

Shandor S. Badaruddin Bar #9999
MORIARITY & BADARUDDIN, PLLC
736 South Third Street West
Missoula, Montana 59801-2514
Telephone: 406-728-6868
Facsimile: 406-728-7722
Email: shandor@emsblaw.com

Attorneys for Plaintiff

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

ESTATE OF JAMES D. REDD, M.D., Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	Case No 2:11-CV-01162-TS PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT UNITED STATES OF AMERICA'S MOTION FOR SUMMARY JUDGEMENT Hon. Ted Stewart
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COMES NOW the Plaintiffs, by and through undersigned counsel, pursuant to DUCivR 7-1(b) and 56.1(c), and their Response and Memorandum in Opposition to the Defendant United State's Motion for Summary Judgment as follows:

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I. Introduction Summarizing Why Summary Judgment Should be Denied

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

Summary Judgment should be denied because the Government and its agents do not have the discretion to violate the Constitution. Because the complained of conduct is unconstitutional, the conduct is therefore non-discretionary and the discretionary function exception does not apply.

Summary judgment should be denied on the second ground on which it is requested, alleged lack of proximate cause between the death of James Redd and the complained of conduct, because the Plaintiffs have requested damages both causally related, and causally unrelated, to the death of James Redd.

II. Response to Statement of Elements and Undisputed Material Facts

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

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

1. Defendant/Movant's First Stated Element: "Summary Judgment is proper where the movant demonstrates that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. [citations omitted]. The movant bears the initial burden of demonstrating that there is an absence of evidence to support a nonmoving party's claim. [citations omitted]. Once the moving party has met this burden, Rule 56(e) requires the nonmoving party to designate specific facts to demonstrate that there is a genuine issue triable

before the court. [citations omitted]” Defense Motion, Dkt. 53, at page 11.

RESPONSE:

This is not an element of any claim, but Plaintiffs agree that this is a correct statement of the law. Movants have correctly stated the legal standard, and correctly identified the assignment of the burden of proof, for the Court to employ on this, and any, Rule 56 Motion.

2. Defendant/Movant’s Second Stated Element: Discretionary Function Exception.

RESPONSE:

This is not an element of a claim or defense, but the identification of the issue presented to the Court. Plaintiffs agree that Movant has moved for summary judgment on the grounds that the discretionary function exception bars Plaintiffs claims. Defense Motion at Dkt. 53, page 4. Plaintiffs also admit and agree that “The application of the exception requires two steps.” *See* Memorandum Decision and Order Granting in Part and Denying in Part Defendant’s Motion to Dismiss, hereinafter, “Order”, at Dkt. 25, page 6.

a. Prong One: The Court must decide whether the conduct at issue is discretionary.

RESPONSE:

Plaintiffs agree that this is an element. “[T]he first step asks whether the challenged conduct is ‘discretionary’” *See* Order at Dkt. 25 at page 6. “...if the employee’s conduct cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exception to protect. (NOTE 11).” Order at Dkt. 25 at page 6, *quoting Berkovitz by Berkovitz v. United States*, 486 U.S. 531, 536 (1988).

To the extent that the Movant submits an analysis of whether the challenged conduct is discretionary involves a different analysis than that articulated by the Court in the Order at Dkt.

25, Plaintiffs submit that the analysis set forth by the Court in its Order Dkt. 25 is now the law of the case, and in the alternative, the analysis set forth by the Court in its Order at Dkt. 25 is not substantially different than that offered by the Movant in its Motion at Dkt. 53, at page 4.

- b. Prong Two: “If the plaintiff fails to identify a mandatory directive governing the conduct at issue, the court must then determine whether the decisions in question involved the exercise of judgment based on public policy considerations.” Defense Motion, Dkt. 53 at page 5.

RESPONSE:

Plaintiffs agree that this is an element. The Court in its Order at Dkt. 25, page 6, held that the second step of the analysis was as follows: “if the Court determines that the conduct in question does involve some amount of discretion or judgment, then Court then must determine if the judgment is “of the kind that the discretionary function exception was designed to shield...The exception, properly construed, therefore protects only governmental actions and decisions based on considerations of public policy.” Order at Dkt. 25 at page 6, *quoting Berkovitz, supra*, at 536-537.

Plaintiffs submit that the analysis set forth by the Court in its Order Dkt. 25 is now the law of the case, and in the alternative, the analysis set forth by the Court in its Order at Dkt. 25 is not substantially different than that offered by the Movant in its Motion at Dkt. 53, at page 5.

3. Defendant/Movant’s Third Stated Element: Proximate Cause is an essential element of Plaintiff’s claims.

RESPONSE:

Agreed that this is an element of Plaintiffs claims. However, Movant asserts only two claims remain, IIED (intentional infliction of emotional distress) and wrongful death. Movant

also asserts that Plaintiffs must prove that the death of James Redd was proximately caused by the conduct of James Redd to recover on any claim.

Plaintiffs admit as follows: wrongful death requires proof of a causal relationship between the death and the wrongful conduct.

Plaintiffs assert as follows: Three claims remain as discussed below, IIED, wrongful death, and survival. IIED and survival do not require a causal relationship between the death of James Redd and the wrongful conduct. They do require a causal relationship between harm/injury/damage and the wrongful conduct. Argument on these points is set forth in Section III(c) below, Plaintiffs damages are not limited to the death of James Redd.

4. Defendant/Movant's Fourth Stated Element: Movant asserts that proximate Cause is:
 - a. The but for cause of Plaintiff's harm;
 - b. "that cause which, in the natural and continuous sequence (unbroken by an efficient intervening cause), produces an injury and without which the result would not have occurred;"
 - c. It is the efficient cause-the one that necessarily sets in operation the factors that accomplish the injury."

RESPONSE:

Proximate cause, is referred to simply as "cause" in Utah, and it is defined as.

(1) the person's act or failure to act produced the harm directly or set in motion events that produced the harm in a natural and continuous sequence; and (2) the person's act or failure to act could be foreseen by a reasonable person to produce a harm of the same general nature. There may be more than one cause of the same harm.

Model Utah Jury Instructions, Second Edition, CV209, (Cause Defined).

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

Movants did not follow DUCivR 56.1(b)(2)(C)'s requirement that the statement of facts follow under each element. However, Movant did submit a "Statement of Undisputed Material Facts in Support of Defendant United States of America's Motion for Summary Judgment," at Dkt. 53-1. Plaintiffs presume that each such fact is relevant to only to Prong One of the second element above, whether the challenged conduct is discretionary.

Pursuant to DUCiv.R 56.1(c)(2)(B), Plaintiff responds to each of these stated material facts restating each numbered paragraph from Dkt. 53-1, indicating whether each statement is disputed or undisputed, with citation to the basis for each disputed fact. Plaintiffs also restate the headings and topical references contained in the Movant's Statement.

Pursuant to DUCiv.R. 56.1(f), all evidence offered in opposition to the motion is submitted in a separately filed appendix with a cover page index, entitled, "Plaintiff's Appendix to Memorandum in Opposition to Defendant United States of America's Motion for Summary Judgment," filed at Dkt. 60

Operation Cerberus

1) This lawsuit stems from a federal law enforcement initiative known as "Operation Cerberus." *See* Dkt. No.2 (Complaint, "Compl.") at ¶ 15.

RESPONSE:

Undisputed.

2) Operation Cerberus was a joint Federal Bureau of Investigation (FBI) and Bureau of Land Management (BLM) investigation identifying a large network of illegal traffickers of Native American artifacts in Southern Utah and the Four Corners Region. Ex. 1 (Ops Plan) at FBI000012.

RESPONSE:

Undisputed.

To the extent this allegation suggests that James Redd was one of these illegal traffickers, that implication is denied and disputed. However, whether James Redd was, or was not, guilty of the offense with which he was charged, is not a material fact or even relevant because the Court has earlier dismissed all claims other than those arising from the claim of excessive force. See Order at Dkt. 25.

3) “As a result of multiple undercover purchases throughout the Four Corners region, and an extended investigation, U.S. Magistrate Judge Samuel Alba ... issued 12 search warrants and 19 arrest[] warrants to be served in southern Utah.” Ex. 1 (Ops Plan) at FBI000012. *See also* Ex. 4 (Search Warrant Locs.) at FBI000005-10; Ex. 5 (Arrest Warrant Locs.) at FBI000011.

RESPONSE:

Undisputed that Judge Alba issued a search warrant for the Redd Home. The warrant is attached as Movant’s Exhibit 19 to Movant’s Appendix, Dkt. 53-2 (filed under seal, but referenced at Dkt. 53-36). It was based on an affidavit by Patrick Brosnan, but the affidavit was not submitted. This Affidavit is the basis for the warrant, and not the Ops Plan submitted as Exhibit 2¹ to the Movant’s Appendix (filed conventionally but referenced at Dkt. 53-21). In addition, a description of the place to be searched was attached to the warrant issued by Judge Alba as “Attachment A.” That attachment was also omitted.

However, all claims related to allegedly illegal warrants, allegedly illegal search

¹ The Ops Plan, FBI000012-18 is referenced and found in the Movant’s Appendix, Dkt. 53-2 at page 1, as Exhibit 2, not Exhibit 1. It was filed conventionally.

of the Redd Home, and related to the alleged provision of false information in order to obtain search warrants were dismissed in the Order at Dkt. 25. Thus, the basis for the warrants are irrelevant to the sole claim remaining in this case and at issue in this Motion, and the basis for the warrants are not “material” facts.

4) On May 27, 2009, James D. Redd and his wife, Jeanne H. Redd, were indicted on felony charges. Ex. 2., Superseding Indictment, *United States v. Jeanne H. Redd & James D. Redd*, 2:09-cr-00044-CW, May 27, 2009, ECF No. 4. Dr. Redd was indicted for “theft of tribal property; aiding and abetting; [and] forfeiture.” *Id.* Mrs. Redd was indicted for “trafficking in stolen artifacts; theft of government property; [and] aiding and abetting.” *Id.*

RESPONSE:

Undisputed.

