bretzing Decl.) at ¶ 24 (“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”); *id.* (“BLM law enforce-

⁶ *See also* Opp. at 8 (“Undisputed” that “*unarmed* civilian cultural specialists from BLM ... helped the law enforcement officers identify, catalog, and safeguard artifacts.”) (emphasis added).

⁷ *See also* Ex. 61 (Bivens Rogs) at 14 (“Jerrica does not know the model or caliber of the guns, but she says she knows a machine gun [when] she sees one.”).

ment officers at the Redd home also wore soft body armor and carried handguns.”)⁸ To the extent it is implied, deny that the one cultural specialist who was at the Redd home at the beginning of the day carried any type of weapon. *See* Ex. 10 (Palus Decl.) at ¶ 21 (“I was unarmed ... This was true of every other cultural specialist I encountered that day.”)⁹ Deny that Plaintiffs have identified authority for the proposition that the weapon pictured in the photo has “fully automatic capability,” or that Jericca Redd’s Declaration addresses whether the guns she saw contained a “self-acting mechanism ... set in motion by a single function of the trigger.” *United States v. Ol-ofson*, 563 F.3d 652, 658 (7th Cir. 2009) (interpreting “the term ‘machinegun’” as defined by 26 U.S.C. § 5845(b)).

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 [*sic*] 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.”

⁸ *See also* Opp. at 11 (“Undisputed” that BLM agents wore soft body armor as required by agency policy.); *id.* (“Undisputed” that “BLM law enforcement officers ... are required to [carry handguns] when performing law enforcement duties in uniform” and that “BLM law enforcement agents at the Redd home followed that policy.”).

⁹ *See also* Opp. at 8 (“Undisputed” that “*unarmed* civilian cultural specialists from BLM ... helped the law enforcement officers identify, catalog, and safeguard artifacts.”) (emphasis added).

Response: Admit that the FBI issued a press release to this effect. Deny that “cultural specialists” were “non-employees.” *See* Ex. 10 (Palus Decl.) at ¶ 7 (cultural specialist assisting with Cerberus “worked for BLM”).¹⁰

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.”

Response: Admit that the Attorney General identified officer safety as a concern. Deny that the transcript is material or admissible, aside from the confirmation that the operations of June 10, 2009 “were done in accordance with the FBI and Bureau of Land Management standard operating procedures.” Deny that the testimony purported to identify every “justification” for the number of personnel involved in Cerberus. *See* Pls’ Ex. 1 at 31-33. Deny that any degree of “force” was exercised at the Redd home. *See* Ex. 28 (302) at 1 (“Agents arrived on scene at 0640 and arrested Jeanne Redd at 0641 without incident ... James Redd ... was also arrested without incident.”).¹¹

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.

¹⁰ *See also* Opp. at 8 (“Undisputed” that “unarmed civilian cultural specialists *from BLM* ... helped the law enforcement officers identify, catalog, and safeguard artifacts.”) (emphasis added).

¹¹ *See also* Ex. 9 (Bretzing Decl.) at ¶ 28 (“Jeanne Redd answered and was immediately placed under arrest without incident.”); *id.* at ¶ 29 (“James Redd ... was arrested without incident and taken to the garage for questioning.”).

- 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 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.”

Response: Admit that the Attorney General made no remarks on these topics. Deny that the transcript is material or admissible, aside from the confirmation that the operations of June 10, 2009 “were done in accordance with the FBI and Bureau of Land Management standard operating procedures.” Deny that any “private individuals” participated in Cerberus or visited the Redd home under its auspices on June 10, 2009. *See* Ex. 10 (Palus Decl.) at ¶ 7 (cultural specialist assisting with Cerberus “worked for BLM”).¹² Deny that Plaintiffs have accurately characterized Defendant Love’s summary-judgment motion with respect to the ways in which the record belies the allegation of the First Amended Complaint that an 80-140-member SWAT team stormed the Redd home *en mass*. *See* MSJ at 6-8

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.”

¹² *See also* Opp. at 8 (“Undisputed” that “unarmed civilian cultural specialists *from BLM* ... helped the law enforcement officers identify, catalog, and safeguard artifacts.”) (emphasis added).

Response: Admit that the press release provided by Plaintiffs does not speak to these topics. Deny that any “private individuals” participated in Cerberus or visited the Redd home under its auspices on June 10, 2009. *See* Ex. 10 (Palus Decl.) at ¶ 7 (cultural specialist assisting with Cerberus “worked for BLM”).¹³ Deny that Plaintiffs have accurately characterized Defendant Love’s summary-judgment motion with respect to the ways in which the record belies the allegation of the First Amended Complaint that an 80-140-member SWAT team stormed the Redd home *en mass*. *See* MSJ at 6-8.

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).”

Response: Admit that Jericca Redd and Senator Hatch have made such representations with respect to Dr. Redd. Deny that the cited exhibits contain such representations as to any other member of the Redd family. Deny that any family member’s reputation is material to the pending summary-judgment motion. Deny that Jericca Redd’s or Senator Hatch’s remarks are competent summary-judgment evidence. *See, infra*, at 2-3. Deny that Dr. Redd had no criminal history. *See* Ex. 1 (Ops Plan) at 2 (“Criminal background: James Redd: desecration of dead body (dismissed)). Deny that Mrs. Redd had no criminal history. *See id.* (“Criminal Background Jeannie Redd: 1997 desecration of dead body (dismissed). 1998 desecration of a corpse (reduced to

¹³ *See also* Opp. at 8 (“Undisputed” that “unarmed civilian cultural specialists *from BLM* ... helped the law enforcement officers identify, catalog, and safeguard artifacts.”) (emphasis added).

crime against person – Misdemeanor)”). Deny that there is any evidence of Mrs. Redd’s or Jericca Redd’s reputation in the community or “history of violence,” or that the reasonableness of any “show of force” turns on such history.

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).”

Response: Admit that Dr. Redd arrived at the Redd home after Mrs. Redd had been arrested. The record neither confirms nor denies that Dr. Redd was “at work” (as opposed to on his way home) at the time of Mrs. Redd’s arrest, but the distinction is immaterial. Deny that Dr. Redd was “at work” when he was arrested or that this is material to the pending summary-judgment motion. *See* Ex. 28 (302) at 1 (“James Redd drove up at 0655 and was also arrested without incident” at the Redd home.).¹⁴ Deny that Dr. Redd was “at work” during the search of his home. *See* Ex. 28 (302) at 1 (“James Redd drove up at 0655 and was also arrested without incident” at the Redd home.).¹⁵

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).”

¹⁴ *See also* Ex. 30 (Dr. Redd Interview) at 1 (“JEANNE told officers that REDD was out picking up a key and would return any minute.”).

¹⁵ *See also* Ex. 30 (Dr. Redd Interview) at 1 (“JEANNE told officers that REDD was out picking up a key and would return any minute.”).

Response: Admit after her arrest and prior to her departure, Mrs. Redd was taken to the kitchen. Admit that after his arrest and prior to his departure, Dr. Redd was taken to the garage. Admit that Jericca Redd spent some portion of the morning in what she has identified as the “Piano Room.”

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).”

Response: Admit that Mrs. Redd unlocked and opened her front door after law enforcement officers knocked and announced their presence.

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.”

Response: Admit that Mrs. Redd was arrested without incident and answered questions voluntarily, until “she was advised” by her attorney “not to provide any further information, and all questioning stopped.” Ex. 32 (Mrs. Redd interview) at 3.

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).”

Response: Admit that Jericca Redd was generally cooperative. Deny that this portion of her Declaration is competent summary-judgment evidence or material to the pending summary-judgment motion. *See, infra*, at 14-15. Admit that Defendant Love asked Jericca Redd about roof access at the behest of the FBI. To the extent that Plaintiffs imply that a conversation regarding the roof creates a genuine issue as to whether Defendant Love was personally responsible for the FBI's decision to convene a partial SWAT team in response to a threat and after Dr. Redd had left the home, deny. *See, infra*, at 14-15.¹⁶

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)."

Response: Admit that agents permitted Jericca Redd to dress in privacy. Deny that Jericca Redd's speculation as to the agents' mindset with regard to Jericca Redd is relevant or competent summary-judgment evidence. *See, infra*, a 12-14. To the extent that Plaintiffs imply that the potential presence of weapons played no role in planning the execution of the Redd arrest and search warrants, deny. *See* Ex. 1 (Ops Plan) at 1 ("CAUTION STATEMENT: ... Guns: Unknown. Barricade: Unknown."). To the extent that Plaintiff imply that the arrests and search implicated no legitimate safety concerns, deny. *See, infra*, at 5-9.

