IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ADLYNN K. HARTE, et al.,	)	
	)	
Plaintiffs,	)	
	)	No. 13-CV-02586
v.	)	
	)	
THE BOARD OF COMMISSIONERS OF THE COUNTY OF JOHNSON COUNTY, KANSAS, et al.,	)	
	)	
Defendants.	)	

PLAINTIFFS' RESPONSE TO THE MOTION FOR SUMMARY JUDGMENT OF THE BOARD OF COMMISSIONERS OF JOHNSON COUNTY AND DEFENDANTS DENNING, BURNS, BLAKE, PFANNENSTIEL, COSSAIRT, SHOOP, SMITH, FARKES, REDDIN, KILBEY AND VRABAC

Kristi Kingston KS No. 19126
EMPLOYEE & LABOR LAW
GROUP OF KANSAS CITY, LLC
3699 S.W. Pryor Road
Lee's Summit, MO 64082
Telephone: (816) 945-2122
kristi@elgkc.com

Cheryl A. Pilate KS No. 14601
Melanie S. Morgan
MORGAN PILATE LLC
926 Cherry Street
Kansas City, MO 64106
(816) 471-6694
cpilate@morganpilate.com

PLAINTIFFS' RESPONSE TO MOTION FOR SUMMARY JUDGMENT

Adlynn K. Harte, Robert W. Harte and their minor children, through undersigned counsel, now respond to the Johnson County Defendants' motion for summary judgment.[1] Based on well-settled principles applying to the determination of summary judgment, including the existence of disputed material facts, this Court should deny Defendants' motion in its entirety.

I. INTRODUCTION

A. The Search

This case goes to the very heart of the Fourth Amendment. It concerns the right of wholly innocent citizens to have their day in court when the government has violated their right to be free from unreasonable searches and seizures by invading their home, holding them and their young children under armed guard, and searching for 2½ hours through every private corner when, with each passing minute, any pretense as to the legality of the search dissipated further.

The morning of April 20, 2012, began much like any other school day. Robert Harte had arisen around 7:20 a.m. and was preparing to wake his children – a girl in kindergarten and boy in seventh grade. His wife, Addie Harte, was beginning to awaken. With no warning, Mr. Harte heard thunderous pounding at his front door. Alarmed, he rushed to open it – and was confronted by a sight he never had reason to anticipate. On his porch, prepared to "breach" the door if he did not open fast enough, was a phalanx of raid-garbed Sheriff's deputies, all with Glocks in hand and one toting an AR-15 assault rifle. They immediately began shouting "Sheriff's Department" and yelling commands to get down. Mr. Harte, shirtless and shoeless, dropped to the floor of the foyer, face-down, hands behind his head. He was bewildered and terrified. Deputies streamed into the house, initially crowding in the foyer. Mrs. Harte and their young daughter and son inched downstairs, with the son holding his hands up. To their shock, they saw the man of the family prone on the floor, with a

[1] On October 13, 2015, this Court dismissed without prejudice Defendant Nate Denton. (Doc. #296).

deputy holding an assault rifle standing over him. Deputies then ordered the whole family to sit cross-legged on the foyer floor, and they all sat, backs against the wall, feeling nothing but fear and bewilderment.

After deputies searched the sofa in the living room, they allowed the Hartes to sit there under the watchful eye of an armed deputy. They remained on that sofa for nearly 2½ hours, right in front of their living room picture window and in full view of neighbors. After deputies "cleared" each room, they searched the entire house, end to end, every closet and corner, including the children's rooms. Initially, deputies were searching for a "marijuana grow operation," but when they failed to find that in the first several minutes, they decided they would look for "remnants" of an "inactive" grow operation. And when they failed to find that, they searched for "personal use" amounts of marijuana or "any evidence of criminal activity."

Both Harte parents, shocked by what was happening, told deputies they were in the wrong house. Deputy Blake gave *Miranda* warnings to both, and both declined an interview. Mrs. Harte declined after asking Deputy Blake if she was allowed to leave. He told her "no, not at this time."

In the very first minutes of the search, deputies entered the Hartes' basement and discovered a hydroponic garden – built by Mr. Harte and his seventh grade son as an educational project. The only plants there were a few struggling tomato and vegetable plants. It was obvious – or should have been obvious to any reasonable law enforcement officer – that the hydroponic garden was not a "marijuana grow op" and had never contained marijuana plants. There were no high-intensity lights, no Mylar reflective material and no special ventilation. Despite the obviously innocent nature of the garden and the deputies' failure to locate any equipment for processing marijuana, they repeatedly combed through the home, at one point even summoning a drug dog on the claim that two of them detected a "fleeting whiff" of something suspicious. The drug dog found nothing. His handler, an Overland Park officer, also reported that he smelled no odor at all.

Eventually the deputies departed, after giving Mr. Harte a receipt stating: "No items taken." They told the Hartes that they searched their house because "seeds and stems" had been previously found on their

property, and they suggested that they could take their son to a pediatrician and have a "family meeting" regarding personal use of marijuana.

After the deputies left 10333 Wenonga, an embarrassed and upset Mr. Harte went door to door in the neighborhood, showing the receipt stating "no items taken," and explaining to neighbors that he and his wife had nothing to do with drugs.

B. Operation Constant Gardener

Two weeks before any investigations in "Operation Constant Gardener" had been completed or any warrants signed, Johnson County Sheriff's Office (JCSO) public information officer Tom Erickson was preparing a press release touting hoped-for arrests and seizures from the upcoming operation, a high-publicity initiative targeting indoor marijuana cultivation. It was scheduled to coincide with the so-called "marijuana holiday" of April 20, also called "420."

Erickson titled the draft release "Law Enforcement Celebrates 420 with Multitude of Arrests." Although the tongue-in-cheek title was later changed, the JCSO indeed hoped for a fruitful day, topped off by Sheriff Denning's appearance at a scheduled 2 p.m. news conference to commemorate the success of the day.

This was the second year for Operation Constant Gardener (OCG), and, as with the previous year's event, the deputies' preparatory investigations would be extremely brief. Nearly all began with a "tip" from Missouri State Highway Patrol Sergeant Jim Wingo that an individual had been surveilled shopping at a hydroponic gardening store. The deputies followed up by doing "trash pulls," in which they seized suspected contraband from a target's trash and tested it with a non-specific "presumptive" test for marijuana. The deputies conducted little surveillance of these homes with suspected "grow operations," made no check of their water or electricity records, and conducted no background investigations of the targets. Most significantly, deputies submitted no suspected contraband to the JCSO's crime laboratory.

Sergeant Wingo, the architect of OCG, had aggressively promoted the idea that shopping at a hydroponic gardening store was an extremely potent indicator of indoor marijuana cultivation. For years, Wingo – binoculars in hand – had surveilled two indoor gardening stores, including the Green Circle in downtown Kansas City, and passed along his "tips" to other law enforcement agencies.

One such "tip" put Mr. and Mrs. Harte in the crosshairs for OCG 2012. On August 9, 2011, Wingo spotted a "white male subject" with two children leaving the Green Circle, carrying a small bag. A license plate check led Wingo to identify 10333 Wenonga Lane in Leawood as the man's address.

The tip, provided just a month before the planned raids, was handed off to JCSO deputies Mark Burns and Edward Blake, who began seizing the Hartes' trash. The first time, on April 3, 2012, they found wet "plant material" in the Hartes' trash, but disregarded it as "innocent." The next two trash pulls, on April 10 and April 17, yielded more results. The same wet plant material appeared again, but this time it was in a "clump" that looked "suspicious." They decided to test the "chopped up" plant material – discovered amidst the Hartes' kitchen trash – with a marijuana field test. Both times, they reported that the test came back "positive," though they did not photograph or describe the appearance of the results. Burns and his supervisor, Sergeant Tom Reddin, also supposedly unrolled some tiny leaves and claimed they found "jagged edges" but did not document that fact anywhere.

With the hydroponic store sighting of Mr. Harte, plus the two "positive" field test results, Burns drafted an affidavit for a search warrant for 10333 Wenonga Lane. At no time did the deputies conduct any other investigation, other than to determine that the Hartes had no criminal history. In his affidavit, Burns cited the sighting at the gardening store eight months earlier and the two alleged positive field tests of what he called "saturated marijuana plant material." Burns also attested that the plant material – later revealed to be Mrs. Harte's wet, discarded tea leaves – appeared to have been "processed for the extraction" of THC, the active compound in marijuana.

On April 17, 2012, Johnson County District Court Judge Peter Ruddick signed the requested search warrant. He later testified that the affidavit had satisfied him – it was in the "standard format" and presented a familiar fact pattern, a tip from Sergeant Wingo followed by trash pulls. Judge Ruddick described his role in issuing the warrant as "routine, very short-lived and totally … not memorable."

The 2012 OCG raids were largely unsuccessful. Of the four raids conducted on April 20, 2012, not a single "active grow" was seized. Three raids conducted in previous days resulted in just two small seizures of growing plants. The Sheriff nonetheless appeared at a 2 p.m. news conference and declared the day a success in helping rid the county of a drug that was linked to "stolen weapons" and "other crimes…associated with personal violence." Erickson told news cameras that people appearing to be "average Johnson County" residents were growing marijuana and that their neighbors had "no idea" what was happening "right next door to them."