5) On the morning of June 10, 2009, BLM and FBI executed the 12 search warrants and 19 arrest warrants virtually simultaneously. Ex. 2 (Ops Plan) at FBI000012; Ex. 3 (Comm Locs) at FBI000005; Ex. 4 (Search Locs); Ex. 5 (Arrest Locs); Ex. 6 (Timeline); Ex. 7 (May 26 EC) at FBI000034; Ex. 8 (April 1 EC) at FBI000117; Ex. 8 (Search/Arrest Warrant Svc.); *see also* Ex. 10 (Bretzing Decl.) at ¶¶ 9, 10. This was due to the fact that in the past, “when search warrants [had] been served in this community, valuable evidence was lost because subjects received advanced warning of impending search warrants.” Ex. 7 (April 1 EC) at FBI000117; *see also* Ex. 10 (Bretzing Decl.) at ¶ 10; Ex. 4 (Search Warrant Locs.) at FBI000006-10.

RESPONSE:

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

support any suggestion that James Redd, or any member of his family, was suspected or warning anyone of any ongoing investigation.

6) A SWAT team was specifically assigned to one of these warrant locations, but not to the Redd home. Ex. 6 (Timeline) at Redd_BLM-0241 (“Swat service at target residence” scheduled for 6:01 a.m.; “Warrant service initiated in ... Blanding” scheduled for 6:45 a.m.); Ex. 7 (May 26 EC) at FBI000034 (“The first subject to be served will be [redacted] ... This will be a SWAT operation”); Ex. 10 (Bretzing Decl.) at ¶ 19.

RESPONSE:

Disputed. Four or more SWAT team members were present at the Redd Home on June 10, 2009. In addition, all SWAT certified agents also serve as FBI agents and any of the FBI agents could have been, and 4 or more actually were, SWAT team members. These facts are demonstrated as follows.

A SWAT team, composed of 10 SWAT members (See Movant’s Appendix at Exhibit 8, 4/1/2009 FBI Electronic Communication Re Cerberus Action, at page 3 (FBI000117), was deployed to execute a search warrant at one of the June 10, 2009 Cerberus Sites. Alternatively, the SWAT team was composed of 12 members. See Movant’s Appendix at Exhibit 9, Cerberus Action Search/Arrest Warrant Service, at page 1 (FBI000063). Yet a third alternative is that there were two SWAT teams, one made up of 10 members, and a second made up of 12 members, for a total of 22 SWAT officers involved in Cerberus.

In Movant’s Appendix at Exhibit 10, Bretzing Decl., Dkt. 53-4, at page 4, ¶20, note 2, Bretzing states that “<https://www.fbi.go/about-us/capabilities/fbi-swat-graphic>” contains “any and all additional details about FBI SWAT.” That reference is attached to Plaintiffs Appendix at Exhibit 2, and provides:

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

...[SWAT] team members must pass rigorous fitness tests and be expert marksmen—in addition to carrying out their regular investigative duties as agents.

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

Search and Arrest Teams

7) Federal personnel who participated in the June 10, 2009, operations in Southern Utah were divided into teams assigned to specific locations. *See* Ex. 2 (Ops Plan); Ex. 4 (Search Locs); Ex. 5 (Arrest Locs); Ex. 6 (Timeline); Ex. 7 (May 26 EC); Ex. 8 (April 1 EC).

RESPONSE:

Undisputed.

8) Only law enforcement officers participated in arresting subjects. Ex. 10 (Bretzing Decl.) at ¶ 13; Ex. 12 (Palus Decl.) at ¶ 15.

RESPONSE:

Undisputed, however the Redd Home was a Cerberus site at which both arrest warrants and search warrants were served. *See* Movant's Appendix at Exhibit 3, Search Warrant Locations, at page 4 (FBI000008).

The record demonstrates that two arrest warrants were served on June 10, 2009, day, one for James Redd and one for Jeanne Redd. *See e.g.* Movant's Appendix at Exhibit 10, Bretzing Decl., Dkt. 53-4, at page 5-6, ¶¶27-30. The search began thereafter and the searchers were present to conduct the search. Movant's Appendix at Exhibit 10, Bretzing Decl., Dkt. 53-4, at page 6, ¶31.

9) Search teams included both federal law enforcement officers and unarmed civilian cultural specialists from BLM, who helped the law enforcement officers identify, catalog, and safeguard artifacts. *See* Ex. 2 (Ops Plan) at FBI000016 (“There will be [evidence response team] personnel and archeologists on scene at the search warrants.”); Ex. 11 (Palus Decl.) at ¶ 15; Ex. 10 (Bretzing Decl.) at ¶ 12.

RESPONSE:

Undisputed.

10) Each team had an Evidence Response Team (ERT) Team Leader, who was in charge of the evidence search and those personnel who participated in the search or assisted with the search by creating evidence logs, photographing evidence, and similar tasks. Ex. 10 (Bretzing Decl.) at ¶ 14; *see also* Ex. 7 (May 26 EC) at FBI000034 (“These [artifacts] will be documented by the ERT personnel on laptop computers at the scene and each item will be photographed.”); Ex. 8 (April 1 EC) at FBI000117 (“There will have to be ERT teams at each search warrant scene.... The ERT teams will have to catalog all the suspect items by photographing and recording each item into an evidence log.”).

RESPONSE:

Undisputed. It is noted that the ERT team members were the persons who catalogued and documented the items to be seized and photographed. Two such persons were adequate to manage the task. See Movant’s Appendix at Exhibit 28, FD-302 by D.E. Kisabeth, at page 1; Movant’s Appendix at Exhibit 11, Palus Decl., Dkt. 53-5, at page 4, ¶20.

11) All teams were led by a Team Leader, a BLM or FBI law enforcement officer who reported directly to the Command Post established to monitor the simultaneous execution of the

warrants. Ex. 10 (Bretzing Decl.) at ¶ 13; Ex. 11 (Palus Decl.) at ¶ 16; Ex. 9 (Search/Arrest Warrant Svc.).

RESPONSE:

Undisputed.

12) Upon service of the arrest warrants, arrestees were interviewed at the site of their arrests, taken to the BLM office in Monticello for processing, and transferred to the Marshals Service for transportation to Moab for their initial appearances in criminal court. Ex. 1 (Ops Plan) at FBI000012; *see also* Ex. 9 (Search/Arrest Warrant Svc.) (“Arrestees will be interviewed on scene, then secured for transportation to the BLM Office located in Monticello. Once in Monticello, the prisoners will be processed and transferred to the custody of the United States Marshal Service (USMS). The USMS will then transport the prisoners to Moab for their initial appearance . . .”).

RESPONSE:

Undisputed.

13) Upon service of the search warrants, ERT teams [Evidence Response Team] began to catalog all artifacts by “photographing and recording each item in an evidence log.” Ex. 8 (April 1 EC) at FBI000116.

RESPONSE:

Disputed in part.

The quoted reference is found at page Movant’s Appendix at Exhibit 8, page 3, FBI000117, not 116.

It is also noted that the ERT team members at the Redd home included one team leader and two archeologists. See Movant’s Appendix at Exhibit 28, FD-302 by D.E.

Kisabeth, at page 1. It was the job of the ERT team to catalogue, photograph and record, and if necessary, package each item. See Movant's Appendix at Exhibit 8, 4/1/2009 FBI Electronic Communication Re Cerberus Action, at page 2-3 (FBI000116-117).

The Operation anticipated a large number of artifacts would be present and therefore recommended that ERT teams be composed of four team members. Movant's Appendix at Exhibit 8, 4/1/2009 FBI Electronic Communication Re Cerberus Action, at page 3 (FBI000117). The volume of artifacts at the Redd Home was relatively smaller than anticipated, and only 2 (or 3) ERT team members were assigned to it. See Movant's Appendix at Exhibit 28, FD-302 by D.E. Kisabeth, at page 1; Movant's Appendix at Exhibit 11, Palus Decl., Dkt. 53-5, at page 4, ¶20.

While Movant asserts that the volume of artifacts at the Redd Home was larger than anticipated, the most favorable inference to Plaintiffs is that the "standard" expectation was that four archeologists/cultural specialists would be needed, and because only 2 (or 3 including the ERT team leader) were employed, the Redd Home included a smaller than standard volume of anticipated artifacts.

14) As teams completed their assigned duties, they "w[ere] reassigned to help with searches/arrests/transport where needed." Ex.7 (May 26 EC) at FBI000035; *see also* Ex. 2 (Ops Plan) at FBI000012 ("Search completed, site secured, ready for re-assignment."); Ex. 6 (Timeline) at Redd_BLM_0242 ("[I]nitial searches concluded. Sites secured and teams reassigned to other locations."); Ex. 10 (Bretzing Decl.) at ¶ 15; *see also* Ex. 11 (Palus Decl.) at ¶¶ 23-25.

RESPONSE:

Undisputed.

15) Teams received information regarding where assistance was needed from their assigned Command Post contact. Ex. 10 (Bretzing Decl.) at ¶ 15; Ex. 11 (Palus Decl.) at ¶ 23.

RESPONSE

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

Movant’s Appendix at Exhibit 3, Command Locations, at page 1, indicates that Agent Love occupied one of Four Command Locations. Agent Love was a Command Post Contact.

Agent Love instructed others to come to the home of James Redd whether or not he was the “assigned” Command Post Contact. See Plaintiff’s Appendix at Exhibit 1, Jericca Redd Decl., at page 6, ¶6). Agent Love summoned others to the Redd Home at various times, and, based on Movant’s Exhibit 3, and the evidence cited by the Movant above (Movant’s Exhibit 10, Bretzing Decl., at page 4, ¶16; Movant’s Exhibit 8, 4/1/2009 FBI Electronic Communication Re Cerberus Action, at page 4 (FBI000118)), he had the authority to do so.

The Redd Warrants Search and Arrest Team

16) The Operations Plan for the Redd residence indicated that 11 law enforcement officers (a team leader, assistant team leader, 5 “searchers,” a “searcher/finder,” a “searcher/interviewer,” a person responsible for the “ERT catalog,” and a photographer) and one archeologist were assigned to be among the first to arrive at the Redd home on June 10, 2009. Ex. 2 (Ops Plan) at FBI000016.