¹⁶ *See also* Ex. 9 (Bretzing Decl.) at ¶ 44 ("To the best of my knowledge, Defendant Love did not make this decision to provide a more protective environment for the federal agents to complete their search of the home by utilizing the FBI's available SWAT resources."); *id.* ("I am not aware of BLM having SWAT teams and it is my understanding that the FBI was the only law enforcement agency involved in the execution of these warrants that had SWAT capabilities.").

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 [*sic*] seized a gun or secured a gun during the course of the search. Plaintiff’s Appendix at Exhibit 4, Jericca Redd Decl., at page 3, ¶ 4(d). None of the Agents seemed worried about, or interested in, any guns that might be in the house. *Id.*”

Response: Admit that Jericca Redd has made such an assertion. Deny that she has sufficient personal knowledge to testify as to what agents did after she left the home or in locations where she was not present. *See, infra*, at 12-14. Deny that Jericca Redd’s speculation as to the agents’ mindset is material or competent summary-judgment evidence. *See, infra*, at 8 n.54. To the extent that Plaintiffs imply that the potential presence of weapons played no role in planning the execution of the Redd arrest and search warrants, deny. *See* Ex. 1 (Ops Plan) at 1 (“CAUTION STATEMENT: ... Guns: Unknown. Barricade: Unknown.”).

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.”

Response: Admit that Dr. Redd was arrested without incident and voluntarily spoke with agents after being advised of his right not to. *See* Ex. 30 (Dr. Redd Interview) at 1 (“REDD stated he understood his rights and signed the waiver of rights and agreed to talk with the agents.”).

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 on Operation Cerberus since December 2009. See Response to Paragraphs 48-52 above.”

Response: Admit.

101. “Cerberus was a joint investigation by the FBI and BLM. Movant’s Exhibit 7, Dkt. 94-2, 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.”

Response: Admit.

101A. “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.”

Response: This is a legal conclusion to which no response is required. To the extent that one is, deny that Defendant has represented that Cerberus was “entirely the responsibility of the FBI.” *See* SOMF at 3, ¶ 8 (“By June 10, 2009, the FBI ‘ha[d] assumed lead federal agency status’ with respect to Cerberus, and it ‘r[a]n the search and arrest teams, with assistance from the BLM.’”) (citing Ex. 7 (Apr 1 EC) at 3, Ex. 9 (Bretzing Decl.) at ¶ 9.). Admit that FBI and BLM shared overall responsibility for Cerberus, each with a variety of roles, including FBI “assum[ing] lead federal agency status” sometime prior to April 1, 2009. Ex. 7 (Apr 1 EC) at 3.¹⁷

¹⁷ *See also id.* (“The FBI will run the search warrants and arrest teams, with assistance from the BLM.”); Ex. 9 (Bretzing Decl.) at ¶ 9 (“It was also determined that FBI would take the role of lead agency in these operations based on its availability of resources for effectuating

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 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).”

Response: Admit that as of April 1, 2009, FBI planned that “[t]he main [Command Post] for this operation will be referred to as ‘Area Command’, at BLM headquarters in Moab, Utah” and that “FBI SA Patrick G. Brosnan, and BLM SA Daniel Love will be assigned to the Area Command.” Ex. 7 (Apr 1 EC) at 4. Admit that FBI SA Brosnan and Defendant Love were not ultimately assigned to the Command Post located at the Moab BLM Office. *See* Ex. 2 (Comm Locs) (reflecting that six others were assigned to this post and Brosnan and Love were assigned to “Blanding Forward Operating Base”). Admit that Defendant Love spent the morning of June 10, 2009, at the Redd home. *See* Ex. 38 (Log) at 1. Admit that FBI SA Brosnan spent the full day there. *See id.*

102A. “The most reasonable inferences available to Plaintiff from these facts is that Defendant Love and SA Brosnan moved Area Command to Blanding.”

large-scale and multiple-location arrests and search warrants.”); Ex. 10 (Palus Decl.) at ¶ 16 (“We were directed to take orders and instruction from the FBI Team Leader on each search warrant team. There was also a BLM lead assigned to each team, but FBI was described as the lead agency.”).

Response: This is a legal conclusion to which no response is required. To the extent one is, deny that there was one Command Location or that “Area Command” was the sole Command Location. *See* Ex. 2 (Comm. Locs) (identifying “Command Locations” as the “Moab BLM Office Joint Command Post,” the “FBI Mobile Command Post Vehicle (Co-located at BLM Moab Office),” the “BLM Office Monticello,” and the “Blanding Forward Operating Base”).

102B. “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.”

Response: Admit that as of June 10, 2009, Defendant Love and FBI SA Brosnan were the lead case agents on Operation Cerberus. Deny that either carried the title of “Commander,” or that Plaintiffs have identified any evidence to this effect. To the extent it is implied, deny that Defendant Love and FBI SA Brosnan acted as “co-commander[s]” of the Redd home. *See* Ex. 1 (Ops Plan) at 5 (identifying Lynda Viti as “Team Leader” and Loren Good as “Asst Team Leader” for the Redd home).¹⁸ Admit that Defendant Love and FBI SA Brosnan carried mobile phones. Deny that there was one Command Location or that “Area Command” was the sole Command Location. *See* Ex. 2 (identifying “Command Locations” as the “Moab BLM Office Joint Command Post,” the “FBI Mobile Command Post Vehicle (Co-located at BLM Moab Office),” the “BLM Office Monticello,” and the “Blanding Forward Operating Base”).

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 instruc-

¹⁸ *See also* Ex. 3 (Search Locs.) at 4 (same); Ex. 28 (302) at 1 (same).

tion 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."

Response: Admit that Jericca Redd has declared that she overheard Defendant Love asking for personnel to come to the Redd home "if they were done with what they were doing at other locations" and that additional personnel subsequently arrived. Jericca Decl. at ¶ 6(a). Deny that Jericca Redd's Declaration asserts that she was actually present "throughout the day" to witness Defendant Love speaking on the telephone, or that Defendant Love was present at the home after noon. *See id.* at ¶ 10 ("I left the house sometime after 12:00 pm on June 10, 2009.").¹⁹ Deny that Jericca Redd's Declaration states that "more agents showed up *inside or outside* of the house." *See id.* at ¶ 6(b) ("After such instructions, more agents would show up *at* the house.") (emphasis added).

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 on the site of other targets on several occasions, and took video footage of same. See Plaintiff's Appendix at Exhibit 6, Undercover Footage."

Response: Admit that Plaintiffs have accurately quoted a portion of an April 1, 2009 FBI memo. *See Ex. 7* (Apr 1 EC). To the extent that Plaintiffs intend to convey that the events related

¹⁹ *See also id.* at ¶ 6 ("During *the time that I was present* at the Redd Home, I saw and heard the Defendant Love talk on his telephone.") (emphasis added); *Ex. 38* (Log) at 1 (showing Defendant Love left at 12:00).

to Operation Cerberus were planned in advance of June 10, 2009, admit. Admit that as part of Operation Cerberus, agents collected undercover video of a confidential informant buying and selling Native American artifacts. Admit that this video included footage of Mrs. Redd and others in their homes. Deny that the confidential informant or undercover video is material to the pending summary-judgment motion.

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.”

Response: Admit that federal personnel anticipated finding many artifacts requiring special handling at the Redd home and “freezing” some artifacts there. Deny that federal personnel did not find more evidence than they anticipated, or that expecting a large volume of artifacts meant agents could not have encountered a larger volume than anticipated. *See* Ex. 9 (Bretzing Decl.) at ¶ 33 (“By about 8:00 a.m., it had become apparent to the team that they would need ad-

ditional law enforcement assistance in order to process all of the potential evidence so that the search could be completed as soon as possible.”²⁰

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:”

Response: Deny that Plaintiffs have identified any competent summary-judgment evidence that any agent who participated in the Redds’ arrests or the search of their home failed to sign in. *See, infra*, at 9-11.²¹

106A. “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;”

Response: Admit.

106B. “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.”

²⁰ *See also* Ex. 10 (Palus Decl.) at ¶ 23 (“Upon completing work at that site, the other cultural specialist at that site and I were directed by the FBI Team Leader there to go to the Redd home, because additional people were needed to complete the search warrant.”); *id.* at ¶ 30 (“The Redd home was large, with many rooms, and an incredible amount of artifacts.”).