II. PLAINTIFFS' RESPONSE TO DEFENDANTS' MATERIAL FACTS

1. Controverted. Plaintiffs object to and controvert this statement of "fact." The evidence relied on in a summary judgment motion must be admissible. The "facts" cited in this paragraph are not "facts" but are opinions that rest on a disputed factual record. The "opinions" mirror those of defense expert, Michael Lyman. As this Court is aware, Plaintiffs filed a *Motion to Exclude or Limit Certain Opinion Testimony of Defense Expert Michael Lyman*, on September 25, 2015. Plaintiffs refer this Court to their arguments stated in Docs. 287, 299, and 306, regarding Mr. Lyman's characterization of the success rates of the various "marijuana grow investigations." Mr. Lyman's data is "cherry picked," failing to take into account various failed or abandoned investigations, dormant investigations, investigations that remain "open" despite no activity in them, and "tips" that never ripened into investigations because of "negative" trash pulls or for other reasons.

Defendants' assertion of "success" with the "same or similar" investigative pattern constitutes unsupported and inadmissible opinion testimony. Plaintiffs further object to Defendants' reliance on "Grow Summary Charts," whose validity and accuracy Plaintiffs have challenged in their Motion to Exclude or Limit the Testimony of Defense Expert Michael Lyman. Plaintiffs hereby reassert and incorporate by reference arguments made in their Motion, Reply and Sur-surreply. (Docs. 287, 299, 306) Plaintiffs further object to the relevance of this evidence, as the claims of "success" have no bearing on whether probable cause existed in this case to seek a search warrant and raid the Hartes' home. Plaintiffs further respond as follows:

News releases are not admissible for the purpose of showing "success" with "grow investigations." The testimony of Tom Erickson and Sheriff Denning establishes that news releases and press announcements do not constitute reliable, relevant evidence for the purpose of showing "success" with "grow investigations." In his deposition, Public Information Officer Erickson testified that his job was to provide a "good news story" to the press, and that a "good news story" was one that "shines a positive light on things the Sheriff's Office is doing." (Exh. 1 at 20:17-21; 23:16-22). Sheriff Denning testified about choosing April 20 – the so-called marijuana "holiday" – to serve warrants as a way to "send a message" to the community. (Exh.

2 at 313:18-22). At his April 20, 2012, news conference, he touted the success of the day and did not acknowledge that any of the raids had been unsuccessful. (Exh. 2 at 250:20-23). He knew that "there wasn't much contraband recovered" that day, but did not disclose that to the press. (*Id.*). "[C]an we sit there and say we did some raids today and we got some here or some there and some not at all[?] What's the value of it?" (Exh. 2 at 250:20-23). Given Erickson's view of "good news" stories and Denning's view that releasing accurate information regarding a day of highly publicized raids lacked "value," the JCSO's press releases and press announcements cannot be reasonably relied upon as providing accurate, reliable information that should be admitted to show investigative "success" with grow cases.

Operation Constant Gardener 2012 yielded few results. Sergeant Tom Reddin, who was in charge of the Directed Patrol Unit (that carried out the raids) admitted in his deposition that not a single live marijuana plant was seized on April 20, 2012. (Exhibit 3 at 95:10-96:14[2]). Only two of the targets, Mr. R on Newton and Mr. D on Noland Road, were ultimately convicted, resulting, between both cases, in two misdemeanors (one for possession of drug paraphernalia, another for possession of marijuana) and one felony (for a drug tax stamp violation). (Exhs. 4, 5, 6, 7). Seven raids, conducted over three days (April 11, April 19, April 20) did not achieve the hoped-for results. On April 20, when deputies' searches for cannabis plants came up empty-handed at both the Hartes and at a Gardner address where the JCSO launched a Sheriff's Emergency Response Team (SERT) (Exh. 8, 9, 10; Exh. 3 at 95:1-96:14), and then found only an "inactive grow" at Mr. R's on Newton (Exh. 3 at 96:-14), Sergeant Reddin sent a terse but pointed email to Lieutenant Michael at 12:54 p.m.: "SON-OF-A-BITCH!!!" (Exh. 11, SH-16888) (capitals in original). Four minutes after receiving Reddin's email, Pfannenstiel sent a response exclaiming:

[2] The reference at line 21 of page 95 in Redding's deposition contains a typographical error, which is clear from the context; the date 4/20/14 actually refers to 4/20/12, which is when the referenced searches were carried out.

"Nothing??????????????????????????" (*Id.*). Reddin then described the "inactive" grow at Mr. R's house: "When this one was up and running, it was a hell of an operation." (*Id.*)

The searches at other locations yielded equally dismal results. At a search at the M's on Stone Creek, deputies (including Burns and Shoop) seized only four live marijuana plants, and the residents were not prosecuted. (Exh. 12, SH-13557-13565). Another raid, of Ms. B on Lowell, resulted in the seizure of just some small leaves in the kitchen, and no grow operation. (Exh. 13 at 138:2 – 139:7). Shoop, who also raided the Harte home, described the recovered contraband from Ms. B as "trace amounts." (Exh. 14 at 24:7-15). Deputies, led by a ram-wielding Chris Farkes, gained entry to the Lowell location by breaking a door open: "[W]e did a ram and nobody was home at the time, and we ended up finding just trace amounts of marijuana." (*Id.; see also* Exh. 15 at 85:12-24; Farkes describes using ram). Ms. B. had no marijuana grow at all. (Exh. 3 at 96:2-4; Exh. 16 at SH- 3743-3752).

Evidence shows that other agencies were unsuccessful during Operation Constant Gardener 2012. Other agencies that participated in Operation Constant Gardener during April 2012 failed to achieve results. When Tom Erickson emailed the public information officer at the Olathe Police Department the evening before JCSO's raids to see if Olathe would send a representative to help "commemorate the success" of the 420 operation, Olathe's representative replied: "Is there any addresses in Olathe that you will be hitting, because the ones we were given we didn't get anything from." (Exh. 17 at SH-16644-45). The Shawnee Police Department also came up short, with the Sergeant in charge of Shawnee's operation telling Reddin that although they had nine arrests, there were "No grow ops this time…." (Exh. 18 at SH-16890). Although Lieutenant Pfannenstiel prepared a chart that purported to show the success that other municipalities in Johnson County had with their grow investigations, he explained that his information was culled from cases that were prosecuted in Johnson County District Court; he did not contact any police departments to see if there were any investigations that did not result in charging. (Exh. 19 at 244:16 – 251:7; Exh. 20, "Summary of Grow Investigations and Convictions" in "Other Johnson County Municipalities Since 2009").

The other "success[ful]" investigations did not have a "same or similar" fact pattern. Judge Ruddick, who signed the warrant for the search at the Hartes' home, also signed warrants arising from other "grow investigations" at homes in Mission, Roeland Park and Overland Park. (Exh. 21 at 176:13-180:6 [Ruddick deposition; sealed portion]; Exh. 22 at [Ruddick deposition redacted]). None of those investigations was "similar" to the Harte investigation as they all rested on far greater evidence of marijuana usage, possession, or cultivation. (*Id*). In each of those cases, deputies either had evidence of: the raw odor of marijuana within the residence and admissions from a resident gained during a knock and talk; multiple trips to the Green Circle observed; obvious alterations to the exterior of the house to conceal windows and ventilate the interior; or the disposal of marijuana "roaches in the trash." (Exhs. 23, 24, 25, 26). In all of these cases, the evidence was far more extensive than the Harte case, and Judge Ruddick signed all of these warrants. (Exh. 21 at 176:13 – 180:6). Ruddick agreed that the affidavits in these other cases presented more facts in support of probable cause. (Exh. 21 at176:13-180:6; Exhs. 23, 24, 25, 26).

No record exists of investigations that were not successful, making it impossible to calculate any rate of success with "grow store" tips. Tom Reddin, the head of the Directed Patrol Unit, which ran Operation Constant Gardener for the JCSO, stated that when "tips" came in, they were handed off to deputies and that information from such cases was maintained only on paper, in manila folders. (Exh. 3 at 183:10-184:25). If a "tip" regarding a Green Circle shopper did not result in a "positive" trash pull after a few or more attempts, the file was closed and disposed of. (Id.; Exh. 3 at 43:12 – 45:20) No one kept a record of those closed, destroyed cases, and therefore, there is no way to know what proportion of Green Circle tips actually led to the seizure of a marijuana grow operation. (*Id*). The Johnson County Sheriff's Office had no document retention policy, according to Reddin. (Exh. 3 at 37:23-24).

Some records that were not discarded reflect investigations that started with a hydroponic store "tip" but were closed with no finding of criminal activity. Of the few records that were apparently maintained of "closed" investigations, some clearly show that some grow store "tips" did not lead to the

discovery of indoor marijuana cultivation. For instance, JCSO deputies Shoop and Denton did a "knock and talk" in March 2011 with residents on Loula in Olathe. (Exh. 27, SH-003853-54; drug tip tracking and review checklist and report). The "tip," from the Missouri Highway Patrol, identified a car registered to the address. (*Id*). Shoop and/or Denton pulled trash twice "with negative results." (*Id*). They then conducted a "knock and talk," and the residents allowed a consensual search. (*Id*.) "No illegal items were observed" and "there were no signs of a marijuana grow investigation." (*Id*). Another "tip" concerned a Mr. and Mrs. H residing on Lowell Avenue. (Exh. 28 at SH-3754-65) They were apparently potential targets for Operation Constant Gardener 2012. *(Id*). Deputies Burns and Blake conducted a trash pull on April 4, 2012, and discovered "no illegal contraband or drugs." (*Id*).

Some cases are still considered "open" even though they have not been actively investigated for years. During discovery, Defendants invoked the "law enforcement privilege" to maintain the confidentiality of records of dormant investigations that started with a "tip" but never progressed to a search or criminal charges. Because the cases had not yet been "closed," the paper files still exist and were not destroyed like other tips that failed to ripen into investigations. (See Exh. 19 at 48:23-56:16; 25:6-27:5, 205:7-207:16). After the Hartes sued, Lieutenant Pfannenstiel had all DPU files brought to him because he had trouble finding files in that unit or obtaining up-to-date information on the status of investigations (*Id*). Presently, Pfannenstiel has custody of those files. (*Id.*). In response to Plaintiffs' Second Requests for Admissions, Denning identified 11 cases that had never been "conclusively" investigated or whose status was unknown. (See Exh. 29, Denning Response to RFA at ¶¶ 1, 2, 3, 4, 6, 7, 10, 11, 12, 13, and 14).