Movant's Note 1: The "Search Warrant Locations" document confirms that 11 law enforcement officers and one archaeologist were assigned to the Redd home. *See* Ex. 4 at FBI00008-9. However, it apportions the duties among the law enforcement officers slightly differently, designating a team leader, assistant team leader, 6 "searchers," "a single "finder," one person assigned to "ERT catalog," and one photographer and an archeologist. *Id.*

RESPONSE

While it is undisputed that the Operations Plan so indicates, it is disputed that only 11 law enforcement officers were present at the Redd Home, or "initially present" at the Redd Home.

There were a total of 12 locations at which warrants were served on June 10, 2009. See Movant's Appendix at Exhibit 10, Bretzing Decl., Dkt. 53-4, page 4, ¶¶19-20. At those locations the following represents the number of agents/officers/employees present at each location:

- i. 82 Dodge Point (Blanding) – 21 officers and an archeologist. Movant's Appendix at Exhibit 3, Search Warrant Locations, at FBI00006;**
- ii. 2089 B-N Reservoir Road (Blanding) – 11 officers and an archeologist. *Id.* at FBI00008.**
- iii. 208 West 200 North (Moab) – 9 officers and an archeologist. *Id.* at FBI00006.**
- iv. 216 South 100 West (Monticello) – 9 officers and an archeologist. *Id.* at FBI00007.**
- v. 165 East North (Monticello) – 9 officers and an archeologist. *Id.***
- vi. 36-10 North Reservoir (Blanding) – 9 officers and an archeologist. *Id.***
- vii. 495 South 200 West (Blanding) – 9 officers and an archeologist. *Id.* at FBI00008.**
- viii. 434 West 200 South (Blanding) – 9 officers and an archeologist. *Id.* at FBI00009.**
- ix. 1100 South 300 West (Blanding) – 9 officers and an archeologist. *Id.* at FBI000010.**

- x. **90 West 100 South (Blanding, first team) – 8 officers and an archeologist. *Id.* at FBI00009.**

90 West 100 South (Blanding, second team) – 8 officers and an archeologist. *Id.* at FBI00009.

If there were as many as 12 agents/employees at the Redd home, there were a total of 123 officers involved in Cerberus (calculated by adding all the number of agents above plus 12 more). However the Government “assignments” fails to account for approximately 27 additional agents, and any and all agents who completed their duties at the above locations and were subsequently sent to the Redd Home. These facts are demonstrated as follows:

- 1. The April 1, 2009 Electronic Communication Re: Cerberus Action (FBI0000115-122) demonstrates:**

- a. **There were 85 or more FBI agents “providing the following support,” *See* Movant’s Appendix at Exhibit 8, 4/1/2009 FBI Electronic Communication Re: Cerberus Action, at page 4 (FBI000118):**

- i. **A minimum of 10 SWAT Officers, and a maximum of 22 SWAT officers;**

- 1. 10 SWAT officers: Movant’s Appendix at Exhibit 8, 4/1/2009 FBI Electronic Communication Re: Cerberus Action, at page 3-4 (FBI000117 and 118).**

- 2. 12 SWAT officers: Movant’s Appendix at Exhibit 9, Cerberus Action Search/Arrest Warrant Service, page 1 (FBI000063).**

- ii. **40 ERTs, *See* Movant’s Appendix at 8, 4/1/2009 FBI Electronic Communication Re: Cerberus Action, at page 4 (FBI000118);**

- iii. 35 SAs (including one ASAC and 2 tech agents). *Id*;
 - iv. This evidence indicates there were at least 85, and perhaps as many as 97 FBI agents, plus additional BLM agents and non-law enforcement employees of either or both agencies.
2. Eight (8) additional Non-FBI agents are identified in Movant's Appendix at Exhibit 3, Command Locations (FBI000004).
3. This evidence indicates there were 93 to 105 total agents, plus additional cultural specialists and archeologists.
4. The FBI issued a press release on June 17, 2009. See Exhibit 8 to Plaintiffs Appendix, June 17, 2009 FBI Press Release. In that statement, the FBI and/or then United States Attorney Brett L. Tolman stated:
- a. The "operation was conducted on June 10, 2009 by approximately 150 agents and employees from the FBI and the BLM." See FBI Press Release, Exhibit 8 to Plaintiff's Appendix, at page 1.
 - b. If there were between 85-97 FBI agents, there were approximately 53-65 more BLM agents and non-law enforcement employees of the FBI and/or BLM.

Plaintiffs submit that the Government has admitted that there were at least 12 agents initially present at the Redd Home, and based on the Declaration of Jericca Redd, the remaining 27 agents were also present at the Redd Home between (shortly after) 6:40 a.m. and before 10:34 a.m.

Plaintiffs set forth additional evidence regarding the number of agents present below in Response to Paragraph 30, and in Paragraphs 72-74, and 88-90, and provides citation to the basis for the contention in those paragraphs.

It is also unclear what is meant by “initially assigned.” See Response to Paragraph 30 below (Agent Vander Veer arrived as late as 6:54 a.m., to arrest James Redd at 6:55 a.m., thus, she was not “initially assigned,” but she was present). Regardless, Plaintiffs assert that no less than approximately 50 agents were present during the morning, from arrival until noon, that were visible from the Piano Room (the room in which Jericca Redd was sequestered). See Plaintiffs Appendix at Exhibit 1, Jericca Redd Decl. at page 6, ¶6(c).

17) The search warrant for the Redd residence authorized officers to:

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

See Ex. 19 (Search Warrant).

RESPONSE:

Undisputed that the Warrant so indicates. However, in its Order at Dkt. 25, the Court dismissed all of Plaintiffs claims based on an allegedly invalid warrant.

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

RESPONSE:

Undisputed. In addition, the officers were also aware that the “young boy” was three years old and presented no threat to officer safety. See Movant’s Appendix at Exhibit 2, Operations Plan, at page 1 (FBI000012).

Arrival at the Redd Home

19) Federal personnel began to arrive at the Redd home at approximately 6:40 a.m. on June 10, 2009. Compl. at ¶ 39; Ex. 25 (Narrative) at FBI000020; Ex. 26 (Admin Worksheet) at FBI000021.

RESPONSE:

Undisputed.

20) The initial number of people who arrived at 6:40 a.m. consisted of 12 law enforcement officers and one unarmed cultural specialists. They were:

- A. 10 BLM and FBI law enforcement officers with specified roles as to the Redd arrests and search (team leader, assistant team leader, 4 “transport” officers, “photographer,” “photo log,” and evidence response team leader”), Ex. 26 (Admin Worksheet) at 1. (NOTE 2). *See also* Ex. 40 (Initial Arrival) at lines 1, 2, 4, 5, 6, 8, 10, 11, 12, 13.
- B. One unarmed cultural specialist, *see* Ex. 40 (Initial Arrival) at line 9. NOTE 3.
- C. One FBI law enforcement officer and a BLM law enforcement officer who arrived on the scene to observe the operation in a supervisory capacity, *see* Ex. 40 (Initial Arrival) at lines 3 and 7, respectively.

Movant’s Note 2: *See also* Ex. 28 (FD-302) at 1 (identifying the roles of the law enforcement officers as: “team leader/interview,” “assistant team leader/interview,” “transport/search/interview,” “communications/search,” “transport/search/interview,” “transport/search,” “photographer,” “photo log” and “ERT leader”).

Movant’s Note 3: One document prepared later indicates that two (rather than one) archeologists were present at 6:40 a.m. *See* Ex. 28 (302). This appears to be a mistake, as one archeologist signed in at 6:45 a.m., and the second archeologist did not sign in until 7:45 a.m. *See* Ex. 41 (6:40 -10:34 Arrival Total), lines 16, 21. Additionally, cultural specialists did not participate in

initial entries into homes and had been instructed not to enter any site until the premises were secure. Ex. 10 (Bretzing Decl.) at ¶ 12; Ex. 11 (Palus Decl.) at ¶ 15.

RESPONSE:

Disputed. See Response to Paragraph 16 above, and Paragraph 89 below.

21) Mrs. Redd and her adult daughter were home when federal officials arrived. Ex. 25 (Narrative) at FBI000020; Ex. 26 (Admin.) at FBI000021.

RESPONSE:

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

22) Dr. Redd was not. Compl. at ¶ 39 (" By the time Dr. Redd arrived at home . . . Defendant's agents had already inundated the Redd's residence at 6:40 a.m.").

RESPONSE:

Undisputed that Dr. Redd was not home when the Agents entered the Home. Dr. Redd arrived subsequent to their entry. When he did so, there were Agents outside the home who arrested him, who had not signed the sign in log, and who, by Movant's computation method, were not present. See Response to Movant's Paragraph 30 and Plaintiffs' Paragraph 89 below. In addition, Plaintiffs submit that there were 50 or more agents at the time of Dr. Redd's arrival. Plaintiffs also submit that Dr. Redd would have seen approximately 50 agents as he drove up his driveway and approached his home. See Plaintiffs Appendix at Exhibit 1, Jericca Redd Decl., at page 6, ¶6(c), (50 or more agents in and around the house); Movant's Appendix at Exhibit 30, Memorandum of Interview: Dr. Redd, at Redd_BLM-0217 (Dr. Redd arrived shortly before 7:05 a.m., and was followed on the main road leading to his home, followed up the driveway, and arrested at the top of the

drive). During this drive, Dr. Redd would see what Jericca Redd saw, which was 50 or more agents.

23) Approximately four law enforcement officers approached the front door, knocked, and announced a police search. Ex. 25 (Narrative) at FBI000020; Ex. 26 (Admin.) at FBI000022; Ex. 10 (Bretzing Decl.) at ¶ 27.

RESPONSE:

Undisputed. However, Plaintiffs submit that they did not “knock,” but rather, pounded or beat on the door. See Exhibit 1 to Plaintiffs Appendix, Jericca Redd Decl. at page 2, ¶2(e).