²¹ *See also* Ex. 9 (Bretzing Decl.) at ¶ 22 (“The FBI and BLM law enforcement officers who arrived at and departed from the Redd residence over the course of the day ... signed in and out on a log, in accordance with standard operating procedure.”); Ex. 10 (Palus Decl.) at ¶ 27 (“All of the cultural specialists who entered the Redd home on June 10, 2009, signed in on that log[.]”).

Response: Admit that Agent Vander Veer signed in late. Deny that this is material to the pending summary-judgment motion, in light of the fact that Defendant has assumed Agent Vander Veer arrived at approximately 6:40 a.m. and stayed through the end of the day.

106C. 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.”

Response: Admit that Agent Vander Veer was present at 6:40 a.m. and participated in Dr. Redd’s arrest and interview. Admit that garages and driveways are generally separate from the interiors of homes. Deny that this distinction is material to the pending summary-judgment motion.

106D. “The most reasonable inference from these facts is that FBI and BLM agents did not sign in (or out) of the log ... unless and until they entered the residence.”

Response: This is a legal conclusion to which no response is required. To the extent one is, deny.

106E. “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.”

Response: Deny that Plaintiffs have identified any competent summary-judgment evidence that “lots of agents” are missing from the record. *See, infra*, at 9-11. Deny that Plaintiffs have identified any evidence that Agent Vander Veer never “enter[ed] the residence,” or that this point is material to any issue relevant to the pending summary-judgment motion (which assumes

Agent Vander Veer arrived at 6:40 a.m. and remained through the end of the day). *See* Ex. 47 (5:00 Headcount) at line 23. Deny that any degree of force was exercised at the Redd home on June 10, 2009. Ex. 28 (302) at 1 (“Agents arrived on scene at 0640 and arrested Jeanne Redd at 0641 without incident ... James Redd ... was also arrested without incident.”).²²

106E(1). “This fact is evident from above.”

Response: This is a legal conclusion to which no response is required. To the extent one is, deny that Plaintiffs have identified any competent summary-judgment evidence in support of the assertions in Paragraph 106(E). *See, infra*, at 9-11.

106E(2). “See Also, Plaintiff’s Appendix at Exhibit 4, Jericca Redd Decl. at page 3, ¶¶ 4(a) and 4(b).”

Response: This paragraph contains no factual assertions. To the extent that it is intended as support for the assertions in Paragraph 106(E), deny that Jericca Redd’s Declaration even addresses “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.” *See* Jericca Decl. at ¶ 4(a)(iii) (stating in the cited paragraph that Jericca Redd “saw many agents outside the house” and speculating that “[m]any of those agents never entered our home,” but making no reference anywhere to Agent Vander Veer, “lots of agents,” or “force”).

²² *See also* Ex. 9 (Bretzing Decl.) at ¶ 28 (“Jeanne Redd answered and was immediately placed under arrest without incident.”); *id.* at ¶ 29 (“James Redd ... was arrested without incident and taken to the garage for questioning.”).

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.”

Response: Admit that the record shows that Defendant Love was not assigned to personally arrest the Redds or search their home. *See* Ex. 2 (Comm Locs) (showing Defendant Love’s assignment to the “Blanding Forward Operating Base”). Admit that Defendant Love and the others identified on the sign-in log were at the Redd home on June 10, 2009. *See* Ex. 38 (Log). Deny that these facts are contradictory. To the extent it is implied, deny that “many others” fail to appear on the sign-in log. *See, infra*, at 9-11.

107(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 the Redd Home.”

Response: This is a legal conclusion to which no response is required. To the extent one is, admit that the federal personnel identified on the sign-in log were at the Redd home on June 10, 2009, and that not all of them originally had assignments specific to the Redd home (or began the day there). *See* Ex. 38 (Log) (showing who visited the home); Ex. 3 (showing assignments to search locations).²³ To the extent it is implied, deny that Plaintiffs have identified any competent summary-judgment evidence that any “individuals who went to the Redd Home” are missing from the record. *See, infra*, at 9-11.

²³ *See also* Ex. 10 (Palus Decl.) at ¶ 23 (“Upon completing work at that site, the other cultural specialist at that site and I were directed by the FBI Team Lead there to go to the Redd home, because additional people were needed to complete the search warrant.”).

107(B). “The government documents do not identify all the agents present at the Redd home (or in the June 10, 2009 operation).”

Response: Deny that Plaintiffs have identified any competent summary-judgment evidence that “agents present at the Redd home” are missing from the record. *See, infra*, at 9-11. Deny that the total number of federal personnel who participated in “the June 10, 2009 operation” (including sites other than the Redd home) as a whole is material to the pending summary-judgment motion. *See* Opp. at 21, ¶ 35 (“[T]he number of agents at other locations is not material, or relevant, to the issue presented to this Court.”). Deny that the summary-judgment record fails to account for the “approximately 150” people Plaintiffs allege participated in the events of June 10, 2009. *See, infra*, at 9-11.²⁴

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 ... and attached to Plaintiff’s Appendix at Exhibit 5, except that they were not wearing goggles or hats.” (citing 94-9 at ¶ 20 n.2; Jericca Decl at ¶ 5).

Response: Admit that Jericca Redd’s Declaration states that “[t]he Agents who entered our home first ... did not have on helmets or goggles, but they otherwise looked like” the SWAT team member pictured on the FBI’s website in an unspecified way or ways. *See* Jericca Decl. at ¶ 5(a)(ii); *but see* Ex. 61 (Bivens Rogs) at 14 (“Jerrica thinks the BLM had BLM clothes, and the FBI were in plain clothes[.]”). Deny that this is competent summary-judgment evidence. *See*,

²⁴ *See also* Ex. 64 (Potential Cerberus Participants) (listing as many as 162 individuals identified in Defendant’s exhibits as potential Cerberus participants).

infra, at 11-12. Deny that Jericca Redd’s Declaration addresses whether anyone wore hats, or that this would be material to any issue relevant to the pending summary-judgment motion. *See* Jericca Decl. at ¶ 5. Deny that any of the 12 law enforcement officers who arrived at the Redd home at approximately 6:40 a.m. was outfitted in the manner of the FBI SWAT team member pictured in Plaintiffs’ exhibit. *See* Ex 61 (Bivens Rogs) at 14 (“Jerrica thinks the BLM had BLM clothes, and the FBI were in plain clothes[.]”).²⁵ Deny that the one cultural specialist who was at the Redd home at the beginning of the day carried any type of weapon or wore anything that might have been mistaken for body armor. *See* Ex. 10 (Palus Decl.) at ¶ 21 (“I was unarmed and wore no body armor or anything that might have been mistaken for body armor. This was true of every other cultural specialist I encountered that day.”).²⁶

108(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, 21-25 above.”

Response: Admit that Jericca Redd’s Declaration asserts that “[t]he Agents who came in the house after the first set of agents who came in the door first and arrested my mother, were not

²⁵ *See also* Ex. 9 (Bretzing Decl.) at ¶ 24 (“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”); *id.* (“BLM law enforcement officers at the Redd home also wore soft body armor and carried handguns.”); *id.* at ¶ 44 (explaining that BLM does not have SWAT teams); *see also* Ex. 1 (Ops Plan) at 6 (“Casual clothing.”); Opp. at 11 (“Undisputed” that BLM agents wore soft body armor as required by agency policy.); *id.* (“Undisputed” that “BLM law enforcement officers ... are required to [carry handguns] when performing law enforcement duties in uniform” and that “BLM law enforcement agents at the Redd home followed that policy.”).