Investigations that resulted in no seizures were apparently not unusual. Deposition testimony by Denning, Burns and Farkes suggests that it is not unusual for a search warrant execution to result in the seizure of no contraband. Denning testified as follows:

> Q. So no one in your department at any point came up and told you we executed a warrant and found nothing?

> A. Again, they did not. And in these types of investigations, that actually is not uncommon. It doesn't mean the product hasn't been there are one time, it just wasn't there when the search warrant was executed.

(Exh. 2 at 96:6-13).

Denning echoed this again in his deposition, stating: "So it is certainly not unusual, it is not common, but it is not unusual to come up with no contraband where we would return the search warrant with nothing taken." (Exh. 2 at 226:15-19; see also Exh. 2 at 275:21-276:5). Farkes testified that it was not unusual to recover nothing on a search because people get "tipped off," though he could not say who might have "tipped off" the Hartes. (Exh. 15 at 149:1-111) Deputy Burns thought about the fruitless Harte search afterward, but concluded that he did not have a "great deal of concern" because they had simply "struck out," and that he was "okay" with that: "we move on." (Exh. 30 at 182:3-22).

Sergeant Wingo's 2012 results were less than expected.

Although email communications clearly establish Wingo's participation in Operation Constant Gardener 2012, he attempted to suggest that he had nothing to do with that initiative and that it was solely the operation of the JCSO. (Exh. 31 at 145:3 – 148:21). Nonetheless, the plants that he seized became part of the OCG 2012 "totals" as they were conveyed to Tom Erickson by MSHP public information officer Stosberg. (Exh. 32) The Missouri State Highway Patrol was also listed on the news releases for OCG 2012, and Stosberg played a prominent role at the news conference and gave statements on behalf of the MSHP. (Exhs. 8, 9, 10). In the email to Erickson, Stosberg stated the MSHP had seized just 20 plants and "one indoor grow operation." (Exh. 32). He added: "Maybe next year we can garner more resources and manpower. Oh well, good working with you….." (*Id*.)

The Johnson County totals were also disappointing – one grow of four plants seized on April 11, and one grow of 19 plants seized on April 19. (Exh. 6; Exh,. 34). Acknowledging the disappointing results, Reddin tried to reassure the deputies they had still accomplished something because they taken down "2 active grow operations" and "3 inactive grow operations" and had therefore made a "dent in cultivation in JoCo." (Exh. 35,

SH-15485) The 2012 results were a far cry from 2011 results, when Wingo, at the end of April 20, 2011, sent an email to OCG participants at various agencies – including Erickson, Farkes and Reddin from the JCSO – stating:

> Thanks again to all of you who worked on this. I think for a first time even this was absolutely an outstanding success. The media coverage was 99% positive on this which is pretty darn good as well. *We've had a lot of suggestions for this operation next year, such as having a telethon type billboard with a large green marijuana plant filling up as the pledges come in, making T-Shirts and whatnot*. One agency had the observation that if this continues for a couple years *4/20 will be something to fear rather than something to celebrate.* On another interesting note, Shawnee wins the IRONIC award for having a search warrant signed at exactly 4:20 p.m.…

(Exh. 36 at 31-32) (emphasis added; capitals in original).

Not every raid led to a seizure, however. Apparently, one of the raids of a "grow operation" apparently turned up a "tomato grow," which Wingo referred to in an email as the "now famous IIPD tomato seizure," prompting an assistant District Attorney in Johnson County to comment: "And a tomato grow discovered…why did Independence have to pick on him." (Exh. 36 at 29, 37; *see also* Exh. 37, P-004251).

Sergeant Wingo's own statements and claimed statistics show grow store "tips" do not always lead to the seizure of "indoor grow operations."

As Wingo prepared for Operation Constant Gardener 2011, he sent out a letter to recruit participating agencies, telling them that, through surveillance, he had garnered the names of "*several hundred customers*" of hydroponic stores. (Exh. 38) (emphasis added). He indicated that April 20, 2011 would be a "significant media event" and that he would supply participating agencies with the names of customers within their jurisdiction on April 4, 2011, giving them two weeks "to initiate brief investigation" in preparation for "420." (Exh. 38) A press release sent out early in the day on April 20, 2011, stated that "narcotics officers were able to identify approximately 375 possible locations of individuals involved with the indoor cultivation of marijuana from Wichita, Kansas to Columbia, Missouri." (Exh. 39 at 322).

Yet, at the conclusion of OCG 2011, even after counting the additional seizures after the official date of 4-20, Wingo reported the seizure of only "52 indoor grows." (Exh. 40, MSHP 319). Clearly, there was a significant discrepancy between the "hundreds" or "375 possible locations" of marijuana grows and the ultimate seizure of just "52 indoor grows." The email traffic among the agencies sheds light on OCG 2011 seizures. For instance, the Topeka Police Department reported on mid-day April 18, 2011: "So far no dirty trash no good car stops, Still working on it." (Exh. 41, WINGO-134). Similarly, the Kansas City Missouri Police Department reported during April 20 that they had started the operation with 75 addresses and had "knocked approximately 25 addresses" but had located just "7 marijuana grow operations." (Exh. 42, WINGO-129).

As is clear from these communications and other documents, not every "tip" that someone shops at a hydroponic gardening store results in the discovery or seizure of a "marijuana grow operation." This is not surprising, since the merchandise at the Green Circle is not exclusive to marijuana and is aimed at any type of indoor growing, including tomatoes. (*See* http://rivermarkethydro.com/products/trellis-netting-5x30-6-mesh, URL showing "trellis netting" for tomatoes sold at the now renamed Green Circle, now called River Market Hydroponics). (*See also* Exh. 33 at 18:18-19:12)(Blake deposition).

2. Controverted in part. Plaintiffs object to the use of the word "pattern" to the extent it suggests that any "pattern" has relevance in establishing probable cause to obtain a warrant for the search of the Harte home. As discussed above, there is no single, unifying pattern; each case is different and has its own facts, including those facts that are relied upon to support probable cause. The Harte case is the only case in which deputies relied upon "saturated plant material" that they claimed had been processed for the extraction of THC. Plaintiffs hereby refer to and incorporate by reference their response to #1, *supra.*

3. Controverted in part. Plaintiffs object to the use of the word "pattern" to the extent it suggests that any "pattern" has relevance in establishing probable cause to obtain a warrant for the search of the Harte home. As discussed above, there is no single, unifying pattern; each case is different and has its own facts, including those facts that aare relied upon to support probable cause. The Harte case is the only case in

which deputies relied upon "saturated plant material" that they claimed had been processed for the extraction of THC. Plaintiffs hereby refer to and incorporate by reference their response to #1, *supra*.

4. Uncontroverted.

5. Controverted in part. Plaintiffs controvert the portion of the factual statement that suggests "knock and talks" were a "less desirable" investigative method. "Knock and talks" were prominently mentioned in Defendant Wingo's initial briefing to OCG participants on April 4, 2011, and Deputy Wingo had successfully used that technique himself. (Exh. 31 at 205:24-206:5, 186:11-17; *see also* Exh. 32, Wingo deposition exhibit 19, slides used on April 4, 2011, *id.*). Testimony by Deputy Shoop actually suggests a split of opinion over the value of "knock and talks." (Exh. 14a 117:24-118:13). The deputies in the Directed Patrol Unit may not have favored "knock and talks" – in fact, Shoop testified that he "hate[d]" them – he indicated that "politicians" or "upper administration" liked "knock and talks" because they liked to go "low key" on targets." (Exh. 14 at 117:23 – 118:17). Shoop added that his whole unit "dislike[d]" knock and talks. (*Id.*). He indicated that he thought "knock and talks" had ruined some cases, even though he also admitted the JCSO had had some "successful" cases with them. (Exh. 14 at 121:8-124:17; see also Exh. 6 at 2404-07 (successful use of knock and talk to make plain view observations and obtain admission from resident)).

6. Controverted in part. Plaintiffs controvert this factual statement to the extent it suggests that the "numerous records" "amassed" by the JCSO from its own files and other jurisdictions have any statistical significance or probative value. As discussed in the response to #1, supra, the records gathered by and available to the JCSO are incomplete and do not reflect numerous failed, dormant or disposed of "tips" or investigations. Plaintiffs hereby reassert and incorporate by reference their response to #1, supra.

7. Uncontroverted. Plaintiffs agree that the records are not complete, but add that the phrase "not necessarily a record of every shopper" is misleading as it suggests that only a few records may be missing, when, in fact, the lack of a document retention policy at the JCSO and the DPU practice of disposing of "tips" that do not lead to full investigations deprive the JCSO statistics of any probative value. Further, the statistics

and charts concerning "grow store investigations" lack *relevance* because the issue in *this* case is whether the deputies had probable cause to seek a warrant of the Harte home and to continue to conduct a search even after it was clear that the hydroponic garden held only vegetable plants.

8. Controverted. Plaintiffs object to subsection (b) of this factual assertion for all of the reasons stated in ##1, 2, 6 and 7. They hereby reassert and incorporate by reference their responses to ## 1, 2, 6, and 7, *supra*. Plaintiffs also request that this court disregard the remaining sections of paragraph 8 as they are not supported by references to the record, in violation of District of Kansas Rule 56.1.