24) Mrs. Redd answered the door and was arrested without incident. Ex. 25 (Narrative) at FBI000020; Ex. 26 (Admin.) at FBI000022; Ex. 10 (Bretzing Decl.) at 27.

RESPONSE:

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

25) Jeanne Redd was advised of her rights at approximately 6:48 a.m. Ex. 32 (Jeanne Interview) at Redd_BLIM-0221.

RESPONSE:

Undisputed.

26) Jeanne Redd consented in writing to “answer questions without a lawyer present” at 6:50 a.m. Ex. 31 (Jeanne Advice of Rights) at FBI000028.

RESPONSE:

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

27) Mrs. Redd was questioned until about 9:22 a.m., spoke with her attorney on the phone, and then terminated the interview at about 9:56 a.m. Ex. 32 (Mrs. Redd Interview) at Redd_BLM-0223.

RESPONSE:

Undisputed.

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

RESPONSE:

Undisputed.

The Arrest, Questioning, and Departure of Dr. Redd

29) Dr. Redd returned home shortly after his wife's arrest, at about 6:55 a.m. Compl. at ¶ 40; Ex. 25 (Narrative) at FBI000020; Ex. 26 (Admin.) at FBI000021; Ex. 28 (FD-302) at Redd_BLM-0243.

RESPONSE:

Undisputed. At or around 6:55 a.m., there were 50 agents or more in and around the Redd Home. See Plaintiffs Appendix at Exhibit 1, Jericca Redd Decl., at page 6, ¶6(c).

30) At this time, there were still 12 law enforcement officers and one unarmed cultural specialists at the Redd home. *See* Ex. 40 (Initial Arrival).

RESPONSE:

Disputed.

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

It is disputed that there were only 12 Agents/officers at the site of the Redd Home. For example, Agent Vander Veer was not accounted for in the sign in log at Movant's Appendix at Exhibit 39 (the sole basis for Movants count of agents), but was obviously present and admittedly participated in the arrest and interrogation of James D. Redd at or about 6:55 a.m. and continuing to 9:30 a.m. See Movants Appendix at Exhibit 28, FD-302 by D.E. Kisabeth, at page 1 (Redd_BLM-0243)(arrival time); Movants Appendix at Exhibit 29, Advice of Rights: James Redd, page 1 (witness signature); Movants Appendix at Exhibit 30, Memorandum of Interview: Dr. Redd, at page 1 (Redd_BLM-0217) (participants).

Agent Vander Veer signed in at 9:52 a.m. Movant's Appendix at Exhibit 39, Sign in Log, at page 1 (FBI000001), but she was present from the time of arrival of the initial agents until signing in.

"Other search teams arrived through the day and assisted with the search..." at the Redd Home. See Movants Exhibit 28, FD-302 by D.E. Kisabeth, at page 1 (Redd_BLM-0243).

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

31) Dr. Redd was arrested in the driveway without incident. Ex. 25 (Narrative) at

FBI000020; Ex. 26 (Admin) at FBI000021-22; Ex. 10 (Bretzing Decl.) at 28.

RESPONSE:

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

32) Dr. Redd was taken to the garage and searched for weapons at about 7:05 a.m. Ex. 30 (James Interview) at Redd_BLM_0217; Ex. 9 (Bretzing Decl.) at 28; *see also* Compl. at ¶ 41.

RESPONSE:

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

33) At approximately 7:10 a.m., officers “read and explained” an Advice of Rights, which Dr. Redd stated he “understood.” Ex. 29 (Dr. Redd Advice of Rights) (waiver of rights signed by James Redd at “7:12 a.m.”); Ex. 30 (Dr. Redd Interview) at Redd_BLM-0217.

RESPONSE:

Undisputed. It is also noted that Dr. Redd was never violent or threatening.

34) Dr. Redd then consented in writing to “answer questions without a lawyer present.” Ex. 29 (Dr. Redd Advice of Rights).

RESPONSE:

Undisputed. It is noted that Dr. Redd was cooperative, and never violent or threatening.

35) Dr. Redd was “sequestered” in the garage for questioning until about 9:30 a.m. Ex. 30 (Dr. Redd Interview) at Redd_BLM-0217.

RESPONSE:

Undisputed.

36) Dr. Redd was transported to BLM's office in Monticello at no later than 10:34 a.m. *See* Ex. 27 (Transport Log) at FBI000019.

RESPONSE:

Undisputed.

37) By that time, a total of 22 federal personnel – 12 members of the initial entry team and one cultural specialist, and 9 additional federal personnel – had made their way to the Redd home. *See* Ex. 41 ("6:40a – 10:34a Arrival").

RESPONSE:

Disputed.

Plaintiffs sets forth additional evidence regarding the number of agents present below in Response to Paragraph 30 and in Paragraphs 72-74, and 88-90, and provides citation to the basis for the contention in those paragraphs.

38) Out of those 9 additional federal personnel who arrived to assist with the search or observe the operation in a supervisory capacity:

- A. Six stayed fewer than 15 minutes. *See* Ex. 41 (6:40a – 10:34a Arrival) at lines 7, 8, 10, 11, 12, 14. NOTE 4.
- B. One was an unarmed cultural specialist (bringing the total number of unarmed archeologists at the Redd residence by 10:34 a.m. to two). *See id.* at line 21. *See also id.* at line 16.

Movant's Note 4: Two of the nine additional federal personnel who stayed less than fifteen minutes returned to the residence and stayed for longer time periods after the Redd's had departed the home. *See* Ex. 43 (10:34a - 5:36p Arrival) at lines 32 and 33.

RESPONSE:

Disputed.

Plaintiffs set forth additional evidence regarding the number of agents present below in Response to Paragraph 30 and in Paragraphs 72-74, and 88-90, and provides citation to the basis for the contention in those paragraphs.

39) In total, sixteen of the 22 federal personnel were still at the home as of 10:34 a.m. *See* Ex. 42 (Present at 10:34 a.m.).

RESPONSE:

Disputed.

Plaintiffs set forth additional evidence regarding the number of agents present below in Response to Paragraph 30 and in Paragraphs 72-74, and 88-90, and provides citation to the basis for the contention in those paragraphs.

Search of the Redd Home

40) Entry photos of the Redd home were taken by federal personnel from about 7:14 a.m. to 7:50 a.m., on June 10, 2009, Ex. 26 (Admin.) at FBI000022.

RESPONSE:

Undisputed.

41) Federal officials began a search of the residence at approximately 7:57 a.m. *Id.*

RESPONSE:

Undisputed that no searching took place until 7:57 a.m. However, Plaintiffs submit that the search began when the Agents entered the home and announced that they had a Search Warrant and sequestered the inhabitants, including Jericca Redd for whom there

was no arrest warrant, in the Piano Room. See Plaintiffs Appendix at Exhibit 1, Jericca Redd Decl., at page 2, ¶2(e).

42) It soon became apparent that the personnel assigned to the Redd residence would need help identifying and cataloging the volume of artifacts found. Ex. 10 (Bretzing Decl.) at ¶ 32; Ex. 11 (Palus Decl.) at ¶ 23.

RESPONSE:

Disputed.

See Response to Paragraph 13 above. The Government anticipated a larger team, a team of 4, would be needed at the standard Cerberus location. The Redd Home, regardless of the initial assignment, included an ERT team smaller than 4. See Also Paragraphs 87-88 below.

43) Over the course of the day, additional federal personnel arrived to assist as operations at other locations concluded. Ex. 26 (Admin.) at FBI000022; Ex. 10 (Bretzing Decl.) at ¶ 33; Ex. 11 (Palus Decl.) at ¶¶ 23-24.

RESPONSE:

Undisputed that additional agents and personnel were summoned to the scene. It is disputed that these agents were called to the scene based on an alleged unanticipated need to execute the search warrant or assist with the collection of items. See Response to Paragraph 13 above, and Paragraphs 87-88 below.

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

A. At approximately 11:55 a.m., one message was left saying: "Is anybody there? I know somebody's there. A whole bunch of you. You gonna pick up the phone? All

right. I'll be in there in a little bit. Be ready." *Id. see also* Ex. 34 (Handwritten Notes) at FBI000023.

- B. At approximately 1:13 p.m. a second message was left, saying: "Hey, you guys still too scared to answer the phone? Don't touch anything of mine. Trust me. You don't want to." Ex. 33 (Typed Notes) at Redd_BLM_0121; *see also* Ex. 34 (Handwritten Notes) at FBI000025.

RESPONSE:

Undisputed.

45) Officers believed that these messages were left by one of the Redds' adult sons and interpreted them as threats. Ex. 10 (Bretzing Decl.) at ¶ 41.

RESPONSE:

Disputed.

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

The voicemails are not characterized as "threatening" in any Government document (other than by counsel for the Movant in its Appendix at Dkt. 53-2 at page 4).

No action was ever taken against any member of the Redd family, male or female, based on any allegation of threatening a federal officer. It is a reasonable inference that if you threaten a federal law enforcement officer, your identity will be ascertained if possible, and appropriate prosecution initiated.

No investigation was conducted into the identity of the person who left the message at or near June 10, 2009, or at any time other than discovery in this suit and/or related litigation. While Agent Love asked Jericca Redd how to access the roof, he did not inquire regarding the identity of the caller. Nor did anyone.

The first message was left from a phone number registered to someone other than anyone associated with this case, Dan Fessia/Roofer's Supply, in Cedar City, Utah. See Movants Appendix at Exhibit 33, Typed Notes on Threatening² Voicemails, at page 1, Redd_BLM-0121.

The second message was also from a Cedar City phone number. *Id.*

It does not appear in Movant's Appendix at Exhibit 33 or Exhibit 34 that the messages were perceived as threatening, and the language in the messages themselves are equivocal regarding the intent of the caller.

There is no Government Report or document that suggests that any agent did anything about the phone messages other than seize the answering machine.