²⁶ *See also* Opp. at 8 (“Undisputed” that “*unarmed* civilian cultural specialists from BLM ... helped the law enforcement officers identify, catalog, and safeguard artifacts.”) (emphasis added).

as heavily armed as the first set of Agents were armed.” Jericca Decl. at ¶ 5(b). Admit that Jericca Redd’s Declaration states that “[i]t is my recollection that they all had guns, but they did not all have their guns out” and that she “d[id]n’t think” the guns were “like in the photo.” *Id.* Deny that Jericca Redd’s Declaration states that agents who arrived after “the initial set of agents ... were ... all wearing body armor.” *See id.* at ¶ 5(a)(i) (“The Agents *who entered our home first*, early in the morning ... appeared to be wearing bullet proof vests or some sort of body armor or flak jacket.”) (emphasis added).²⁷ Deny that Jericca Redd’s vague statements are competent summary-judgment evidence as to this point. *See, infra*, at 11-12. Admit that law enforcement officers who visited the Redd home on June 10, 2009, wore soft body armor as required by their agencies’ policies. *See Ex. 9* (Bretzing Decl.) at ¶ 24 (“According to standard operating procedure, FBI agents carrying out arrest warrants wear ... ‘soft body armor’ ... FBI agents at the Redd home followed this procedure. BLM law enforcement officers at the Redd home also wore soft body armor[.]”).²⁸ Deny that any cultural specialist who visited the Redd home on June 10, 2009 carried any type of weapon or wore anything that might have been mistaken for body armor. *See Ex. 10* (Palus Decl.) at ¶ 21 (“I was unarmed and wore no body armor or anything that might have been mistaken for body armor. This was true of every other cultural specialist I encountered that day.”).²⁹

²⁷ *See also id.* at ¶ 5(b) (not addressing whether “[t]he Agents who came in the house after the first set of agents who came in the door first and arrested my mother” wore body armor).

²⁸ *See also Opp.* at 11 (“Undisputed” that BLM agents wore soft body armor as required by agency policy.).

²⁹ *See also Opp.* at 8 (“Undisputed” that “*unarmed* civilian cultural specialists from BLM ... helped the law enforcement officers identify, catalog, and safeguard artifacts.”) (emphasis added).

108B. “Yet more additional Agents stayed outside the home and never entered the residence itself. *Id.* at page 3, ¶ 4.”

Response: Admit that Jericca Redd’s Declaration asserts that she “saw many agents outside the house” and speculates that “[m]any of those agents never entered our home.” Jericca Decl. at ¶ 4(a)(iii). Deny that this portion of the Declaration supports the inference that many additional agents visited the Redd home without signing in, in light of Jericca’s complete lack of personal knowledge as to where and when personnel signed in, what took place outside of her presence while she was in the “Piano Room,” or what happened after she left the home. *See, infra*, at 9-11. Deny that Jericca Redd Declaration addresses whether the “many agents” she claims to have seen were part of the first group of federal personnel, or not. Deny that this is material to any assertion relevant to the pending summary-judgment motion. To the extent it is implied, deny that Plaintiffs have identified any competent summary-judgment evidence that federal personnel who participated in the Redd arrests or search are missing from the record. *See, infra*, at 9-11.

108C. “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).”

Response: Admit that Jericca Redd’s Declaration states that “Agents were inside the house, outside the house, and far away from the house walking around our land. They were everywhere.” Jericca Decl. at ¶ 4(a)(ii). Deny that Jericca Redd has testified (or has sufficient personal knowledge to testify) as to the location of federal personnel after she left the home or in places where she was not present. *See id.* at ¶ 4 (describing Jericca Redd’s observations “[w]hile I was at home on June 10, 2009”). Admit that federal personnel searched the Redd home and

property. Deny that federal personnel were “everywhere” in the literal sense or all “agents.” *See* Ex. 10 (Palus Decl.) at ¶ 23 (“Upon completing work at that site, the other *cultural specialist* at that site and I were directed by the FBI Team Lead there to go to the Redd home, because additional people were needed to complete the search warrant.”) (emphasis added).³⁰ Deny that this is material to the pending summary-judgment motion.

108D. “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.”

Response: This is an unsupported speculation by Plaintiffs’ counsel, to which no response is required. To the extent one is, deny that Plaintiffs have identified any competent summary-judgment evidence that federal personnel who participated in the Redd arrests or search are missing from the record. *See, infra*, at 9-11.

³⁰ *See also* Opp. at 8 (“Undisputed” that “unarmed civilian cultural specialists from BLM ... helped the law enforcement officers identify, catalog, and safeguard artifacts.”).

ARGUMENT

I. The Court's prior Rule 12 ruling does not control.

Though purporting to understand that “different standards apply,” Opp. at 53, Plaintiffs suggest that the Court must deny summary judgment because it denied dismissal on the pleadings.³¹ The law says otherwise: factual allegations lacking adequate evidentiary support no longer carry any presumption of truth.³² The facts currently before the Court differ significantly from Plaintiffs’ previous story,³³ and this Court has never considered whether “79 or fewer agents would be constitutionally permissible.” Opp. at 56. In fact, Plaintiffs identify *no* case in which *any* court has addressed the deployment of “79 or fewer agents,” much less found it unreasonable under analogous circumstances.³⁴ This alone means qualified immunity must apply. *See Novitsky*

³¹ *See* Opp. at 59 (“the facts alleged in the Complaint ... are substantially the same as now”); *id.* at 61 (same).

³² *See Behrens v. Pelletier*, 516 U.S. 299, 309 (1996); *see also Kaufman v. Alexander*, --- Fed. Appx. ---, No. 14-3293, 2015 WL 5062074, at *2 n.7 (3d Cir. Aug. 28, 2015) (unpublished) (“The District Court’s ruling on a motion to dismiss ... could hardly foreclose a subsequent ruling on summary judgment where a different standard applies.”); *Cohlma v. St. John Medical Center*, 693 F.3d 1269, 1282 (10th Cir. 2012) (though plaintiff had “alleged facts in his complaint sufficient to survive a motion to dismiss,” he failed to adequately support them at the summary-judgment phase).

³³ *Compare, e.g.,* Dkt. No. 47 (Opp to MTD) at xi (“a group of 80 federal agents ... descended upon James Redd’s home, armed in flak jackets and wielding assault rifles) *with* Opp. at 8-9, ¶ 11 (“Undisputed” that “[s]earch teams included ... unarmed cultural specialists”); Jericca Decl. at ¶ 5(b) (“The Agents who came in the house after the first set of agents ... were not as heavily armed ... [and] mostly had guns in a holster at their waist” that “appeared to be pistols.”); *id.* at ¶ 6(c) (“There appeared to be as many as 50 agents at any one time” that morning.); Ex. 61 (Bivens Rogs) at 14 (“Jerrica thinks the BLM had BLM clothes, and the FBI were in plain clothes[.]”); Ex. 62 (Bivens RFAs) at 5 (“Plaintiff is without sufficient information to admit or deny” that “no member of the team of federal personnel who knocked on the Redds’ door at approximately 6:40 a.m. on June 10, 2009, carried an automatic weapon.”).

³⁴ *See* Opp. at 60-61 (arguing that “the constitutional right was clearly established,” but citing only *Anderson v. Blake*, 469 F.3d 910, 913-14 (10th Cir. 2006) (not an excessive force case); *Morris v. Noe*, 672 F.3d 1185, 1197 (10th Cir. 2012) (addressing the constitutionality of

v. City of Aurora, 491 F.3d 1244, 1255 (10th Cir. 2007) (“The plaintiff bears the burden of articulating clearly established law.”).

II. Plaintiffs overstate the “indulgence” accorded summary-judgment opponents.

Defendant Love has no duty to prove he did not use excessive force against Dr. Redd. *Boyett*, 2006 WL 3422104 at *15. Rather, he met his summary-judgment burden by demonstrating the “absence of evidence to support” Plaintiffs’ claim that he did. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Plaintiffs must now “present sufficient evidence in specific, factual form for a jury to return a verdict in [their] favor.” *Thomas v. IBM*, 48 F.3d 478, 484 (10th Cir. 1995); *see also Fitzpatrick v. Catholic Bishop*, 916 F.2d 1254, 1256 (7th Cir. 1990) (“The days are gone, if they ever existed, when the nonmoving party could sit back and simply poke holes in the moving party’s summary judgment motion.”).

A. Unsupported “facts” deserve no presumption of truth.

Plaintiffs say they have “identified adequate facts that,” if true, “would support a claim for a violation of a constitutional right.” Opp. at 57. But the vast majority lack support in “proper evidentiary material.” *Allen v. Int’l Telephone and Telegraph Corp.*, 164 F.R.D. 489, 491 (D. Ariz. 1995). For example, “[h]earsay testimony that would not be admissible at trial is not sufficient to defeat a motion for summary judgment.” *Jaramillo v. Colorado Judicial Dept.*, 427 F.3d 1303, 1314 (10th Cir. 2005).³⁵ Therefore, neither a press release from a non-party nor Senator Hatch’s repetition of “facts” deriving from unspecified “media reports” can create a genuine is-

throwing an arrestee to the ground but not the number of agents); *Ridge at Red Hawk, LLC v. Schneider*, 493 F.3d 1174 (10th Cir. 2007) (not a constitutional tort case)).