9. Controverted. Deputy Shoop was part of the investigation of the Loula address, which turned up no marijuana whatsoever. (Exh. 27). He was also part of the search team at the Lowell address raided on April 20, 2012, at which deputies made a forcible entry with a ram but found only "trace" amounts of marijuana. (Exh. 14 at 24:2-15; *see also* Exh. 15 at 85:12-24; Farkes describes using ram). The woman who lived there had no marijuana grow at all. (Exh. 3 at 96:2-4; Exh. 16 at SH-3743-3752).

10. Controverted. Plaintiffs hereby reassert and incorporate by reference their responses to ## 1, 2, 6, 7, 8, and 9, *supra*.

11. Controverted. Plaintiffs controvert the use of the phrase "investigative pattern." As stated in the response to #1 above, each case presented different facts, and others contained many other indicia of marijuana usage or cultivation, including: multiple trips to the Green Circle and the purchase of a "grow light hood" and the seizure of partially burnt marijuana cigarettes from the trash (Parish search); alterations to the residence detectable from the outdoors, including running fans and covered windows (Maple search); and a knock and talk following a Green Circle sighting in which the deputies observed in plain view marijuana pipes and an electronic vaporizer, detected the "strong odor of raw marijuana," and obtained an admission from the resident (Antioch search). (See Exhs. 23, 24, 25 and 26). Such facts were used to support the search warrant affidavit in the Harte case, which rested only on a single sighting of the Hartes' vehicle, eight months earlier, at the Green Circle with no knowledge of the shopper's purchase, along with the dubious identification of

"saturated plant material" seized from kitchen trash as marijuana despite the absence of the typical odor and visual characteristics of marijuana. (Exh. 43 [Harte search warrant affidavit]; Exh. 58:15-25). Plaintiffs further controvert this factual assertion to the extent it suggests that some kind of "investigative pattern" somehow establishes probable cause to search the Harte residence or any other home.

12. Controverted. Plaintiffs hereby reassert and incorporate by reference their response to #11, supra. Further, they controvert this factual statement to the extent it suggests that Judge Ruddick has any present recollection of the Harte search warrant and affidavit, as he testified that he does not. (Exh. 21 at 11:21-2). Ruddick did testify, however, that he did not believe he reviewed the warrant affidavit for "terribly long" and that his role in the case was "minimal," "routine," "very short-lived" and "totally…not memorable." (Exh. 21 at 10:15-12:6, 66:21-67:4). He further testified that although the fact that the wet green vegetation came from the kitchen trash was "not meaningful" to him, he "guess[es]" he would have considered that fact had it been presented. (Exh. 21 at 90:13-25). Judge Ruddick did note that he had seen other cases with the same "fact pattern" – i.e., a sighting at hydroponics store followed by a trash pull – and viewed the case as "another one of those." (Exh. 21 at 73:15-76:10) The affidavit was in the "standard format" and he was "familiar with the pattern." (Exh. 121:9-122:10). He was unaware that the vegetative material did not emit any odor consistent with marijuana – which would be different than the usual "pattern" – and did not know anything about the false positive rate of the field test although he was aware that another botanical could yield a false positive. (Exh. 21 at 150:11-151:16, 43:22-45:11) He also testified that if the material did not look like marijuana – i.e., if the after-the-fact observations of the lab analyst had been made available to him while he was reviewing the affidavit – he would have wanted to know that. (Exh. 21 at 176:1-12) In that instance, he said he would not have signed the warrant. *(Id.)*. Other factors that might have impacted his decision about whether to sign the warrant would be whether the officer was properly trained in conducting the field test, whether the test had a very significant false positive rate, or whether the plant material did not smell in any way like marijuana. (Exh. 21 at 167:20 – 169:14; 161:20-162:18)

13. Controverted. This statement is misleading. Mrs. Harte was not stating that she viewed hydroponic gardening as "synonymous" with growing marijuana, merely that it is "common knowledge that some people grow marijuana using hydroponics." Exh. 44 at 181:22-23) Mr. Harte stated only that he knew there was a "connection" with hydroponics and marijuana growing and that he knew "some pot growers did hydroponic gardens." Exh. 45 at 84:2-12. In response to a question by Defense counsel, "As I understand your testimony, you determined early on in your research that hydroponics was synonymous with growing marijuana...?" Mr. Harte responded: "No." (Exh. 45 at 251:8) In another answer, on page 96:12 of Exh. 45, Mr. Harte conveyed only that he was aware that other people might view hydroponics as a way to grow marijuana. During Mr. Harte's research about hydroponic gardening, he consulted several sources for information, including a Kansas City Star article about hydroponic vegetable gardening (Exh. 45 at 96:14-23), "Hydroponic Tomatoes for the Home Gardener," by Howard Resh, and "Hydroponic Gardening: A practical guide to growing plants without soil," by Lon Dalton and Rob Smith. (Exh. 46).

14. Controverted. Plaintiffs controvert the "factual statement" in this paragraph, which is not a fact at all, but is actually an opinion of Defendant Wingo. Plaintiffs assert that "grow investigations" were not nearly as successful as Wingo portrayed, based on all the facts cited by Plaintiffs in response to #1, supra. Plaintiffs hereby reassert and incorporate by reference their responses to ## 1, 2, 6, 7, 8, and 9.

15. Controverted. Plaintiffs dispute that any member of the JCSO participated "meaningfully" in any "investigation." Indeed, there was no "investigation" in the usual sense of that word. The Harte case was never assigned to a particular deputy, and no deputy or supervisor attempted to ensure that there was adequate time and adequate steps taken to conduct a "meaningful" investigation. The "supervisor" at the scene of the raid – James Cossairt – had no previous contact with the file and almost no knowledge about the case. The supervisor of the DPU, Tom Reddin, assigned himself to another search team and was not present at the Harte residence when it was raided and searched. Mark Burns, the affiant, also was not present at the search; he, too, was assigned to another search team.

Defendant Shoop testified that the Harte case was just a "general case" not assigned to a particular deputy, and although Deputy Blake "may have had a background in the case," he "wasn't really assigned to that case I think until the morning of the search. (Exh. 14 at 130:8-19) Various deputies just worked on it "when they had time." (*Id.*).

Role in Harte investigation of James Cossairt. At the Harte search, Sergeant Cossairt was the supervisor in charge of all of the deputies. Cossairt was brought in for OCG from another division – investigations – and he knew nothing about the case other than the warrant was based on trash pulls. (Exh. 13 at 17:16 – 18:6). Cossairt described himself as just a "fill in" supervisor for Reddin, who was on another search team. (Exh. 13 at 128:10). Cossairt described his role as "start[ing] with the briefing and pretty much end[ing]" after the warrant was served. (Exh. 13 at 121:17-25).

Although Cossairt was the supervisor of the tactical operation at the Hartes, he stated he had only been on a front entry team himself four or five times. (Exh. 13 at 129:17-19) He and Deputy Laura Vrabac stationed themselves on the rear perimeter in the back. (Exh. 13 at 67:1-7). Cossairt stated that drugs were not his "forte," that he had not conducted any drug investigations, and that his experience with drugs was very limited. (Exh. 13 at 105:24-106:3; 136:18-137:1). Cossairt testified that he didn't know too much about "brands" and types of marijuana, although he admitted he was aware of the possibility of false positive results with drug field kits. (Exh. 13 at 105:24-106:3; 133:22-134:8).

Cossairt described the seven-member entry/search group as a "compiling of people from different divisions" who had not worked together before. (Exh. 13 at 55:16-56:5) In fact, one of them, Laura Vrabac, had not ever participated in a search before. (Exh. 13 at 40:25 – 31:7). Cossairt's goal for the tactical entry was "just kind of have the house surrounded." (Exh. 13 at 39:5-8) Cossairt did not direct anyone to bring an AR-15 rifle, indicating that Deputy Kilbey brought one of his own accord, and that he did not have any problem with that. (Exh. 13 at 66:3-12) Cossairt could not say how long an "entry team" was supposed to wait at the front door before attempting a forcible entry, as they were prepared to do. (Exh. 13 at 61:19-62:9). He did not

think there was "any formal training" on the waiting period. (Id.). Cossairt was informed that there were likely to be children in the house, but he nonetheless choose Wenonga as the first raid target of the day and did not delay the start of the raid to allow the children to be out of the home and at school. (Exh. 13 at 51:1-52:19).

After deputies had spent nearly 1½ hours searching, Cossairt consulted with Pfannenstiel by phone. They decided to summon a drug dog after Deputies Farkes and Smith claimed to have smelled an odor of marijuana in an upstairs hallway. (Exh. 13 at 94:12-24). The drug dog, which was dispatched at 8:56 a.m., was brought by his handler from the Overland Park Police Department; the dog sniffed the area and found nothing. (Exh. 53 at 844-55; Exh. 13 at 112:19-117:23).

Cossairt suggested they had let the dog stay in the house longer than necessary, stating: "I'm also aware that with canines sometimes it's nice to give them extensive search times and depending on their, I guess their tenure with the department…[for] Either training or just experience." (Exh. 13 at 117:16-23). He added that his "main goal" was to have the dog check the supposed suspicious area, but if the dog handler "wanted to run the dog for the dog's experience and stuff like that through the house, I was fine with that too." (Exh. 13 at 112:19-113:2).

Cossairt stated that the deputies knew about the innocent hydroponic garden within the first 15 or 20 minutes, but continued to search because "[w]e had a search warrant for the home" and were looking for "just process[ed] marijuana, just any scales, drug paraphernalia, whatever the items were that were listed in the search warrant." (Exh. 13 at 96:16-19) Although Cossairt was in charge of the search, he did not read either the warrant or the affidavit prior to the search. (Exh. 13 at 46:1-19).