46) In response to written discovery served by the United States, all Plaintiffs except for Javalan Redd indicated that they "believe the message was left by Javalan Redd" and denied leaving the messages themselves. Ex. 37 (Pls.' Resp. 3d Interrogs.) at 4-5. In response to the same written discovery, Javalan Redd asserted "his Fifth Amendment Privilege not to answer." *See id.*

RESPONSE:

Disputed. The citation does not support the allegation. Each Plaintiff other than Javalan Redd asserted that they were told by someone other than Javalan Redd, that Javalan Redd left the message. Each Plaintiff other than Javalan Redd stated that they did not recall who told them that except that the declarant was not Javalan.

With regard to the response of Javalan Redd, Plaintiffs admit that Javalan asserted his Fifth Amendment Privilege not to answer the question.

² This title was given to the document by Counsel for the Movant. It appears nowhere in the document, nor is the word "threatening" or "threat" used in the document or by anyone other than counsel.

Plaintiffs also submit that it is not material who left the message, but only how the messages were perceived, and what was done about them. Based on the information set forth in Response to Paragraph 45 above, the messages were not interpreted or perceived as threatening and nothing was ever done about them.

47) Because of the threat, FBI began to enlist the assistance of members of an FBI SWAT team, who (in their primary role as FBI agents) happened to already be at the residence assisting in the evidence search, to shift gears into protecting the residence so the agents could continue their safe and cautious processing of the search. Ex 10 (Bretzing) at ¶ 42.

RESPONSE:

Disputed.

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

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

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

48) This required them to stop assistance with the search, the reason for which they initially

responded to the residence, and transform into a protective role whereby they acquired long guns from their vehicles and took up tactical positions at or around the residence to ensure that no one could approach undetected in a hostile manner. *Id.*

RESPONSE:

Disputed. See Paragraph 47 above.

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

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

RESPONSE:

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

Dr. Redd's Alleged Return to the Home

50) Dr. Redd's adult daughter, Jerrica Redd, has contended in this case that she and her parents returned to the Redd home and parked outside at "about 5:00 p.m." Ex. 36 (Pls' Resp. 1st Interrogs) at 3.

RESPONSE:

Undisputed.

51) However, Plaintiffs admitted in the *Bivens* case that "James, Jeanne and Jerrica Redd" did not "return [] to their home" until "around 6:30 pm." *See* Ex. 38 (Pls.' Resp. to *Bivens* RFA) at 4.

RESPONSE:

Disputed.

Movants Appendix at Exhibit 38, Dkt. 53-15, does not include Plaintiffs' Responses. Attached to Plaintiffs Appendix at Exhibit 9 are the Responses to the Bivens' RFAs (Plaintiff's Responses to Individual Defendant Daniel Love's First Requests for Admissions), and Response to Request to Admit No. 13, at page 4, provides:

REQUEST FOR ADMISSION 13: Admit that after 10:34 a.m. on June 10, 2009, no member of the Redd family reentered the Redd home until after all federal personnel had left.

RESPONSE Admitted in part and denied in part. Jerrica Redd was in the home after 10:34 a.m. on June 10, 2009, but it is not known whether she exited or reentered after 10:34 but before 2:30 pm. Jerrica Redd is believed to have left the home between 1:15 pm and 2:30 pm to go to Moab. James, Jeanne and Jerrica Redd returned to their home around 6:30 pm on June 10, 2009, but did not attempt to enter the premises, or the home, until after all the agents had left.

52) The 6:30 return time is corroborated by the contemporaneous records from that day. *See* Ex. 25 (Narrative) ("SSRA John Wright was advised by Redd's attorney Rod Snow, that the Redds would return after the agents left the scene."); Ex. 26 (Admin) at FBI000021 (same).

RESPONSE:

Disputed.

First, the document does not support the fact asserted. Rod Snow was in Denver, Colorado, at the time he made the quoted statement, and he is speaking about the desire and intent of the Redd's, not about their activity or whereabouts.

James, Jeanne and Jericca Redd did return home on June 10, 2009 (but did not enter the residence immediately), and saw that the agents were still at their home. They waited outside the home, until after they believed that all agents had left. See Plaintiffs Appendix at Exhibit 1, Jericca Redd Decl. at pages 8-9, ¶¶11-12.

It is undisputed that it was the intent and desire of James Redd, Jeanne Redd and Jericca Redd, to return home only after all federal agents had left, but were unsuccessful in achieving their goal.

Conclusion

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

RESPONSE:

Disputed.

See below at paragraph 54 and 55. The final survey and exit photography was part of the search, albeit not defined as such by the Movant. Nevertheless, the Agents were present in the home searching or not searching, under the ostensible authority granted by the search warrant. Plaintiffs contend the search did not conclude until 5:36 p.m., but admits that the agents had completed their search prior to 5:36 p.m.

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

RESPONSE:

Undisputed.

55) All federal personnel left the Redd home by approximately 5:36 p.m. Ex. 25 (Narrative) at FBI000020; Ex. 26 (Admin.) at FBI000022; Ex. 27 (Transport Log) at FBI000019.

RESPONSE:

Undisputed. Once the agents were gone, and off the premises, the search was over. However, based on the Plaintiffs Appendix at Exhibit 1, Jericca Redd Decl. at pages 8-9, ¶¶11-12, either the Agents left after 5:36 p.m., or the Redd's returned home prior to 6:30 p.m. The most favorable inference for Plaintiffs is that James, Jeanne and Jericca Redd returned home prior to the departure of the agents, and the precise time of their respective arrivals and departures is not material.

56) Over the course of the entire day, a total of 53 federal personnel visited the Redd home. Ex. 44 (Entire Day); Ex. 10 (Bretzing Decl.) at ¶ 35. NOTE 5.

- A. Seven of the 53 were unarmed cultural specialists. *See* Ex. 44 (Entire Day) at lines 16, 28, 32, 36, 37, 38, 41; Ex. 11 (Palus Decl.) at ¶ 28.
- B. Thirty-five of the 53 were still there at the end of the day. *See* Ex. 45 (Present at 5:36p).
- C. The total number of federal personnel at the home at any one time never exceeded 45.

See Ex. 39 (Sign-in log).

Movant's Note 5: Thirty-three of the 53 federal personnel arrived *after* Dr. Redd had departed the residence and, of that number, five were unarmed cultural specialists. *See* Ex. 43 (10:34a - 5:36p Arrival).

RESPONSE:

Disputed.

Plaintiffs set forth additional evidence regarding the number of agents present below in Response to Paragraph 30 and in Paragraphs 72-74, and 88-90, and provides citation to the basis for the contention in those paragraphs.

57) All told, more than 800 artifacts were ultimately seized and inventoried from the Redd home. *See* Ex. 22 (Bill of particulars).

RESPONSE:

Disputed to the extent that the statement implies that over 800 artifacts were seized and inventoried from the Redd home on June 10, 2009. The Government left most of the artifacts where they were found, and came back for them on July 7, 2009. The items were labeled on June 10, 2009, but not removed from the premises. These facts are demonstrated as follows:

Movant's Appendix at Exhibit 22 (Bill of Particulars), at Doc. 53-9, at page 27, (Item 792 through Item 812), lists 20 items as the "Items seized on June 10, 2009." Plaintiffs admit that those 20 items were "seized" and understands "seized" to mean they were removed from the premises and taken away.

The remaining 791 items (112 boxes) were seized (meaning removed from the premises and taken away) on July 7, 2009. Plaintiffs Appendix at Exhibit 1, Jericca Redd Decl. at pages 9-11, ¶13; (this is also a reasonable inference from Movant's Appendix at Exhibit 22, the photos at Plaintiffs Appendix at Exhibit 5, as explained in the Jericca Redd Decl. at page 10, ¶13(e), and that if the items were not listed as seized on June 10, 2009, they were not seized on June 10, 2009). Attached at Plaintiffs Appendix as Exhibit 4 is a Receipt for property seized from the Redd Home on June 10, 2009 listing 35 items taken. This list includes the 20 items on the Government's Exhibit 22, page 27, plus several more items listed in an preliminary and final order of forfeiture in United States v. Redd, Case NO. 2:09 CR044-CW, Dkt. Nos. 42 and 52, plus additional items which were seized, but not forfeited.

58) The complete set of items seized from the Redd residence took up more than 112 boxes and required rental trucks to transport the volumes of seized artifacts from the Redd

residence to BLM headquarters. *See id.*; Compl. at ¶ 60 (“Defendant’s . . . utilized rental trucks to haul away the Redd’s entire native artifacts collection . . .”).

RESPONSE

Disputed in part. The vast majority of items seized from the Redd Residence were seized and removed on July 9, 2009, not June 10, 2009. See Response to Paragraph 57 above.

59) All of the artifacts at the Redd home required special handling. Ex. 11 (Palus Decl. at ¶ 33. Given their age – some 100 to 1,000 years old – and the nature of the materials, including plant fibers, ceramics, and shell, these ancient items were quite fragile and delicate. *Id.*; *see also*, e.g., National Park Service, Museum Handbook 7:32 (“Treat collections subject to [the Native American Grave Protection and Grave Repatriation Act] with great sensitivity, because of their cultural significance, sacred importance to descendants, tribal leaders, elders, and traditional religious leaders.”), available at <http://www.nps.gov/museum/publications/MHi/CHAP7.pdf> (last accessed July 14, 2015).

RESPONSE:

Disputed in part.

Not every item seized on June 10, 2009, or July 7, 2009, was an “artifact.” See Plaintiffs’ Appendix at Exhibit 4 (Receipt) (listing computers, camera’s, journals, bank statements, etc.).

With regard to items that required special handling the special handling was accomplished by 2-3 person ERT teams. See Response to Paragraph 13 above.

60) Some of the items located at the Redd home were of especially great delicacy and cultural significance. Ex. 11 (Palus Decl.) at ¶ 36. These included an Apache Gan mask that

was crudely hung on a wall with fishing line; a cradleboard used to carry an infant that journals indicated had been taken from a child's burial site, which had been spotted under a bed; and human remains that were found in a box in the basement with an assemblage of random artifacts. *Id.*

RESPONSE:

Undisputed. The handling was accomplished by one unarmed non-agent employee without body armor. See Movants Appendix at Exhibit 11, Palus Decl., Dkt. 53-5, at page 6, ¶¶36-37.