³⁵ Pursuant to DUCivR 7-1(b)(1), Defendant raises evidentiary objections here.

sue as to what actually happened at the Redd home.³⁶ Plaintiffs’ problems of proof also go far beyond admissibility concerns. For example, they assert that “Defendant Love was the ‘assigned Command Post contact’” for the Redd home, *see* Opp. at 10-11, but the only cited exhibit says no such thing.³⁷ Similarly, the sole evidence cited for Plaintiffs’ “assert[ion] that approximately 50 agents were present ... that were visible from the Piano Room,” Opp. at 17, ¶ 27, states otherwise.³⁸ With respect to other “facts,” Plaintiffs cite no authority at all except for their own conclusory assertions and speculation.³⁹ *See also* Ex. 48 (Facts Admitted).

B. Unreasonable inferences cannot defeat summary judgment.

The claim that the Court must resolve “*all* doubts” and “*all* inferences” against Defendant Love, Opp. at 53, 20 (emphasis added) is wrong. *See Llewellyn v. Allstate Home Loans, Inc.*, 711 F.3d 1173, 1187 (10th Cir. 2013) (unreasonable inferences not required). The Court ought not

³⁶ *See Robinson v. Keota*, 20 F. Supp. 3d 1140, 1151 n.11 (D. Colo. 2014), *amended sub. nom. by Robinson v. City & Cnty. of Denver, CO*, 12-cv-00483, 2014 WL 1395758 (D.Colo. Apr. 10, 2014) (unpublished) (newspaper articles are hearsay inadmissible as summary judgment evidence); *Century Colorado Springs P’ship v. Falcon Broadband*, No. 05CV02295, 2006 WL 521791, at *3 (D. Colo. Mar. 2, 2006) (unpublished) (a “press release” is “pure hearsay and thus not competent summary judgment proof”).

³⁷ *See* Ex. 2 (Comm. Locs) (identifying “SA Dan Love” as one of four law enforcement officers assigned to the “Blanding Forward Operating Base” and making no reference to the Redd home). Instead, the record shows that the Team Leader at the Redd Home (an FBI agent) communicated with Mark Wooley (another FBI Agent). *See id.*; Ex. 27 (Transport Log).

³⁸ The declaration says Jericca saw “several” agents outside of each of an unspecified number of windows in the “Piano Room.” Jericca Decl. at ¶ 4(a)(i). The “50 agent” figure represents her speculation as to the total number of federal personnel on the property as a whole during the morning.

³⁹ *See, e.g.*, Opp. at 48, ¶ 12(A) (identifying no authority showing that an “Area Command” existed in Blanding, but arguing that “[t]he most reasonable inference ... is that Defendant Love and SA Brosnan moved Area Command to Blanding.”); *id.* at 51, ¶ 106(E) (citing only “the above” and Jericca Redd’s Declaration, asserting that “[t]here 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.”).

resolve doubts or inconsistencies in Plaintiffs' favor where logic or context mandates otherwise.⁴⁰ Despite Plaintiffs' claims to the contrary, *see* Opp. at 54, the Court is not required to ignore obvious inferences "more likely" or "more probable" than the ones Plaintiffs strain to justify. *See Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009) (even at the *pleading* stage, dismissal is appropriate when the alleged conduct "is ... not only compatible with, but indeed [is] more likely explained by, lawful" behavior).⁴¹ This is particularly true when the proffered inference requires considering portions of evidence in isolation from the record *as a whole*.⁴² For example, the Court need not suspend disbelief to infer that no reasonable officer could have found voicemail messages such as, "I'll be there in a little bit. Be ready," as threatening under the circumstances.⁴³ Nor,

⁴⁰ *See also, e.g., Grubb v. YSK Corp.*, 401 Fed. Appx. 104, 111 (6th Cir. 2010) (unpublished) ("[W]e are not obliged to draw unreasonable inferences[.]"); *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 382 n.12 (3d Cir. 1990) ("[A]n inference based upon speculation or conjecture does not create a material factual dispute[.]"); *Blackston v. Shood and Fletcher Insulation Co.*, 764 F.2d 1480, 1482 (11th Cir. 1985) ("[A]n inference based on speculation and conjecture is not reasonable."); *Parrillo v. Commercial Union Ins. Co.*, 85 F.3d 1245, 1250 (7th Cir. 1996) ("[T]he court is not required to draw every possible inference in favor of the non-movant, only all *reasonable* inferences.").

⁴¹ *See also Woodward v. Emulex Corp.*, 714 F.3d 632, 640 (1st Cir. 2013) ("[W]e will not ignore the obvious context of a statement simply because the language is open to multiple interpretations."); *Hyland v. HomeServices of America, Inc.*, 771 F.3d 310, 317 (6th Cir. 2014) (Courts "cannot ignore the clear teaching of *Matsushita* that 'conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.'" (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986)); *Sylvia Dev. Corp. v. Calvert Cnty, Md.*, 48 F.3d 810, 821-822 (4th Cir. 1995) (courts need not "ignore or distort the plain meaning of words or conveniently to read them out of context.").

⁴² *See, e.g., Hocker v. Walsh*, 22 F.3d 995, 999 (10th Cir. 1994) ("We decline plaintiff's invitation to view [the phrase] in isolation ... [which] ignores the factual context[.]"); *Lyons v. Lancer Ins. Co.*, 681 F.3d 50, 57 (2d Cir. 2012) ("[T]he district court may not properly focus on individual strands of evidence and consider the record in piecemeal fashion; rather it must consider all of the evidence in the record.") (citation and quotation omitted).

⁴³ In fact, a month later, a very similar threat from another Redd brother made a local writer so "uneasy and uncomfortable" that she contacted the police to make an "intimidating statement report." *See* Ex. 50 at 3 (Jay Redd saying "make sure you don't write anything slan-

even were the precise identity of the message-leaver material, must this Court accept Plaintiffs' contention that the person who left those messages was some "unidentified person from Cedar City," and not Javalan Redd, who lived in Cedar City⁴⁴ and has "refuse[d] to answer whether he left the message[s]," *see* Opp. at 34, ¶¶ 63-64 – even though his only brother has explicitly denied doing it, and his brother and mother go out of their way *not* to deny that it was Javalan.⁴⁵

III. Plaintiffs fail to identify any *genuine* issue precluding summary judgment.

Plaintiffs specify no fact supposedly precluding summary judgment. Instead, they argue generally that: (1) the Redds were arrested for felonies "comparatively low in severity"; (2) the Redds "presented no threat or danger or risk of flight"; and (3) Defendant Love "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." *See* Opp. at 1. These arguments are unavailing, in light of the record as a whole.

A. Arrests for "nonviolent" offenses can and do turn violent.⁴⁶

Plaintiffs make much of the nonviolent nature of the Redds' felonies. *See* Opp. at 43, 58. But as the Supreme Court has recognized, *whenever* officers "execut[e] an arrest warrant within a private dwelling," they encounter a risk of "potential ambush." *Maryland v. Buie*, 494 U.S.

derous about my father, mother and family, I will make sure I will do everything that is necessary. I'll be watching"); *id.* (complainant "deems Jay[']s conduct crazy and scary"). While this evidence is not explicitly material to the pending motion, it certainly counters Plaintiffs' suggestion that the officers' inference as to the threatening nature of the voicemails was unreasonable.

⁴⁴ Ex. 50 (Blog) at 5-6 (May 2010 post by Javalan's wife announcing that "[w]e are moving" from Cedar City because "Jav got a job for Christensens Arms").

⁴⁵ *See* Opp. at 34, ¶ 64 ("Jay Redd ... [d]enies leaving the message himself. He does not know if Javalan left the message."); *id.* ("Javalan Redd ... [a]sserts his Fifth Amendment Privilege"); Ex. 61 (Bivens Rogs) at 11 ("Javalan Redd may have left the phone message[.]").

⁴⁶ Though not directly material to Defendant's summary-judgment motion, the sources cited in this and the subsequent section squarely combat Plaintiffs' suggestion that the non-violent nature of the crimes meant that those serving Cerberus warrants ought not have taken precautions when they went to the Redd home or responded to threatening voicemails.