Role in Harte investigation of Mark Burns. Burns prepared and signed the search warrant affidavit but did not go on the raid to the Harte residence because he was assigned to another search team. (Exh. 43 at 512-15; Exh. 30 at 9:9-19). No deputy was specifically assigned to the Harte case, though he and Blake had both been involved with the trash pulls. (Exh. 30 at 151:20-152:10).

Although Burns stated in the search warrant affidavit that he knew from "personal past experience" that the Green Circle "sells hydroponic grow equipment and materials commonly used in the cultivation of marijuana," he admitted in his deposition that he had never gone inside the Green Circle. (Exh. 30 at at 148:7-9; Exh 43 at 512-13)

Burns also stated in the search warrant affidavit that "through [his] training and experience, [he] has come to know marijuana plant material which is left over from the processing of plants after cultivation, such as leaves and stems, is often saved to be used for the extraction of THC for the manufacture of resins and oils with extremely high THC content." (Exh. 43 at 514). At his deposition, however, Burns admitted that he had no "formal training" in the extraction of THC from marijuana plant material "unless you consider YouTube videos a form of training." (Exh. 30 at 111:25-112:25). Burns said he watched YouTube videos at his own discretion, separate from any training class, and it was not documented anywhere. (Exh. 30 at 112:9-114:1). In his affidavit, Burns also recites that he has "270 hours of additional training" beyond academy training in "drug law enforcement"; he never acknowledges having no formal training in the KN field test that he used. (Exh. 43).

Burns testified that, in 2012, he was not aware of the possibility of a false positive on a drug field test and that he had received no training that any other botanicals could cause a positive result on a drug field test. (Exh. 30 at 104:9-13; 97:13-98:8). Although Burns had been trained in another manufacturer's field test some years earlier, he had received no training – as of 2012 – on the Lynn Peavey KN reagent test that he was using in 2012. (Exh. 30 at 137:11-20). He testified that he has done no reading about field tests and did not retain any curriculum from his prior training; his understanding is that you just "follow the directions" on the box. (Exh. 30 at 91:10-13) Despite Burns' professed confidence in following the directions, he had difficulty explaining what particular colors and layers the Peavey KN test was supposed to produce to indicate a presumptive positive result for marijuana. He described it as a "bilayer red," even though the instructions clearly state that a clear layer must be on top of an orange-red layer. (Exh. 47 at 558-59; Exh. 48 at 4803).

The field tests are done in small test tubes or in small "pouches," and the diagram on the instructions explicitly shows a clear layer on top. (Exh. 47 at 558-59).

Burns also testified that, with field test results, the "color does not have to match exactly," indicating he believed a degree of subjective interpretation might be necessary. (Exh. 30 at 93:22-96:19). When Burns finally attended a formal four-hour training in field tests in 2013 (20 months after the Harte raid), he took a proficiency test, for the first time, and got one of the 12 answers wrong; he therefore had to take a retest. (Exh. 49 at 6638). Although Burns and the other deputies stated that they believed a positive field test could provide probable cause (Exh. 30 at 232:14-24), the instructions provided by the manufacturer of the test kit, Lynn Peavey, expressly state in a lengthy instructional guide sent to the JCSO in 2007 that a positive result on a marijuana field test only provided "probable cause" to take the "sample in to a *qualified crime laboratory*…" (Exh. 48 at 4795) (emphasis added).

When Burns did the trash pulls at the Harte residence, he dismissed the wet green vegetation on the first pull, on April 3, 2012, as "innocent" plant material. (Exh. 43 at 514). He noted that the material was dispersed "inside a lot of other vegetation" amid "other kitchen refuse." (Exh. 30 at 127:20-128:1). On the next pull, on April 10, however, he became more suspicious. The previously "scattered" vegetation was now "clumped into one grouping." (Exh., 30 at 128:2-14).

Burns stated that the material recovered on April 10 "was a lump of green vegetation that was processed to the point *it was hard to identify.*" (Exh. 30 at 115:11-13) (emphasis added). He stated he did not "know what it was other than was a green vegetation that had been processed." (Exh. 30 at 101:15-17). Rather than taking this mysterious vegetation to the JCSO crime lab – a certified lab run by the JCSO whose director reports directly to Sheriff Denning – Burns decided to show the vegetation to his supervisor, Sergeant Reddin. (Exh. 30 at 117:1-4). He and Reddin claimed they unrolled some of the tiny leaves – now known to be tea leaves – and saw "serrated edges" that they stated were associated with marijuana. (Exh. 30 at 117:20-

118:16). Burns never mentioned in his report or the affidavit, however, that he and Reddin had seen tiny "serrated edges." (Exh. 30 at 140:13-142:6).

Along with being a member of the DPU, Burns was also a canine handler, and he described a prior case in which he used his canine to sniff trash that had been brought to the Sheriff's Office. (Exh. 30 at 36:3-5). However, he never considered using his canine to see if it alerted in the presence of the Hartes' trash. (Exh. 30 at 105-08). He stated that he didn't attempt to smell the trash himself to see if it emitted an odor consistent with marijuana, and he didn't want his dog to sniff it. (Exh. 30 at 105-08). Sergeant Reddin expressed the same viewpoint, stating, "I don't smell items that come out of people's trash." (Exh. 3 at 113).

Foregoing the use of a canine or consultation with a laboratory examiner, Burns tested the plant material himself on April 10 and stated in his affidavit that the results were "positive." (Exh. 43 at 513). He failed to disclose that he had not detected any odor consistent with marijuana from the plant material or that he had believed the appearance of the plant material made it "hard to identify." (*Id.*); (Exh. 30 at 115:11-13).

Further, although Burns' affidavit stated that the field test used "consists of reagents similar to those utilized by the Johnson County Criminalistics Laboratory to conduct its initial screening test for marijuana," that representation was misleading. (Exh. 43 at 513). The KN reagent is indeed used by the JCSO crime lab, but it is used for a different purpose – it is used in a different kind of screening test, Thin Layer Chromatography, as a visualization agent on a thin plate. (Exh. 50 at 104:7-15). For presumptive drug screening, the lab actually used another reagent, the DL reagent (or Duquenois-Levine), which is the far more prevalent screening tool and is most typically used by law enforcement officers for field tests. (Exh. 52) When JCSO deputies later returned to the far more widely used and accepted DL reagent test, the minutes of an April 2013 meeting of the Sheriff's executive staff team reflected the deputies now use "the same test kits the Lab uses." (Exh. 51). Sheriff Denning acknowledged in his testimony that the lab used the DL reagent as a

screening tool because that was the "ASCLAD standard." (Exh. 2 at 190:20-22)[3]. The difference in the reagent used in 2012 – the KN reagent rather than the DL reagent – is significant because the KN reagent has a significantly higher false positive rate (up to 70 percent on common kitchen botanicals[4]) and because Judge Ruddick testified in his deposition that he relied on the statement in the search warrant affidavit that Deputy Burns had used "reagents similar to those utilized by the Johnson County Criminalistics Laboratory to conduct its initial screening…." (Exh. 43 at 513; Exh. 21 at 157:14-158:22). Judge Ruddick testified that if this representation were not true, that might have changed his assessment and he might not have signed the wwarrant. (Exh. 21 at 158:10-22; 176:4-12).

When the JCSO later decided that the KN reagent had rendered a "false positive" on the Hartes' trash, Defendant Pfannenstiel contacted the manufacturer, the Lynn Peavey Company. Doug Peavey responded to the inquiry by email, stating:

> Mike…you *threw us for a loop on this one*. After talking with the crime lab, evidently the test that you used was the KN (or fast blue B salt).Unfortunately, most of the results here in the US is based around the Duquenois-Levine and the chloroform (modified) test. Commonly we differentiate between the two as referring to the ORANGE test and the PURPLE test. All of the experts I have talked with don't know about these KN reagents and say that this is primarily only used in the UK and Europe….

(Exh. 52 at 4251) (emphasis added).

Despite the indeterminate appearance of the vegetation and the lack of any odor of marijuana, Burns and Reddin together decided to proceed on the result of the field test and their visual examination of the plant material. (Exh. 30 at 117:1-119:1). They did not photograph the results of the field test or document the color and type of layering observed in the field test results. (Exh. 43; Exh. 71).

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[3] ACLAD is the American Society of Crime Lab Directors. It is an accrediting body for crime labs. *See* http://www.ascld.org/.

[4] See Exh. 85; Kelly, "False Positives, False Justice," Mintwood Media Collective, 2008; see also Exh. 82, Kelly, Addanki and Bagarsa, "The Non-Specificity of the Duquenois-Levine Field Test for Marijuana," Open Forensic Science Journal.

Even though the use of the KN reagent was relatively new – the JCSO made the switch a couple of years earlier from the DL test to the KN test because KN also seemed to screen for K2 (synthetic marijuana) – no one asked a lab analyst to attempt to confirm the results. Although lab tests could sometimes take a few weeks, both Sheriff Denning and lab analyst Valarie Kamb admitted that in 2012 and earlier, it was feasible to request expedited tests of suspected contraband and that a lab result could be turned around in just a couple of days if needed. (Exh. 2 at 122:6-19; Exh. 50 at 133:20-134:5).

Although Burns could have taken other investigative steps as discussed above, he did not because the field test confirmed what he "knew" based on the appearance of the vegetative material and Mr. Harte being spotted at the Green Circle. (Exh. 30 at 230:5-17). He therefore took no further steps to investigate prior to the April 20 raids, and stated the "goal was to have it done on that day." (Exh. 30 at 14:10-12). Reviewing the case in retrospect, Burns testified that even if he had had months to do an investigation, he would not have done anything any differently. (Exh. 30 at 124:16-22).