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

RESPONSE:

Undisputed. These are not material facts.

62) Jericca Redd also pleaded guilty to related charges. Ex. 24 (Jerrica Final Judgment).

RESPONSE:

Undisputed. These are not material facts.

Applicable BLM Agency Policies

63) BLM mandates that when its law enforcement officers are “conducting high visibility public contacts,” they wear clothing identifying them as such. Ex. 12 (BLM-Uniforms) at Redd_BLM-0142; *see also* Ex. 1 (Ops Plan) at FBI000017 (“Each law enforcement member will clearly display insignia identifying them as law enforcement.”). BLM law enforcement agents at the Redd home followed that policy. Ex. 10 (Bretzing Decl.) at ¶ 25.

RESPONSE:

Undisputed.

64) BLM law enforcement officers “who are engaged in duties that may expose them to high risk enforcement incidents such as search warrants, arrest warrants or felony vehicle stops, must wear soft body armor.” Ex. 13 (BLM-Armor) at Redd_BLM-0152. BLM law enforcement agents at the Redd home followed that policy. Ex. 10 (Bretzing Decl.) at ¶ 23.

RESPONSE:

Undisputed.

65) BLM law enforcement officers routinely carry handguns on duty. Ex. 14 (BLM-Fire-arms) at Redd_BLM-130. They are required to do so when performing law enforcement duties in uniform. Ex. 12 (BLM-Uniform) at Redd_BLM-0143; *see also* Ex. 15 (DOI-Firearms) at Redd_BLM-0226 (“All persons engaged in law enforcement activities shall be properly, trained, armed and equipped.”); *id.* at Redd_BLM-0227 (“When performing law enforcement duties in uniform, law enforcement officers will carry firearms.”). BLM law enforcement agents at the Redd home followed that policy. Ex. 10 (Bretzing Decl.) at ¶ 23.

RESPONSE:

Undisputed.

Applicable FBI Agency Policies

66) According to standard operating procedure, FBI agents carrying out arrest warrants wear a bullet-proof vest (also called “soft body armor”) and carry a side arm, which is a handgun. Ex. 10 (Bretzing Decl.) at ¶ 23; *see also* Ex. 17 (FBI-Armor) at FBI000060 (“Wearing of body armor by [Special Agent] personnel is mandatory during planned arrests, execution of search warrants and surveillances which can be reasonably be expected to culminate in a confrontation with armed and dangerous subject(s).”). FBI agents at the Redd

home followed that policy. Ex. 10 (Bretzing Decl.) at ¶¶ 23, 25.

RESPONSE:

Disputed. There is no evidence that any of the persons anticipated to be present at the Redd Home on June 10, 2009 (James Redd, Jeanne Redd, Jericca Redd, and the 3 year old Redd boy), were thought to be armed or dangerous.

Otherwise, undisputed.

67) Agency policy requires FBI law enforcement officers to “be armed at all times when on official duty with the handgun secured to the Agent’s person.” Ex. 16 (FBI-Weapons) at FBI000045. “Immediate access to the handgun and security are paramount.” *Id.* FBI agents at the Redd home followed that policy. Ex. 10 (Bretzing Decl.) at ¶ 23.

RESPONSE:

Undisputed.

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

RESPONSE:

Undisputed.

69) All FBI field offices have SWAT or “special weapons and tactics” units. FBI SWAT, *supra*. Each team has specialists, such as snipers, breachers, and assaulters. *See* Ex. 48 (FBI SWAT) (<http://www.fbi.gov/about-us/capabilities/fbi-swat-graphic>). BLM does not have SWAT or tactical teams.

RESPONSE:

Disputed in part.

Undisputed. The reference (<http://www.fbi.gov/about-us/capabilities/fbi-swat-graphic>) is attached as Exhibit 2 to Plaintiffs Appendix. It notes that a SWAT Specialist (Assaulter) is equipped with, among other things, an H&K (Heckler and Koch) MP5 submachine gun, which can be set to fire one shot (semi automatic), a two shot burst (something between semi automatic and fully automatic), or fully automatic. *Id.*

Disputed. BLM has access and employs SWAT teams, or at least, they did so on June 10, 2009. There were no less than four, and no more than twenty two, SWAT certified officers on site at the Redd Home on June 10, 2009. Movants Appendix at Exhibit 10, Bretzing Decl., Dkt. 53-4, at page 9, ¶45.

c. Plaintiffs Statement Of Additional Material Facts

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

i. Additional Facts Relevant to Element Two, Prong One, Whether the Conduct at Issue is Discretionary

Number of Agents and Manner in Which They Were Equipped

70) 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 Plaintiffs Appendix as Exhibit 6. See Also, Oversight Committee Hearing video excerpts, attached to Plaintiffs Appendix as Exhibit 7.

71) Attorney General Holder read a prepared statement and then offered to answer “any questions that [the committee] might have.” Plaintiffs Appendix at Exhibit 6 (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).

72) Senator Orin G. Hatch from Utah was a member of the Committee on the Judiciary on June 17, 2009, and he asked Attorney General Holder questions about the June 10, 2009 raids. The relevant colloquy was as follows (all emphasis is supplied, no emphasis is in the original):

Senator Hatch:

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

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

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

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

To which Attorney General of the United States responded:

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

Senator Hatch:

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

Attorney General Holder:

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

See Plaintiff's Appendix at Exhibit 6, Pages 31-33 of the Exhibit, pages 27-29 of the transcript; See Also Plaintiff's Appendix at Exhibit 7, Video Excerpts of June 17, 2009 Senate Oversight Hearing.

73) 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.*

B. As noted in Response to Paragraph 6 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 even if they

were SWAT certified and equipped (except with regard to the 10-12 member SWAT team that executed the 6:01 a.m. search).

C. Four or more SWAT team members were on site at the Redd Home at or about noon.

Response to Paragraphs 6 and 51 above and Paragraph 83 below.

D. In Plaintiffs Appendix at Exhibit 1, 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 Plaintiffs Appendix at Exhibit 2, page 1, and referenced at Movants Appendix at Exhibit 10, Bretzing Decl., Dkt. 53-4, at page 4, note 2, except that they did not have helmets and goggles.

E. The Agents who entered the home at 6:40 a.m. had guns like the gun in the same photo (a firearm with fully automatic capability). Plaintiffs Appendix at Exhibit 1, Jericca Redd Decl., at page 4-5, ¶5(a)(iii).

74) Also on June 17, 2009, the same day as Mr. Holder was answering Senator Hatch's questions, the FBI issued a press release in which confirmed that the number of agents involved in the June 10, 2009 operation included "approximately 150 agents and employees from the FBI and BLM." The number of additional non-employees, such as cultural specialists, was not offered in the press release. *See* Plaintiffs Appendix at Exhibit 8, FBI June 17, 2009 Press Release.

75) 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* Plaintiffs Appendix at Exhibit 6 at pages 31-33, and Paragraph 72, above;.

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

- A. There were only 10 SWAT Agents, and they were not at the Redd Home.
- B. None of the other agents were in combat gear.
- C. Not only was officer safety a concern, but the volume of material that needed to be handled, catalogued, inventoried and seized, required additional manpower.
- D. 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.

77) Similarly, the June 17, 2009, FBI press release makes no allegation similar to those set forth in paragraph 76(A) through 76(D) above.

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

78) 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. Plaintiffs Appendix at Exhibit 1, Jericca Redd Decl., at page 7, ¶8; Plaintiffs Appendix at Exhibit 6, at Pages 31-33 of the Exhibit, pages 27-29 of the transcript; *See Also* Paragraph 72 above (Statements by Senator Hatch).

79) At the time the Arrest and Search Warrants were executed, James Redd was at work at his Blanding medical clinic. Plaintiffs Appendix at Exhibit 1, Jericca Redd Decl., at page 2, ¶2(c).

80) Upon entry into the Redd Home, the Redd family members were sequestered in separate rooms. See Plaintiffs Appendix at Exhibit 1, Jericca Redd Decl., at pages 2-3, ¶¶2(f)-2(g).

81) Jeanne Redd was ordered to open the door, and she complied. Plaintiffs Appendix at Exhibit 1, Jericca Redd Decl., at page 2-3, ¶¶2(e)-2(g).

82) 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 24 above.

83) 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, Agent Love asked Jericca Redd how to access the roof and she told him how to do it. Plaintiffs Appendix at Exhibit 1, Jericca Redd Decl., at page 3, ¶3 and page 3-4, ¶4(c). Jericca Redd was under no obligation to assist the officers or to be courteous to them.

84) 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 to do so. Plaintiffs Appendix at Exhibit 1, Jericca Redd Decl., at page 4, ¶4(d).

85) With regard to weapons, at no time did the Agents appear to be searching for weapons. Guns were in the house, but no Agent ever seized a gun or secured a gun during the course of the search. Plaintiffs Appendix at Exhibit 1, Jericca Redd Decl., at page 7, ¶9. None of the Agents seemed worried about, or interested in, any guns that might be in the house. *Id.*

86) 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 Paragraph 31 above.

Government’s Anticipation and Expectation Regarding
the Volume of Material to be Searched

87) The FBI and BLM began organizing resources and assets, including manpower and funding, on or before April 1, 2009. See Movants Appendix at Exhibit 8, 4/1/2009 FBI Electronic Communication RE: Cerberus Action, at page 1, FBI000115.