325, 340 (1990) (Brennan, J., dissenting, but “agree[ing] with the majority” as to this point). And regardless of the nature of the crime, an arrestee may “attempt to flee; attempt to injure or kill [the] arresting person; commit suicide; [or] effect a rescue by confederates.” Ex. 18 (FBI Arrest Policy). As a matter of agency policy, officers planning arrests must do their best to ensure that there are “enough Agents/officers ... to cope properly with those or other situations which might arise,” even if that number of officers turns out to be more than strictly necessary. *Id.*⁴⁷ Similarly, when carrying out an arrest, “it is not unreasonable for officers to carry weapons or to take control of a situation by displaying their weapons” without first waiting to see whether an arrestee will attempt to resist. *Holland v. Harrington*, 268 F.3d 1179, 1192 (10th Cir. 2001) (internal citations omitted).⁴⁸ Searches, too, implicate risks necessitating precautions that may appear unnecessary in hindsight.⁴⁹ These principles hold no less true with respect to arrests (and searches of the homes) of “nonviolent” felons, who can and do pose real threats to law enforcement, espe-

⁴⁷ See also *Graham v. Connor*, 490 U.S. 386, 396 (1989) (“Not every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers, violates the Fourth Amendment.”); *Fisher v. City of Las Cruces*, 584 F.3d 888, 894 (10th Cir. 2009) (Fourth Amendment reasonableness “does not require [law enforcement officers] to use the least intrusive means ..., only reasonable ones.”) (quotation omitted).

⁴⁸ See also Ex. 16 (FBI Weapons) at 2 (“[E]mphasis 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.”) (emphasis added); *Michigan v. Summers*, 452 U.S. 692, 702 (1981) (“The risk of harm to both the police and the occupants is minimized if the officers ... exercise unquestioned command of the situation.”); *Santistevan v. City of Colorado Springs*, 983 F. Supp. 2d 1295, 1319 (D. Colo. 2013) (“[T]he Tenth Circuit has intimated that even a blanket policy of sending a SWAT team to execute warrants in all narcotics cases may not offend the Fourth Amendment[.]”).

⁴⁹ See *Bailey v. United States*, 133 S. Ct. 1031, 1039 (2013), *cert. denied*, 135 S.Ct. 705 (2014) (“It is likely ... that an occupant will return to the premises at some point ... Officers can and do mitigate that risk ... by taking routine precautions, for instance by erecting barricades or posting someone on the perimeter or at the door.”); *United States v. Davis*, 588 F. Supp. 2d 693, 703 (S.D. W. Va. 2008) (“[L]aw enforcement officers may be at risk from unknown threats [whenever] they are in a home[.]”).

cially when they question the legitimacy of federal authority.⁵⁰ Indeed, even outside of the context of arrests and searches, the facially prosaic issue of “management of ... federal lands” has given rise to “written and verbal threats,” “assaults, firebombs hurled at campground hosts, and shots fired,” in the surrounding area and elsewhere, in which “BLM and Forest Service workers have been attacked at work and accosted in bars, threatened while grocery shopping and called at home.” *See* Ex. 54 (“BLM, Forest Service”) at 1-2.⁵¹ Plaintiffs’ contention that the “non-violent” character of the offenses for which the Redds were being arrested obviated any precautions taken upon entering the property, or convening a partial SWAT team (in the context of threatening voicemail) after the Redds were removed from it is meritless.

B. The Redd arrests and search implicated legitimate safety concerns.

Plaintiffs’ claim that no one “in the Redd Residence presented [a] threat or danger or risk of flight” ignores the fact that Fourth Amendment reasonableness “turns on an objective assessment of the officer’s actions in light of the facts and circumstances confronting him at the time,” not how things ultimately played out. *Maryland v. Macon*, 472 U.S. 463, 470 (1985) (quoting *Scott v. United States*, 436 U.S. 128, 136 (1978)). A number of factors could have led a

⁵⁰ *See, e.g., Arizona v. Johnson*, 555 U.S. 323, 330 (2009) (“[T]raffic stops are ‘especially fraught with danger to police officers.’”) (quoting *Michigan v. Long*, 463 U.S. 1032, 1047 (1983)); Ex. 51 (“Sovereign Citizens”) at 6 (cataloging “violent encounters with sovereign citizens,” including Terry Nichols, who “might be easy for one to dismiss ... as a nuisance because they seem generally harmless”); Ex. 52 (“One Dead”) at 1 (“A music-box maker suspected of growing marijuana in his remote forest home ... stormed out shooting,” “ambush[ing]” a small group of officers “serving a search warrant”).

⁵¹ *See also* Ex. 54 (“Protestors”) at 2 (“Last week, in rural Utah, two men pointed a handgun at a BLM worker in a marked federal vehicle while holding up a sign that said, ‘You need to die.’ But even before that, BLM employees in southern Utah seldom wore the agency’s uniform, in an effort to maintain a lower profile” and “[m]any longtime BLM agents have adopted the habit of parking their trucks nose-out.”); Ex. 55 (“Defuse”) (describing reports of harassment of BLM employees in southern Utah).

reasonable officer to fear that Dr. Redd would react dangerously, as though officers were attacking his family or way of life: the role “pot hunting” played in the lives of Blanding residents of his generation;⁵² Dr. Redd’s antipathy toward the government for past “distress and anxiety” as well as perceived religious persecution by “federal powers”;⁵³ the location of the Redds’ home (“on the top of a hill,” which could have permitted him to see agents approach);⁵⁴ Dr. Redd’s love of hunting, coupled with the absence of information regarding how many guns he had or whether the home presented a potential “[b]arricade” situation;⁵⁵ and “San Juan County[’s] ... [history as] a hotbed of far-right anger over federal intrusion into local affairs.”⁵⁶ Plaintiffs’ subsequent admission that Dr. Redd actually had *nine* guns,⁵⁷ including at least two semi-automatic

⁵² See Ex. 56 (“Native American Artefacts”) at 1 (Childhood friend of “Jim Redd” stating that “scavenging for the treasures” was “our way of life.”); Ex. 57 (“Unearthed Relics”) at 3 (“By the 1950s and 1960s, ‘pot hunting’ was deeply ingrained among Blanding’s 1,800 or so residents.”); Dkt. No. 2 (Original Complaint) at ¶ 47 (alleging that federal agents “were out to get Dr. Redd”).

⁵³ See Dkt. No. 2 (Original Compl.) at ¶ 47(c), (e).

⁵⁴ Jericca Decl. at ¶ 11(a); see also Ex. 1 (Ops Plan) at 1 (“House is elevated above surrounding area. There is one access driveway ... visible from residence.”).

⁵⁵ See Dkt. No. 47 (Opp to MTD) at 23 (Dr. Redd loved hunting); Ex. 1 (Ops. Plan) at 1 (“Guns: Unknown. Barricade: Unknown.”). Jericca Redd’s speculation that agents other than Defendant Love “were not afraid of [her]” and did not “appear to be searching for weapons,” Opp. at 47, ¶ 98, is immaterial, given her lack of personal knowledge (both as to agents’ thoughts and what happened outside of her presence), the *objective* nature of the reasonableness test, and the fact that her observations regard events *after* the home was secure.

⁵⁶ Ex. 58 (“Recapture Canyon”) at 2; see also Ex. 59 (“Reluctant Rebellion”) at 3 (southern Utahans “particularly [those from] Blanding ... have long butted heads with the feds”); Ex. 60 (“Open Hostilities”) at 1 (“At Canyonlands ... a ranger opened up a trailhead register to find that someone had written, ‘Government [expletive deleted] who close off their lands to us ought to be shot.’”).

⁵⁷ See Ex. 61 (Bivens Rogs) at 11 (“Three 12 gauge shotguns (Browning Auto 5 lite’s), [o]ne Winchester 410, [o]ne Christensen Arms 300 RUM, [o]ne Benelli Super Black Eagle, [o]ne HK 223, [o]ne 300 WIN MAG Browning BAR, [and] [o]ne 300 RUM Remington SBS.”).

rifles,⁵⁸ confirms the reasonableness of such concerns. Officers had no constitutional obligation to wait to see whether these warning signs would coalesce into violence *before* exercising caution.⁵⁹

C. Plaintiffs identify no genuine issue as to the actual “show of force” used.

Plaintiffs’ final, equivocating justification for denying summary judgment – that “Defendant Love” supposedly “sent ... as many as ... 106-118[], armed or heavily armed agents to the Redd Home,” *see* Opp. at 1 – is pure fantasy.