Role of Tom Reddin in the investigation. Tom Reddin was the supervisor of the investigation, to the extent that one occurred, and either he and/or Lieutenant Pfannenstiel approved Defendant Burns' affidavit. (Exh. 3 at 213: 3-7). Reddin felt that all that was needed to get a warrant were "positive trash pulls" and that trash pulls alone could supply probable cause. (Exh. 3 at 79:23-80:1). At the same time, Reddin exhibited some confusion about what constituted a positive result on a test with the KN reagent, stating a positive result was a red layer over a clear layer, when the instructions state the opposite that the clear layer is on top. (Exh. 3 at 78:1-18). Reddin also testified that he never received any training about the possibility of false positive results and had never discussed false positive results with anyone (Exh. 3 at 80:2-4; 176:21-23).

When Burns brought back the seized plant material from the April 10 trash pull, he asked Reddin to look at it. Reddin's impression was it looked like a "wet glob of vegetation." (Exh. 3 at 121:4). There was no apparent smell, but Reddin stated that it was not necessary either for him or for a canine to attempt to detect

any odor because they obtained "our positive field test." (Exh. 3 at 125:2-9) He also stated: "We don't put our canines on trash." (Exh. 125-26:8-10). Reddin also stated that the fact the "glob of vegetation" came from kitchen trash raised no questions for him. (Exh. 3 at 126:8-10) Although the plant material "didn't look like your typical marijuana" because it was "chopped up" and "had been saturated," he did not think they needed to show the vegetation to a lab analyst. In fact, Reddin disagreed with the lab scientist's post-raid report on the material's "macroscopic" appearance (to the naked eye) stating, "From what I was looking at and with the totality of what I had, I would disagree," he testified. (Exh. 3 at 118:19-119:6).

On April 10, 2012, Reddin joined Burns in examining the "plant material," and the two of them had concluded that the "wet glob" was plant material left over after making "bubble hash." (Exh. 3 at 124:4-11). A technique used for extracting THC from marijuana plants is indeed referred to as making "bubble hash," but as the YouTube videos that Burns professed to watch show, the amount of leftover plant material from such processingwould be far larger than what was found in the Hartes' trash. *See e.g.*, "How to Make Bubble Hash," https://www.youtube.com/watch?v=Uf0skTsA1bw (uploaded February 24, 2010).

Reddin decided that the "glob" of wet plant material was "suspicious" and, unrolling some tiny leaves, he claimed to see "serrated edges." (Exh. 3 at 124:21-24). In his opinion, those observations, along with the supposed "positive" field test result, were sufficient for probable cause, and there was no need to do any further investigation. (Exh. 3 at 126:8-17; 127:3-18)

Reddin ran the DPU and therefore was in charge of "grow investigations" at the time of OCG 2011 and 2012. (Exh. 3 at 13:4-5). Operation Constant Gardener was more successful in 2011, leading to 52 seizures among the participating agencies. (Exh. 86) . In August 2011, Reddin contacted Wingo asking about "business" at the Green Circle, stating: "My guys are starting to have withdrawals." (Exh. 3 at 147:14-148:23; Exh. 38 at 0008). Two months earlier, Reddin had Wingo come in and provide training in "indoor grows," but he did not retain a copy of Wingo's PowerPoint presentation or any other written materials. (Exh. 3 at 49:13-51:13). Reddin testified that although he had invited Wingo to come in and provide some training to the

deputies in marijuana grow cases for "court credibility purposes," he felt no need following the presentation to ask Wingo for a copy of his materials to keep as a reference. (Exh. 36 at 22; Exh. 3 at 51:5-13). Training records show that five deputies attended Wingo's training class on marijuana grow investigations at the JCSO: Reddin, Ed Blake, Mark Burns, Larry Shoop and Nate Denton. (Exh. 89). Reddin stated that he was "comfortable with locating and dismantling grow operations" and so didn't need training on that, but was interested in things like "grow cycles" and what "certain items were used for." (Exh. 3 at 157:5-12). He added: "[I]t wasn't so much on investigating and getting the probable cause for a search warrant on a grow op, it was once you are in there, identifying different types of plants, the different materials you find in there, what things are used for, how to grow [the plants]…" (Exh. 3 at 155:25-156:9).

Despite this training, Deputy Blake testified that the growth cycle for marijuana was 8 to 12 months, while Wingo has attested in his search warrant affidavits that it was 60 to 90 days. (Exh 33 at 106-08; Exh. 61 at 208) Given the timing of the Green Circle sighting, eight months before the raid of the Harte home, the growth cycle for marijuana would be a relevant fact, which, again was not included in the search warrant affidavit. (Exh. 43). Although Reddin professed to be confident that the "wet glob of vegetation" was marijuana that had been "processed," Wingo testified that he had never seen in any of his cases plant material that was left over after extraction of THC. (Exh. 31 at 104: 7-20).

Reddin testified that he was familiar with investigative techniques like obtaining utility bills (and has in fact done so in past cases) and surveilling a home to see if alterations had been made to the exterior (like concealed windows) that would suggest an indoor marijuana grow. (Exh. 3 at 105-08: 3-4, 132:20-133:5). He nonetheless didn't think those techniques were necessary to use in the Harte case, and that even if he had gotten the tip about the Harte residence much earlier than March 2012, he would not have done any additional investigation. (Exh. 3 at 149:19-22). He stated that either he and/or Lieutenant Pfannenstiel approved the search warrant affidavit for the Harte home, and that Denning, in his after-the-fact review was "comfortable" with how the case had been handled. (Exh. 3 at 212:12-16) He admitted that, prior to the raid, he had known

nothing about the Hartes other than the JCSO "believed they were growing marijuana." (Exh. 3 at 154:11-15). He also stated he had no regret for how the case was handled. (Exh. 3 at 155:8-16). Although Reddin had numerous phone calls with public information officer Tom Erickson throughout the morning of April 20, 2012, he acknowledged that the JCSO did not seize a single live marijuana plant on that day. (Exh. 61 [with attached chart of cell phone calls]; Exh. 3 at 96:12-14)

Role in the investigation of Edward Blake. On the morning of the raid, Ed Blake was assigned as the "team leader" or "case agent." (Exh. 33 at 94-96). Prior to that, the case was not assigned to any specific deputy. (Exh. 33 at 102-04). Blake was involved in the investigation and was present for two trash pulls – on April 3, 2012, when only "innocent" material was found, and on April 17, 2012, after Burns and Reddin had concurred in the previous week that the "wet" vegetation was saturated marijuana plant material. (Exh. 33 at 317-20).

No one did any investigation into the Hartes' background other than obtaining their driver's license records and running a criminal record check. (Exh. 74). When asked if he knew anything else about the Hartes, he said: "I don't know about them." (Exh. 33 at 338:12-16). Blake agreed that the wet vegetation looked like marijuana that had been processed with "some kind of fluid." (Exh. 33 at 62:11-14). He testified that there were several ways to "disperse THC" from the marijuana plant and that one used water and ice, but after stating the plant was soaked in ice water, he could not say what the next step was or describe where THC was located in the marijuana plant. (Exh. 33 at 68:15-69:11). Like Burns and Reddin, Blake did not photograph the wet vegetation. (Exh. 33 at 65:8-10). He also testified that he had no training in preserving exculpatory evidence. (Exh. 33 at 60:5-25).

Blake admitted that there were no signs on the exterior of the Harte home, such as fans or blacked-out windows, that suggested a marijuana grow operation was being concealed and that there was no other "indicia" in the trash to suggest illegal drug use. (Exh. 33 at 75:2-21).

Blake could not recall whether he had reviewed the warrant affidavit prior to the raid, but he was aware the probable cause was based on a sighting at the Green Circle and two trash pulls. (Exh. 33 at 310:6-8; 116:10-21). He stated that he didn't recall sharing the warrant affidavit with any other deputy on the case. (Exh. 316:9-25). Although the fact that Mr. Harte had visited the Green Circle was deemed to be a very important fact by Blake, he admitted he had never actually been inside the Green Circle. (Exh. 33 at 18:1-4). Blake said he never questioned the field test result, even though the plant material was just a "smashed together" ball. (Exh. 33 at 222:1-8). Blake stated he did not recall ever seeing plant material like that before. (Exh. 33 at 229:3-8). Blake agreed that he had never received any training in the possibility of false positives or in distinguishing marijuana from any other botanicals. (Exh. 33 at 118:21-25). Despite his lack of background, however, he stated that he disagreed with the lab analyst, Malinda Spangler, who documented in her case note that the plant material, viewed "macroscopically" (or to the naked eye) did not appear to be marijuana. (Exh. 73 at 533).

With regard to training in field tests, Blake stated he had never received any training in the Lynn Peavey test being used, and that the only training he had ever received from was the field tests kit instructions and from any demonstrations by his field training officer. (Exh. 33 at 199:1-25). When the laboratory test results were reported on May 1, 2012 (10 days after the raid), Blake stated he still doubted the field test was wrong. (Exh. 33 at 300: 10-24).

Blake acknowledged he did little else in the investigation besides gather and test trash with Burns. When asked about obtaining utility records to see if there had been any spike in electrical or water usage, Blake stated that's "not a common practice." (Exh. 33 at 329:11-19). Blake acknowledged that he had been to Wingo's training in marijuana grow operations in June 2011 (Exh. 89), but that he still didn't know too much about marijuana grow operations. When asked how an indoor grow was set up, Blake stated: "I'm not an expert on that at all." (Exh. 33 at 318:3-10).