88) 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; Movant's Appendix at Exhibit 8, 4/1/2009 FBI Electronic Communication RE: Cerberus Action, at page 2-3, FBI000116-117;
- B. Persons with special skill, Archaeologists, would be needed to properly process each scene. Exhibit 8, 4/1/2009 FBI Electronic Communication RE: Cerberus Action, at page 2, FBI000116;
- C. There would be a large volume of artifacts. Exhibit 8, 4/1/2009 FBI Electronic Communication RE: Cerberus Action, at page 3, FBI000117;
- 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. Exhibit 8, 4/1/2009 FBI Electronic Communication RE: Cerberus Action, at page 3, FBI000117; See Also, Movant's Appendix at Exhibit 9, Cerberus Action Search/Arrest Warrant Service, at page 1, FBI000063;
- E. In fact, the artifacts and evidence were labeled and tagged and left where they were found for almost 30 days. The Government returned to seize the labeled items on July 7, 2009. See Plaintiffs Appendix at Exhibit 1, Jericca Redd Decl. at page 9-11, ¶13. See Also Plaintiff's Appendix at Exhibit 3, (Photos of Items left behind on June

10, 2009), Exhibit 4, (June 10, 2009 Receipt for Property Seized) and Exhibit 5, (Photographs of July 7, 2009 Seizures).

Accuracy of the Sign In Log

89) The Sign In Log, filed at Movants Appendix at Exhibit 39, indicates only those agents who entered the Redd Residence, but not those who were at the home or on the premises, but not in the Residence. This fact is demonstrated as follows:

- A. SA Bretzing declares that “the FBI and BLM law enforcement officers who arrived at and departed from the Redd residence over the course of the day on June 10, 2009 signed in and out on a log...” Movants Appendix at Exhibit 10, Bretzing Decl., Dkt. 53-4, at page 5, ¶22;
- B. Agent Vander Veer did not sign in until 9:52 a.m., but she was “present” at the time of arrival at 6:40 a.m. to arrest James Redd and/or to search the Redd “Residence.” See Movants Appendix at Exhibit 2, Operations Plan, at page 5, FBI000016 (Vander Veer assigned as Searcher); Movants Appendix at Exhibit 4, Search Warrant Locations, at page 4, FBI000008 (Vander Veer as Finder); Movants Appendix at Exhibit 28, FD-302 by DA Kisabeth, at page 1, Redd_BLM-0243 (Vander Veer alleged to arrive on scene at 640 a.m. and designated as a transporter/searcher/interviewer);
- C. Agent Vander Veer was present at 6:40 a.m., and she assisted in the arrest and interview of James D. Redd. This took place not in the Redd “Residence,” but in the driveway and garage. Movants Appendix at Exhibit 28, FD-302 by DA Kisabeth, at page 1 (“James Redd drove up at 6:55 a.m.”); See Also Movants Appendix at

Exhibit 30, Memorandum of Interview: Dr. Redd, at page 1, Redd_BLM-0217

(“Time [of interview of James Redd]: 7:05 a.m. to approximately 9:30 a.m.”);

D. The most reasonable inference from these facts is that FBI and BLM agents did not sign in (or out) of the log at Exhibit 39 to Movants Appendix, unless and until they entered the residence;

E. There were lots of agents besides just Vander Veer who did not enter the residence, but who were present at the Redd Home and exercising force or a show of force.

1. This fact is evident from above;

2. See Also, Plaintiffs Appendix at Exhibit 1, Jericca Redd Decl., at page 3-4,

¶¶4(a) and 4(b).

90) Agent 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 Movants Exhibit 4, Search Warrant Locations, at page 4 (B8)(Search team); Movants Exhibit 5, Arrest Locations, (James and Jeanne Redd are not listed). But Agent Love, and many others, signed in and out of the Redd Home.

A. A reasonable inference from these facts is that there are individuals who went to the Redd Home who were not “assigned” to go to Redd Home.

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

Other Relevant Facts

91) Most of the agents who entered the home first appeared to be armed and dressed like the agent in the picture referenced in Movants Exhibit 10, Bretzing Decl., Dkt. 53-4, at page 4, ¶20,

note 2, and attached to Plaintiffs Appendix at Exhibit 2, except that they were not wearing goggles or hats. Plaintiffs Appendix at Exhibit 1, Jericca Redd Decl., at page 4, ¶5.

- A. Additional Agents entered the home, or walked around outside of it. These agents were not as heavily armed as the initial set of agents, but they were armed and they all had guns. Plaintiffs Appendix at Exhibit 1, Jericca Redd Decl. at page 6, ¶5(b). They were also all wearing body armor. *Id.* at page 4, ¶5(a)(i);
- B. Yet more additional Agents stayed outside the home and never entered the residence itself. Plaintiffs Appendix at Exhibit 1, Jericca Redd Decl. at page 3, ¶4, page 6-7, ¶6(c).
- C. There were Agents inside the house, outside the house, and far away from the house (but on the property). They were everywhere. Plaintiffs Appendix at Exhibit 1, Jericca Redd Decl. at page 3, ¶4(a).
- D. If the Agents were on site, but did not enter the residence, they did not sign in the sign in log. See Paragraph 89 above.

III. Argument

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

Summary judgment should be denied because the discretionary function exception does not bar the claims of Plaintiffs because the Government agents do not have discretion to violate the Constitution. The decision to use the amount of force that was used, including the number of armed agents dispatched, and the manner in which they were equipped, amounts to an excessive show of force which was not reasonable under the circumstances and the discretionary function exception does not apply.

Summary Judgment should be denied on the alternative ground requested by Movant, an alleged lack of proximate cause between the death of James Redd and the complained of conduct, because (1) Plaintiffs have a survival claim that, as a matter of law, presumes the death was not caused by the wrongful conduct and (2) the wrongful conduct caused other elements of compensable harm in addition to, or other than, the death of James Redd.

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

In ruling on a motion for summary judgment, the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986). In addition, all doubts must be resolved against the non-movant, all evidence must be construed in favor of the non-movant, and all reasonable inferences must be drawn in favor of the non-movant. *Hunt v. Cromartie*, 526 U.S. 541, 550-555, 119 S.Ct. 1545, 1551-1552, 143 L.Ed.2d 731 (1999).

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

Second, while a district court should be demanding in its examination of a Rule 56 Movant's papers, it should treat a Rule 56 opponent's submissions “indulgently.” *Lew v. Kona Hospital*, 754 F.2d 1420, 1423 (9th Cir. 1985) *citing* 10A C.Wright, A. Miller & M. Kane,

Federal Practice and Procedure § 2738 at 484 (1983)³. In ruling on a Rule 56 motion, a district court does not weigh the evidence or find facts or determine the credibility of witnesses. *Anderson, supra*, 477 U.S. at 255. Evaluating credibility, weighing evidence, and identifying which factual inferences to draw are all functions reserved for the jury. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-151, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000); *Anderson, supra* 477 U.S. at 255.

The standard on Rule 12(b)(6), and applied by the Court in Dkt. 25, at page 4, was an assumption that “all well pleaded factual allegations, as distinguished from conclusory allegations, [were] accepted as true and viewed in the light most favorable to the Plaintiffs” to determine whether there were enough facts to state a claim to relief that is plausible on its face. Order at Dkt. 25 at page 5, *citing Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007). Presumably, the Court did not accept the complaint’s legal conclusions. *See Ridge at Red Hawk, LLC v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007).

Thus, the Court’s legal analysis as set forth in its order at Dkt. 25 is still applicable, but there is a difference as to what facts it must now apply to that analysis now that the case is presented on a Rule 56 motion. Those facts are set forth above in Section II(b) and II(c) above, all of which must be viewed in a light most favorable to the Plaintiffs. Plaintiffs are also entitled to all reasonable inferences available from those facts and to have all doubts resolved against the Movant.

b. The Conduct in Question Was Not Discretionary

As set forth by the Court previously, “It is widely accepted that law enforcement officers do not have the discretion to violate the Constitution. NOTE 15.” Order at Dkt. 25, at 7-8,

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

(citations omitted). Plaintiffs submit evidence that demonstrates that the complained of conduct was unconstitutional in order to demonstrate that the conduct is not discretionary. *See Id.*

Plaintiffs argue herein that the decision to use the amount of force that was used, including the number of armed agents dispatched, and the manner in which they were equipped, amounts to an excessive show of force that was not reasonable under the circumstances. *See Id.* at 15.

In the Order at Dkt. 25, the Court held:

the Tenth Circuit has held that the decision of what amount of force to use to execute a warrant is governed by the Fourth Amendment, so that if the degree of force decided upon is unreasonable, the Fourth Amendment is violated. NOTE 30. Thus, the Tenth Circuit has reviewed a decision to send in a SWAT team to execute a warrant by “balanc[ing] the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.” NOTE 31. The Court will apply this same test to evaluate the amount of force used to execute the Redd warrants.

Id. at 15.

In its Order at Dkt. 25, the Court held that the use of 100 plus heavily armed officers was unreasonable and nondiscretionary. *Id.* at 16. The Court found the following instructive:

...the Tenth Circuit has stated that “[t]he decision to deploy a SWAT team to execute a warrant necessarily involves the decision to make an overwhelming show of force—force far greater than that normally applied in police encounters with citizens.” Note 32

Id. at 16, citing *Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1190 (10th Cir. 2001).

In addition, the Court also found it relevant and otherwise important that:

The lack of other indicia of danger further supports the Court’s conclusion: Dr. Redd was not accused of a violent crime, was not known to be dangerous or living with dangerous people, and nothing suggested that evidence would be destroyed unless a large force was dispatched

Id. at 16.

Last, the “overwhelming show of force alleged was a serious intrusion into Dr. Redd’s privacy, and it is not clear to the Court that a governmental interest justified its use.” *Id* at 16.

While the number of officers demonstrated on summary judgment is not clearly in excess of 100 or more, this Court did not hold that 99 or fewer officers would have been reasonable or discretionary. The Court’s holdings above turned on the (1) the number of officers; (2) the nature in which they were equipped, and in particular, whether the officers were heavily armed and/or SWAT officers; and (3) the lack of other indicia of danger. Last, the Court’s holding also turned on a finding that the facts alleged demonstrated an “...overwhelming show of force—force far greater than that normally applied in police encounters with citizens...” These factors and circumstances have been demonstrated in the instant motion in Section II above.

i. Number of Officers

Plaintiffs note at the outset that the Redd “Home” includes both the residence, and the real estate immediately outside and around the residence. Movant seems to agree. See Defense Motion, at Dkt. 53 at page 10 of 40, note 4. Force was exercised and experienced both within and without the walls of the residence.