1. The Court should reject Plaintiffs’ “phantom agent” theory.

Rather than seriously dispute what the record does show – that no more than 53 federal personnel *in total* visited the Redd home throughout the entire day – Plaintiffs propose that “53-65” mysteriously “unaccounted for” agents may have participated in Cerberus as a whole, all of whom visited the Redd home in a manner that constituted constitutionally excessive force. *See* Opp. at 22-23.⁶⁰ The exact number of participants in Cerberus *as a whole* has nothing to do with

⁵⁸ *See United States v. Martin*, No. 1:03-CR-MP-AK, 2011 WL 679328, at *2 (N.D. Fla. Feb. 15, 2011) (unpublished) (describing a “Heckler and Koch .223 caliber” as a “semi-automatic assault weapon”); *Batten v. Clarke*, No. 7:12cv00547, 2013 WL 2565990, at *1 (W.D. Va. June 11, 2013) (unpublished) (describing the “Browning Semi-Automatic Rifle ‘300 win cal.’”).

⁵⁹ *See United States v. Perdue*, 8 F.3d 1455, 1462 (10th Cir. 1993) (“[P]olice officers should not be required to take unnecessary risks in performing their duties.”); *United States v. Hatcher*, 680 F.2d 438, 443 (6th Cir. 1982) (“Courts should be cautious ‘in limiting the ability of police officers to protect themselves as they carry out missions which routinely incorporate danger.”) (quoting *United States v. Coates*, 495 F.2d 160, 165 (D.C. Cir. 1974).

⁶⁰ Tellingly, Plaintiffs evince so little faith in this theory that they identify no particular discovery for the purpose of uncovering any *actual* evidence in support of it. Nor would additional discovery be appropriate based only on “a speculative hope of unearthing evidence sufficient to prevail.” *Ellis v. J.R.’s Country Stores, Inc.*, 779 F.3d 1184, 1206 (10th Cir. 2015); *Morris v. Humphrey*, No. Civ-14-497, 2014 WL 6603874, *3 (W.D. Okla. Nov. 20, 2014) (unpublished)(in qualified immunity cases, “a plaintiff’s burden under Rule 56(d) is somewhat elevated”) (citations and quotation omitted).

this case beyond contextualizing the size of the Redd team. Moreover, despite Plaintiffs' claims, Defendant's exhibits actually do account for the "approximately 150" people who participated in Cerberus.⁶¹ *See* Ex. 64 (People in the Record) (identifying as many as 162). And, Plaintiffs cite no more than the theoretical possibility that, even if they existed, any "unaccounted for" agents visited the Redd home, much less encountered Dr. Redd with anything that might reasonably be characterized as "force." *See* Opp. at 22, ¶ 35(4); *see* Ex. 10 (Palus Decl.) at ¶ 25 ("Some of the other cultural specialists ... were never sent to the Redd home.").

Indeed, the Court could not credit the argument that an extra "53-65" people visited the Redd home without also making the underlying, unjustifiable inference (finding no support in fact) that half or more of the federal personnel failed to sign in altogether.⁶² The immaterial points that Agent Vander Veer signed in *late*,⁶³ or other people neglected to sign *out*, *see* Opp. at 27-28, ¶ 47, cannot justify this inference.⁶⁴ Nor can Jericca Redd's claims about agents she sup-

⁶¹ Though Plaintiffs' various tallies generally lack consistency or any readily apparent basis in arithmetic, *see, e.g.*, Opp. at 12, ¶ 23, it is reasonably clear that they believe Cerberus "was conducted ... by approximately 150 agents and employees from the FBI and the BLM." *See* Opp. at 23, ¶ 35(3); *id.* at 45, ¶ 87; *id.* at 45, ¶ 89(C). At some points, Plaintiffs suggest that an unspecified number of "non-employees, such as cultural specialists," *see* Opp. at 45, and "private individuals," *see* Opp. at 45, ¶ 89(C) should be added to this "approximately 150," but it is undisputed that cultural specialists came from BLM, and Plaintiffs identify nothing suggesting that "private individuals" participated, or that this could possibly be relevant to the liability of Defendant Love.

⁶² *See* Opp. at 56 n.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.").

⁶³ Agent Vander Veer is not missing from the log but rather signed in twice. *See* Opp. at 26-27; Ex. 46 (Total Headcount) at 2, 3.

⁶⁴ Nor does this create a genuine issue as to any of these agents' whereabouts. Defendant's motion assumed that Agent Vander Veer arrived at the Redd home first thing in the morning and stayed through the end of the day. *See* Ex. 39 (Personnel Present for Initial Arrival) at line 8 & n.1; Ex. 47 (5:00 Headcount) at line 23. It also assumed that any person whose depar-

posedly saw “outside the house” and thinks may not have signed in, because she lacks personal knowledge as to when or where anyone signed in, who entered the home during the significant portion of the morning she spent in the “Piano Room,” or what happened after she left. *See* Dkt. No. 103-4 (“Jericca Decl.”) at ¶¶ 2, 4, 10. Furthermore, Plaintiffs offer no explanation (or even speculation) as to why the record as a whole – which fills in other gaps in the log, such as Agent Vander Veer’s arrival time and the departure times for three of those who did not sign out – fails to confirm the presence of a single other person. This entire line of argument is “the stuff of [Plaintiffs’] dreams,” plainly insufficient to create a genuine issue of material fact in the face of the existing summary-judgment record. *Mesnick v. Gen. Elec. Co.*, 950 F.2d 816, 822 (1st Cir. 1991).

2. Plaintiffs identify no genuine issue as to the first group to arrive.

Rather than arriving in SWAT gear, the first officers to go to the Redd home wore soft body armor and carried handguns, as required by agency policy. *See* Ex. 9 (Bretzing Decl.) at ¶ 24. Plaintiffs fail to controvert this point with Jericca Redd’s declaration that:

- This first group’s “appearance was more like military than the police officers [she is] accustomed to seeing on the streets of Blanding or Salt Lake City.” Jericca Decl. at ¶ 5(a)(i).
- “They did not have on helmets or goggles,” but the first group “otherwise looked like the FBI SWAT team member pictured on the FBI’s website, *id.* at ¶ 5(a)(ii).
- Though “not a gun expert,” she thinks “[t]he guns” carried by the first group “looked like machine guns,” “not pistols or rifles,” *id.*
- The guns carried by “the first set of Agents who entered [the] home” looked similar to the gun held by the” FBI SWAT team member on the FBI’s website, *id.* at ¶ 5(a)(iii).

ture time was unclear from the record remained at the home through the end of the day. *See* Ex. 47 (5:00 Headcount) at 1; Dkt. No. 99 (Errata) at 1. As to those agents, departure times are unclear only as to 12, not “as many as “35.” *See* Opp. at 38, ¶ 71; Ex. 47 (Personnel Present at 5:00); Dkt. No. 99 (Errata).

First, regardless of what they wore or carried, Plaintiffs identify no evidence whatsoever that this first group of officers numbered more than 12, or that more than 1 unarmed cultural specialist accompanied them.⁶⁵ Nor have Plaintiffs identified any authority that would have put Defendant Love on notice that 12 officers vaguely resembling SWAT agents or “military” in unspecified ways⁶⁶ would have violated the Fourth Amendment. Plaintiffs make no attempt to reconcile Jericca’s claim that all 12 officers resembled FBI SWAT team operators with her admission that she saw only “5 or 6” of them, *see id.* at ¶ 2(d), or the previous sworn statement that she “thinks the BLM had BLM clothes, and the FBI were in plain clothes.” Ex. 61 (Bivens Rogs) at 14. Plaintiffs have not asserted that this group engaged in the sort of SWAT activity that might be construed as constitutionally unreasonable (or require the helmets and goggles that Jericca admits no one wore).⁶⁷ And of course, Plaintiffs ignore the elephant in the room – that Defendant Love was not personally responsible for the clothing or weapons policies of either agency involved, a fact they have admitted. *See* Ex. 62 (Bivens RFAs) at 1-3.

3. Plaintiffs identify no genuine issue as to the personnel who arrived

⁶⁵ *See* Opp. at 23-24, ¶ 37 (“Disput[ing]” that the “initial group consisted of 12 law enforcement officers and one cultural specialist” but citing only “Paragraph 35” and “Paragraph 106”); *id.* at ¶ 35 (not addressing the initial group); *id.* at ¶ 106 (same).