The investigation was not meaningful. As discussed by Plaintiffs' expert in his report, a competent investigation would have included several components utterly missing in this case, including: a far more thorough probe of the Hartes' background including much more extensive checks of various records and databases; an examination of their utility records to see if there was any indicator of increased usage as might occur with a marijuana grow; some surveillance of the Hartes to try to determine who might be coming or going from their residence or if any indicators of a hydroponic grow were visible from the outside of the home; a knock and talk consensual encounter, which often leads to the discovery of important information; more extensive trash pulls to determine if other indicia of drug use or cultivation could be found; and, most importantly, having a qualified laboratory analyst review and test the seized material. (Exhibit 54 at 1-17).

16. Controverted in part. Plaintiffs do not dispute that Deputy Burns attended the listed training seminars. However, Deputy Burns' training was insufficient and did not prepare him to adequately investigate the "tip" concerning the Hartes. Plaintiffs hereby reassert and incorporate by reference the material facts stated above in the response to #15, which establish the following:

- Burns had no training in the particular field test he was using, the Lynn Peavey KN test;
- Burns had never gone into the Green Circle, although the alleged probative value of a trip to that store was a key part of his assertion of probable cause;
- Burns claimed he knew nothing about the possibility of a false positive result on a field test;
- Burns claimed he could visually identify as marijuana an indeterminate "clump" of wet, green vegetation despite having no training or experience that would enable that determination;
- Burns had no formal training in the extraction of THC from marijuana; what he claimed to know supposedly came from self-directed watching of YouTube videos;
- Burns had received no training on other botanicals that might cause a positive result on a field test;

- Burns's actions demonstrated little understanding of the necessity to conduct an investigation and establish legitimate probable cause.

All of these facts are cited in the response #15, see response to #15, supra.

17. Controverted in part. Plaintiffs do not dispute that Deputy Blake attended the listed training seminars. However, Deputy Blake's training was insufficient and did not prepare him to adequately investigate the "tip" concerning the Hartes. Plaintiffs hereby reassert and incorporate by reference the material facts stated above in the response to #15, which establish the following:

- Blake had received no training in the possibility of false positive results on field tests;
- Blake had received no training in distinguishing marijuana from other botanicals;
- Blake had never received any training in the Lynn Peavey KN test;
- Although Blake stated he believed the wet plant material had been processed for the extraction of THC, he had never received training in that technique, could not describe it and did not know what parts of the marijuana plant contained THC;
- Blake claimed he could visually identify as marijuana an indeterminate "clump" of wet, green vegetation despite having no training or experience that would enable that determination;
- Blake had received no training in the duty to preserve exculpatory evidence and did not photograph the wet plant material seized from the trash; and
- Blake's actions demonstrated little understanding of the necessity to conduct an investigation and establish legitimate probable cause.

All of these facts are cited in response #15, see response to #15, supra.

18. Controverted in part.

Plaintiffs do not dispute that Sergeant Reddin attended the listed training seminars. .

However, Sergeant Reddin's training was insufficient and did not prepare him to adequately supervise the Harte case, in which a real investigation never occurred. Plaintiffs hereby reassert and incorporate by reference the material facts stated above in the response to #15, which establish the following:

-Reddin was not trained in the use of the Lynn Peavey KN test, as reflected in his incorrect answer regarding the appearance of a positive result on the KN test;

- Reddin was not adequately trained in probable cause determinations, leaving him unable to provide proper guidance to his subordinates, as he believed that a positive result on a presumptive field test, standing alone, could establish probable cause for a search warrant;

- Although the plant material was a "wet glob," Reddin claimed to be able to identify it by unrolling tiny leaves and observing so-called serrated edges;

- Reddin claimed to believe that he and his unit had sufficient training and experience in "locating and dismantling indoor grow operations" and only needed Wingo's training for subjects like "grow cycles" and what "certain items were used for in a grow." By making this determination, by virtue of his position in the chain of command, Reddin deprived his subordinates of obtaining appropriate training in the techniques of investigating a marijuana grow investigation, including conducting surveillance, obtaining utility records, doing in-depth background investigations and engaging in knock-and-talks for intelligence gathering or other purposes.

All of these facts are cited in response #15, see response to #15, supra.

19. Controverted in part. Sergeant Wingo did not claim to see any actual purchase. The spreadsheet containing his "tip" reflects that a "white male subject" was seen leaving the Green Circle with a "small bag." (Exh. 76).

20. Uncontroverted.

21. Controverted in part. The Wingo spreadsheet provides part of that information, the street address.

22. Controverted in part. Mrs. Harte does not believe that the estimate of one cup of wet vegetation is accurate. (*See* Exh. 44 at 85:14-18)

23. Controverted in part. Plaintiffs controvert this assertion to the extent they have no personal knowledge of how many bags of trash were seized on April 10, 2012 or where they were taken for inspection.

24. Controverted. None of the bags of trash contained any item of "evidentiary value" and no reasonable, well-trained police officer would conclude that wet green vegetation found amid kitchen trash was marijuana when it lacked marijuana's distinctive odor and otherwise did not resemble marijuana.

Any reasonable police officer would have paid attention to the fact that the wet vegetation in the Hartes' trash was discarded amid *kitchen trash* and was likely a vegetative substance from the kitchen, particularly given the lack of the characteristic odor of marijuana, which neither Burns nor Reddin detected. (Exh. 30 at 107:13-108:12; Exh. 3 at 114:9-16) Plaintiffs' expert Michael Bussell (a former detective of the Lenexa Police Department with many years of experience in drug investigations) brewed the very same types of tea from Teavana that Mrs. Harte regularly brewed and drank in 2012. In his supplemental expert report, dated January 20, 2015, Mr. Bussell stated that the Teavana teas (which are specialty tea blends) had fruity and flowery scents and did not have even a trace of the distinctive odor of marijuana. (*See* Exh. 55). Mr. Bussell photographed the teas that he tested with field tests for his January 2015 report. (Exh. 55, 56 [photographs]). He also brewed same types of tea again in April 2015 and took daily photographs of them over a week's period to document the changes as the teas went from quite saturated to more dry. (Exh. 58). At no point did any of the teas resemble marijuana; in fact, because the teas are blends, bits of dried fruits and flowers cold be easily visualized in them. (*See* Exh. 58).

In his January 2015 expert report, Mr. Bussell explains that the odor of marijuana is distinct, and that the Teavana teas consumed by Mrs. Harte "did not emanate any sort of an odor that a *trained, experienced narcotics investigator could remotely confuse with the unique odor of marijuana. The fragrance of the teas tested more closely resembled fruity or floral potpourri rather than any type of marijuana."* (Exh. 55 at 10).

Plaintiffs assert that Mr. Bussell's photographs of brewed Teavana tea, taken over a period of days, readily establish the fact that even an untrained layperson would not mistake a clump of these wet tea leaves for "processed marijuana." (*See* Exh. 56, 55).

25. Controverted. Plaintiffs have no personal knowledge as to what field test was used on the plant material seized from their trash or the results obtained. However, as discussed below, compelling evidence exists that Reddin, Burns and Blake all either misinterpreted the tests because of their inadequate training or failure to follow the test instructions or that they falsely reported the results as positive when they were, in fact, negative.

When Plaintiffs' expert Mr. Bussell used two different manufacturer's tests with the KN reagent on the same tea blends brewed by Mrs. Harte that he consistently obtained *negative* results on the tests, as evidenced by the appearance of an a reddish-brown upper layer *over* a clear layer, instead of the reverse, with the clear layer on *top*. (*See* Exh. 55 [expert report], Exh. 56 [photographs of tea that was field tested], 58 [videos of field tests conducted on tea]. According to the manufacturer's instructions, the result on the KN test is negative unless a dark red or red-orange color is on the *bottom* and a clear or colorless layer is on top. (Exh. 55 [expert report]; *see also* Exhs. 47, 48.

In May 2015, Mr. Bussell also tested the actual tea seized from the Hartes' trash. The entire process was videotaped at the Sheriff's Operations Building, and counsel representing all parties were present. (Exh. 60, with videos 60a, 60b, 60c and 60d). Again, the testing of Mrs. Harte's actual tea, seized from the Hartes' trash, resulted in a *negative* result on both the KN and the DL tests in May 2015. *Id*.

Based on Mr. Bussell's results on the same tea blends brewed by Mrs. Harte and field tested by him in October and December 2014, and also based on Mr. Bussell's field test results on the *actual* tea seized from the Hartes' trash – all of which turned out negative on the KN test – one may reasonably infer that *either* Reddin, Burns and Blake falsely reported their results and conclusions concerning the "saturated plant

material" seized from the Hartes' trash, or they were so poorly trained that they did not know how to properly perform the KN reagent test and/or failed to properly interpret the results and their significance.

Although a simple examination of the photographs of the tea by anyone, even a layperson, would seem to suggest that no reasonable, well-trained law enforcement officer would confuse the tea for marijuana, it is certainly *possible* at least that Reddin and/or Burns and/or Blake utterly failed in their ability to conduct a field test, interpret the results and reach a conclusion.

There is some evidence to suggest that their understanding of field tests and their probative value was deficient. Burns described a positive result on the KN tests as a "bilayer red," even though the instructions clearly state that a clear or colorless layer must be on *top* of an orange-red layer. (Exh. 47 at 558-59; Exh. 48 at 4803). Similarly, Reddin exhibited some confusion about what constituted a positive result on a test with the KN reagent, stating a positive result was a red layer over a clear layer, when the instructions state the opposite – that the clear layer is on top. (Exh. 3 at 78:1-18). Reddin also testified that he never received any training about the possibility of false positive results and had never discussed false positive results with anyone (Exh. 3 at 80:2-4, 176:21-25).