Plaintiffs submit evidence above that the number of agents at the Redd Home was no less than 50 (See Plaintiffs Appendix at Exhibit 1, Jericca Redd Decl. at page 6-7, ¶6(c)), and as many as 100, (See Section II(c) at Paragraph 72 above). Plaintiffs submit that 50 or more agents unreasonable and were constitutionally impermissible and demonstrated an overwhelming show of force which was far greater than that normally applied in police encounters with citizens.

With regard to the necessity of the number of agents, Plaintiffs submit that based on Paragraph 13 of Section II(c) above, the Government only needed, and only used, 2-3 ERT team members to catalogue and record each item. In addition, there was no evidence gathering need,

or tedious packaging to conduct, because almost all of the evidence was left at the Redd Home on June 10, 2009, and was not actually seized and taken away (and handled and packaged) until July 7, 2009. See Paragraph 57 and 58 of Section II(b) above.

In sum, the Government deployed 50 to 100 agents, of which no more than 12 were needed for the arrest of Jeanne and James Redd and for the search of the Redd Home, and no more than 3 of those 12 were needed to identify, catalogue, photograph and record evidence. The remaining 38-78 additional agents represented an excessive and unreasonable application of force.

ii. Nature in which Officers were armed and equipped

The present facts indicate that the Agents who entered were “heavily armed⁴.” Those Agents who entered later and who walked around outside the residence without entering were also heavily armed, albeit not as heavily armed as the entry group. These Agents were wearing body armor and had guns, and 4 or more were SWAT team members who had sniper rifles, or “long guns.”⁵ The Agents, whether SWAT or otherwise, were dressed like SWAT officers, except that they did not have helmets and goggles. See Section II(b), Paragraph 86 above.

iii. Lack of Indicia of Danger

James and Jeanne Redd were not accused of violent crimes. See Order at Dkt. 25 at page 16. They had no history of violence or violent crime. Their reputations in the community were good, if not outstanding, and they were not thought to be dangerous or living with dangerous people. See Section II(c) above, at Paragraphs 72 and 78; See Also Order at Dkt. 25 at 16. There was nothing to suggest that evidence would be destroyed unless a large force was dispatched,

⁴ See Plaintiffs Appendix at Exhibit 1, Jericca Redd Decl. at page 4-6, ¶5; See Also Section II(c) above, at Paragraph 91 .

⁵See Section II(b) above Response to Paragraphs 48 and 49.

and in fact, the vast majority of evidence seized, two truck loads, was left in the home for almost 30 days, marked and labeled so that if the Redd's were inclined to hide or destroy it, they would know exactly which items to destroy or of which to dispose. See Section II(b), Response to Paragraph 57. There was no concern for safety after the initial entry, and there was no concern regarding possible destruction of evidence at any time.

In the related Bivens action, Judge Shelby previously found:

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

United States District Court Case No. 2:11-cv-478-RJS at Dkt. 76 at page 12.

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

Id.

Nothing in the facts presented on summary judgment suggest any different conclusion is appropriate. As noted, Dr. Redd was a respected doctor in the community with no known history of violence⁶. Nothing in the record suggests agents believed Dr. Redd was engaged in criminal activity when the warrant was executed in the early morning hours of June 10, 2009. And while Dr. Redd arrived at his home shortly after agents began the raid, he was returning only from a morning visit to his clinic—not from any alleged criminal activity. See Section II(b), Paragraph 86, and above; See Also Plaintiffs Appendix at Exhibit 1, Jericca Redd Decl., at page 2, ¶2(c). More facts were presented on Rule 56 than were presented on Rule 12(b)(6) that further support

⁶ See Section II(c) above, at Paragraphs 72 and 78.

the conclusion that neither Dr. Redd, nor his family, posed any threat to the officers. Senator Hatch characterized Dr. Redd as “an upstanding member of his community, a decent, honorable man...” whom “everybody respected [and] everybody loved.” See Section II(b), Paragraph 72 above. This characterization was not challenged or corrected by Mr. Holder, or Movant, and has been confirmed in Section II(c) above. The circumstances of Dr. Redd’s arrest demonstrate that Dr. and Mrs. Redd surrendered without violence or attempt at flight, and he immediately agreed to a lengthy interview at which they were cooperative with the investigating agents.

Last, as set forth above⁷, once inside the home, the Agents made no effort to secure the guns, even with an individual in the home who was allowed to move around from time to time, unsupervised, such that she might access a gun had she been so inclined. Jericca Redd was allowed to be alone in a room to change clothes and dress for the day when the home ostensibly had an unknown number of guns in unknown locations. While there were guns in the home, the Agents were not concerned about them at any time on June 10, 2009. See Plaintiffs Appendix at Exhibit 1, Jericca Redd Decl., at page 4, ¶4(d) and page 7-8, ¶ 9.

iv. Other Relevant Facts

The evidence demonstrates that Agent Love summoned more and more agents to the Redd Home throughout the morning. See Plaintiffs Appendix at Exhibit 1, Jericca Redd Decl. at page 6, ¶ 6. Whenever he did so, more agents showed up at or around the Redd Home. *Id.* at 6. In addition, Government documents confirm more and more search teams arrived throughout the day at the Redd home. The purported reason for needing more agents, to gather and catalogue evidence, is not supported by Mr. Holder’s responses (officer safety only), to the Senate’s questions regarding the basis for the force, and it is not supported by the evidence. See Section II(c) above, at Paragraphs 72-73. The agents had originally planned on simply freezing evidence

⁷ See Section II(c), at Paragraph 85 above.

in place pursuant to a court order, and had also anticipated a large amount of material would need handling. *Id.* at Paragraph 88(D)-82(E). Moreover, the SWAT agents, while they had special training, were not trained in the handling or cataloguing of evidence (See Plaintiffs Appendix at Exhibit 2), and they did not need tactical weapons to assist the handling or cataloguing, photographing or packaging artifacts. Only a few items were seized on June 10, 2009, and most everything else, 112 boxes, were handled, catalogued, packaged, and taken away much later on July 7, 2009. See Paragraph 88(E) above.

While there are arguably fewer agents on Rule 56 than there were previously on Rule 12(b)(6), the evidence demonstrates that the prior justification for most of the agents, evidence gathering, did not exist on June 10, 2009. The remaining facts, the lack of indicia of danger and the manner in which the agents were armed and equipped, is substantially similar on Rule 56 as it was on Rule 12(b)(6). Viewing the evidence in a light most favorable to the Plaintiffs, and making all inferences in favor of the Plaintiffs, the evidence is the same or sufficiently similar to the facts alleged in the complaint, such that a reasonable jury would be authorized to find in favor of the Plaintiff and summary judgment should be denied.

c. Causation

Movant's argument presumes that the only harm alleged is wrongful death, and that "Plaintiffs must show that the number of federal personnel dispatched to the Redd residence on the morning of June 10, 2009, was a but for cause of Dr. Redd's suicide. (citation omitted)" Defense Brief at Dkt. 29 at page 37 of 40. However, Plaintiffs asserted claims of intentional infliction of emotional distress, wrongful death, and survivorship (survival). The Court, in its order at Dkt. 25, dismissed or allowed claims as follows:

In light of the foregoing, the Court finds that Plaintiffs' malicious prosecution, abuse of process, false arrest and false imprisonment claims are barred in their

entirety by the discretionary function exception. The Court further finds that Plaintiffs' intentional infliction of emotional distress and wrongful death claims are barred to the extent they rely on the conduct of Defendant's agents during the raid, but are not barred to the extent they rely on the allegation that Defendant's agents dispatched 100 plus heavily armed officers to execute the Redd warrants. Finally, the Court finds that the detention of goods exception bars Plaintiffs' conversion, trespass to chattels, replevin, and post-raid negligence claims.

Dkt. 25 at 22.

Plaintiffs asserted, *inter alia*, a claim of survivorship in the Complaint at Dkt. 2, page 21-22 (Section IX, Survival Action); See also Complaint at Dkt. 2, page 2, ¶9. The portion of the Complaint alleging the survival claim references Utah Code § 78B-3-107 as the source of the claim being brought. Complaint at Dkt. 2, page 21, ¶147. The Court did not identify the Survival Claim as among those asserted in the Complaint (See Order at Dkt. 25 at page 5, Section III), nor did it reference it as among those that were the subject of the Motion to Dismiss. See Order at Dkt. 25 at page 22, quoted above. However, based on the Order at Dkt. 25, the Survival Claim appears to "survive" to the extent it is based on the allegation of excessive force, or "Defendant's Agents' decision to use the amount of force employed against Dr. Redd." See Order at Dkt. 25 at page 17 (in reference to survival of IIED and wrongful death claims).

In order to prevail on their survival claim, the Plaintiffs must first demonstrate that the discretionary function exception does not apply. If it does not, Plaintiffs can prevail on the survival claim regardless of whether the wrongful acts of the Defendant caused the death of James Redd. Plaintiffs need only show they suffered harm of some sort. Utah Model Jury Instruction, Second Edition, CV2015 (Survival Claim), as well as Utah Code § 78B-3-107, allow an award for damages to a deceased plaintiff regardless of whether the fault or conduct caused a death to a decedent. CV2015 provides:

If you decide that [name of defendant]'s fault was a cause of [name of decedent]'s harm,

you must award economic and non-economic damages for the period of time that [name of decedent] lived after the injuries, *regardless of whether [name of defendant]'s fault caused the death.*

Model Utah Jury Instruction, Second Edition, CV2015 (Survival Claim)(emphasis supplied).

Thus, Plaintiffs do not need to prove the wrongful conduct caused the death of James Redd in order to prevail at trial, and summary judgment is not appropriate on these grounds.

IV. Conclusion

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

Dated: November 16, 2015

/s/ Shandor S. Badaruddin

Shandor S. Badaruddin, Esq.

Attorneys for Plaintiff

MORIARITY & BADARUDDIN, PLLC

736 South Third Street West

Missoula, Montana 59801

Telephone: 406-728-6868

Facsimile: 406-728-7722

Email: shandor@emsblaw.com