⁶⁶ Of course, a number of differences between police and federal agents in the midst of serving arrest and search warrants would have little or no materiality – group’s size, the visibility of soft body armor, casual clothing, and insignias worn. Likewise, federal agents resembled the FBI photo in a number of ways not suggestive of a fact issue – some wore clothing marked “FBI,” they carried holstered handguns, they wore visible body armor, they may have worn gloves, boots, or sneakers.

⁶⁷ *See, e.g., Ramage v. Louisville/Jefferson County Metro*, 520 Fed. Appx. 341, 346 (6th Cir. 2013) (unpublished) (evaluating reasonableness of SWAT officers’ use of “flash-bang” devices); *Ealum v. Schirard*, 46 Fed. Appx. 587, 597 (10th Cir. 2002) (unpublished) (describing dynamic entry as an “overwhelming show of force”); *Phillips v. James*, 422 F.3d 1075, 1082 (10th Cir. 2005) (asking whether a SWAT team “performed the more passive role of securing the perimeter”).

after the arrests.

Plaintiffs concede that personnel who arrived at the Redd home post-arrest did so neither looking nor acting like a SWAT team.⁶⁸ As to their numbers, the record shows that a *total* of 28 had been to the house by noon, and a *total* of 53 had been there by the end of the day. MSJ at 7; Dkt. No. 99. Plaintiffs fail at controverting this point with Jericca Redd’s vague and speculative claim that “[t]here appeared to be as many as 50 agents at any one time.” Jericca Decl. at ¶ 6(c). Jericca (who left “sometime after 12:00 pm,” *id.* at ¶ 9, and was confined to the “Piano Room” for a significant portion of the morning), admits that she saw only “5 or 6” officers approaching the house early in the morning, *id.* at ¶ 2(d); an unspecified number of “agents coming and going from the Piano Room,” *id.* at ¶ 4(a); “several agents outside of each” of the unspecified number of windows in the “Piano Room,” *id.*; and “6-8 agents ... immediately in front of the front door,” *id.* at ¶ 4.⁶⁹ This creates no triable issue,⁷⁰ especially where the record blatantly contradicts her speculation. *See Scott v. Harris*, 550 U.S. 372, 380 (2007) (“When opposing parties tell

⁶⁸ *See* Jericca Decl. at ¶ 5(b) (“The Agents who came in the house after the first set of agents who came in the door first and arrested my mother, were not as heavily armed as the first set of Agents were armed.”); *id.* at (b)(ii) (their “guns appeared to be pistols.”); 5(b)(i) (“they did not all have their guns out”); *id.* at (b)(ii) (“These officers mostly had guns in a holster at their waist[.]”).

⁶⁹ *See also id.* at ¶ 4(a) (“There were more agents than I could count.”); Ex. 63 (USA Rogs) at 7-8 (“Jeanne Redd and Jerrica Redd: We did not count the number of agents[.]”); Ex. 61 (Bivens Rogs) at 14 (admitting that Jericca Redd could see only “to the south and the west and a little bit to the north” from the “piano room”).

⁷⁰ *See, e.g., Argo v. Blue Cross & Blue Shield of Kansas, Inc.*, 452 F.3d 1193, 1200 (10th Cir. 2006) (rejecting assertions from someone who “simply was not in a position to acquire such comprehensive knowledge”); *Murray v. City of Sapulpa*, 45 F.3d 1417, 1422 (10th Cir. 1995) (“[N]onmovant’s affidavits must be based upon personal knowledge.”) (quotation omitted); *Conaway v. Smith*, 853 F.2d 789, 794 (10th Cir. 1988) (plaintiffs cannot rely on “ignorance of facts,” “speculation,” “suspicion, or “the mere hope that something will turn up at trial.”); Fed. Practice & Procedure § 2738 (affidavits opposing a summary-judgment motion must “be made on personal knowledge” and “set forth such facts as would be admissible in evidence”) (quoting Fed. R. Civ. P. 56(e)).

two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts[.]”).

With respect to why personnel continued to arrive *after* the arrests, early on, it became apparent that the personnel assigned to the Redd home would need help identifying and cataloging the great volume of artifacts found there. *See* Ex. 9 (Bretzing Decl.) at ¶ 33.⁷¹ Plaintiffs purport to “dispute” this but identify no evidence controverting it,⁷² and point to no reason to infer that any anyone arrived for any other purpose. Given that Dr. Redd was sequestered in the garage and left by 10:34, inferring that anyone summoned agents for the purpose of injuring him (or whose arrival in fact injured him) makes no sense.

4. Plaintiffs identify no genuine issue regarding “SWAT Agents.”

One FBI SWAT team assisted with Cerberus.⁷³ After personnel had already entered the Redd home, four members of that team came to assist with the Redd search. *See* Ex. 9 (Bretzing Decl.) at ¶¶ 43, 45. Shortly before noon, officers overheard the first of two voicemails that they

⁷¹ *See also* Ex. 10 (Palus Decl.) at ¶ 23; *see also* Opp. at 40 (“Undisputed that 800 items were seized.”); *id.* (“Undisputed” that “items seized from the Redd home took up more than 112 boxes.”).

⁷² *See* Opp. at ¶ 58 (“Disputed. See Paragraphs 104-105 below.”); *id.* at 49, ¶ 104 (not addressing the reason why additional personnel went to the home); *id.* at 49-50, ¶ 105 (claiming that “there was [no] surprise” agents knew in advance that “[t]here would be a large volume of artifacts,” without explaining how this would make it impossible to find more artifacts than expected); *Karacand v. Edwards*, 53 F. Supp. 2d 1236, 1252 (D. Utah. 1999) (“[S]urprises,’ by definition are unexpected[.]”).

⁷³ *See* Opp. at 13 (“A SWAT team was in use on June 10, 2009, and four or more members of *the* SWAT team(s) was present at the Redd Home[.]”) (emphasis added); Ex. 6 (May 26 EC) at 1 (referring to a single “SWAT operation,” at a home other than the Redds’); Ex. 7 (Apr 1 EC) at 3 (“The Salt Lake City SWAT team” – singular – “will be deploying 10 members ... to execute *a* high risk search warrant at the home of *a* subject.”) (emphasis added); Def’s Ex. 8 (Search and Arrest Service) at 1 (“12 SWAT operators will leave their search site” – singular – “after it has been served”); Ex. 9 (Bretzing Decl.) at ¶ 43 (referring to “members of *an* FBI SWAT team”) (emphasis added).

interpreted as threatening. *See* Ex. 9 (Bretzing Decl.) at ¶ 42.⁷⁴ Officers other than Defendant Love (who left at noon and works for an agency with no SWAT teams)⁷⁵ enlisted the help of the four SWAT team members who happened to be present, who then retrieved their rifles and took up positions allowing them to ensure that no one could approach the home undetected. *See id.* at ¶¶ 44-47. Plaintiffs fail to controvert the manifest reasonableness of this sequence of events (or Defendant Love’s lack of personal involvement, or the fact that Dr. Redd could not have been injured by it) with the argument that as many as 22 “SWAT certified officers”⁷⁶ *may have* participated in Cerberus *as a whole*. This theory relies on the fact that one planning memo refers to the team as having 10 members and another says 12 members. *See* Opp. at 12. Reaching 22 would require either double counting 10 of the officers or reading the one of the memos out of context. And there is no evidence that every SWAT-certified officer who participated in Cerberus went on to visit the Redd home.

In sum, permitting this baseless litigation to proceed would do no more than unjustifiably subject Defendant Love to the very burdens of litigation that the doctrine of qualified immunity was designed to prevent.

CONCLUSION

For the foregoing reasons, and those set out in his motion, Defendant’s Motion for Summary Judgment on the sole count against him should be granted.

⁷⁴ Plaintiffs claim that “[t]here is no evidence that the messages were interpreted as threats.” *See* Opp. at 34, ¶ 65. But *see* Ex. 9 (Bretzing Decl.) at ¶ 42 (“Officers interpreted these messages as threats and believed that they came from one of the Redds’ adult sons.”).

⁷⁵ That Defendant Love allegedly “conversed with Jericca Redd” at some unspecified time before leaving the house at noon about how to access the roof fails to controvert this point. *See* Opp. at 36.

⁷⁶ Plaintiffs overlook the distinction between an agent who happens to be SWAT-certified and an agent actually outfitted in full SWAT gear and participating in a SWAT operation.

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