Blake was also confused about field tests; he did not mention layering in the results, simply stating that a positive result was a "solid, dark-orange color." (Exh. 33 at 197:10-25). When Blake first received formal training in field tests in 2013, he missed 3 out of 12 on the proficiency test and had to take a remedial test. (Exh. 49 at 6634). The lab analyst who developed and presented the first formal training on field test kits, in 2013, testified in her deposition that "presumptive" meant "a possibility." (Exh. 50 at 75:10-13). Blake, however, attached great weight to field test results, stating with regard to the Hartes: "We got two positives off of it and that was the presumptive that we were good with. I wasn't going to send it to the lab." (Exh. 33 at 252:14-16).

Thus, although a *reasonable* and *well trained* law enforcement officer would not likely misinterpret the field test results or their significance, certainly it is possible that Defendants in this case did so, particularly

given their obvious confusion about the color and meaning of test results. *See supra*. The other possibility, which may be more likely (and which a jury could conclude) is that Reddin, Burns and Blake falsely reported the results of the field tests. Based on the evidence, this is a reasonable inference, and one that a finder of fact could make.

25. Controverted. Plaintiffs hereby reassert and incorporate by reference their response to #15, *supra*. The testimony of Ms. Kamb shows that the lab used the KN reagent not as a "tube" or "pouch" test, but as a visualization agent in Thin Layer Chromatography. (Exh. 50 at 104:6-14).

26. Controverted. Plaintiffs have no personal knowledge as to what Sergeant Reddin "thought." As discussed in the response to #24, *supra*, the observations and testing by Mr. Bussell as well as the appearance of Mrs. Harte's brewed tea leaves suggests one of two possibilities – either Reddin, Burns and Blake were so poorly trained that they failed to properly conduct and/or interpret the field tests and, further, failed to comprehend the nature of the "plant material" they seized, or they falsely reported that the field tests were positive and falsely reported that the plant material was wet marijuana that had been "saturated" with a liquid for the "extraction of THC" – making this conclusion even though none of them had any training in the extraction of THC from marijuana. (*See* Exh. 43; Exh. 30 at 111:25-112:25 (Burns' assertion of watching of YouTube videos on THC extraction)).

27. Controverted in part. The quoted language appears in the search warrant identified, but Plaintiffs controvert that portion of the assertion that suggests that Deputy Burns "misidentified" the plant material and that it was not actually "innocent" as he first stated he believed. Plaintiffs hereby reassert and incorporate by reference their response to #24, *supra*.

28. Controverted in part. Plaintiffs acknowledge that Deputy Burns gave the testimony cited, but dispute that he or Reddin was able to "unroll" tiny leaves of "saturated plant material" and reach a conclusion that the leaves hade "serrated edges similar to a marijuana plant." Mrs. Harte's teas are white teas, primarily made with very young white tea leaves that do not have serrations because they are younger leaves and the

least processed. Mrs. Harte indicated that she herself had brewed tea leaves of her white teas from Teavana and carefully checked the leaves for serrations and did not see any. (Exh. 44 at 97:24 – 100:21); *see also* product description and photograph of Teavana white tea brewed by Mrs. Harte. http://www.teavana.com/us/en/search?navid=search&q=snow%20geisha

29. Uncontroverted. However, Plaintiffs note they have no personal knowledge, one way or the other, as to the truth or falsity of this statement.

30. Controverted. Plaintiffs dispute that the tea leaves in their trash returned a positive result for marijuana when Deputy Blake field tested it. Compelling evidence indicates that Deputy Blake either was so poorly trained – or totally untrained in field test use – that he either did not know how to properly perform the test or interpret the results, or he falsely reported that the test results were positive. Plaintiffs hereby reassert and incorporate by reference their responses to #15, #24 and #28 regarding Deputy Blake's lack of adequate training and the strong evidence provided by Mr. Bussell's testing of the same tea blends as well as the tea leaves seized from the Hartes' trash – all of which returned a *negative* result with the KN test. *See* Exhs. 55, 56, and 57. Plaintiffs also specifically note that, even once he was trained, Blake had continued problems with his "proficiency" on field tests, getting three items incorrect on a 12-item proficiency test. (*See* Exh. 49 at 6634).

32. Controverted. Plaintiffs do not dispute that Burns' affidavit makes these representations regarding the appearance of the plant material and Burns' purported conclusion that the "plant material" had been "saturated" for the purpose of extracting THC. They point out, however, that Burns had no experience or training to reach the conclusion that he did, and when asked about such training, agreed he had none unless "unless you consider YouTube videos a form of training." (Exh. 30 at 111:25-112:25). Burns also testified that his watching of YouTube videos was at his own discretion, separate from any training class, and was not documented anywhere. (Exh. 30 at 112:9-114:1).

33. Controverted in part. Plaintiffs do not dispute that the search warrant affidavit contains the cited representations regarding Deputy Burns training. They do dispute that this recitation is meaningful or in any way indicates that he had the experience or training to properly conduct and/or interpret a field test or assess the probative value of its results or to assess the probative value of a sighting at the Green Circle. Plaintiffs hereby reassert and incorporate by reference their responses to ##15, 16 and 24, *supra*.

34. Uncontroverted.

35. Controverted in part. Judge Ruddick's review was brief. Plaintiffs hereby reassert and incorporate by reference their responses to ##1, 15 regarding Judge Ruddick's role and the material information he was not provided with regard to the Hartes, their trash, the field testing of their trash, and the sufficiency of Burns' training.

36. Controverted in part. Mr. Harte testified that he had "no independent knowledge of anything [deputies] Blake and Burns did." Ex. 45, 71: 11-12 and that "they [the deputies] presented it [the investigative report] as accurate." Exh. 45, 45: 20-21. Mr. Harte testified, several times, that the raid began before 7:38 a.m. Exh. 45, 76 5:17; 132: 21-24; 139:15-22; 180:5-12. Mr. Harte testified that he did not agree that with any law enforcement report or document that stated that there was anything in the Hartes' trash that smelled like marijuana, looked like marijuana, or was marijuana. Exh. 45, 321:18-322:25.

37. Controverted. Mr. Harte testified that he did not agree that with any law enforcement report or document that stated that there was anything in the Hartes' trash that smelled like marijuana, looked like marijuana, or was marijuana. Exh. 45, 321:18-322:25. Mr. Harte did not have personal knowledge or foundation to answer many of the questions presented by Defendants' about the factual basis for the search warrant affidavit, including the amount of training the affiant had participated in, where the Harte trash was tested, or any of the questions related to the affiants' experience. Mr. Harte stated that he had no personal knowledge of the deputies' training or experience (Exh. 45, 322:7-9) and further that he had "no independent knowledge of anything [deputies] Blake and Burns did." Ex. 45, 71: 11-12.

38. Uncontroverted.

39. Controverted. Defendants' claim that Mrs. Harte testified that she had no reason to dispute any of the facts asserted in the investigative reports other than those listed in No. 38. To the contrary, Mrs. Harte either disputed nearly every fact, or testified that she had no personal knowledge from which to answer. Ex. 44, p. 70:5-11.Mrs. Harte testified that they had never possessed any hallucinogenic drugs. Ex. 44, p. 70:1-2. In truth, Mrs. Harte stated:

> What I'm saying is I have no knowledge of what Officer Blake said, did, when, so I can't confirm anything other than the location of the incident being a single family residence and that there was no crime incident, there was no crime of hallucinogenic. I can't tell you about the rest of the stuff. I don't have any knowledge of it."

Id., 70:16-23. Mrs. Harte goes on listing additional items that she believes are inaccurate in the investigation reports, further stating "there was clearly no marijuana plant material...we were not offenders, so I don't think it's fair to say that the offenders were suspected of using drugs…the [warrant] was not executed at 7:38. I will say it again, it was not 7:38." *Id*., 71:17-72:3. Asked if she notices any additional inaccuracies, she states that the report indicates "trash was seized, showing signs of indicia and illegal drugs. There were no illegal drugs in my trash" and "the time is inaccurate. Friday, April 20, 2012 approximately 7:30. It was not 7:38." *Id.*, 73:14-20.

40. Controverted. In reference to the search warrant affidavit Mrs. Harte challenged the assertion that loose leaf tea appeared to be marijuana, "[a]ny well trained law enforcement officer who was no rushing to judgment and/or hiding behind the fact that they never, up until the law was changed last year, the affidavits would never become public, I don't think any responsible law enforcement officer would have made this statement." Ex. 44, 85:19-86:3. Mrs. Harte goes on, "and also the part about wet marijuana, appeared to be wet marijuana plant materials, leaves and stems." *Id*., 86:12-14. Continuing her review of the search warrant affidavit, she testified that she disputed Officer Blake's assertion in the affidavit that a field test was positive for THC:

Again, I will say the same thing I said before. He may have falsified it, he may have been completely inept or untrained, but the fact that just from an appearance and smell he knew it wasn't marijuana is a major concern to me as a citizen of Johnson County.

Id., 89:12-17.

41. Uncontroverted.

42. Controverted. Wingo did not make that statement attributed to him. In fact, the question and answer are as follows:

> Q. …Have you ever run across someone in your 25 years of narcotics investigations who shops at a hydroponic store, brews loose tea leaves, and disposes of them in their trash?
>
> A. *There may have been.* Other than the items I'm looking for, I don't pay much attention to *other stuff in the trash*, you know, there could very well have been food. I don't remember.
>
> (Exh. 31 at 284:17-285:4).

Further, Plaintiffs dispute the notion that having a hydroponic garden, drinking loose tea and disposing of tea leaves in the trash is an unusual or suspicious combination of activities for any reason, or that those activities should somehow attract the attention of law enforcement. Teavana is a major corporation, with multiple stores in nearly every state and a major online presence. http://www.teavana.com/us/en/about-us http://www.teavana.com/us/en/store-locator.html

In her deposition, Mrs. Harte mentioned the Teavana store at Oak Park mall, which is known to many Johnson County suburbanites. (Exh. 44 at 202:2-7). Moreover, Leawood neighbors who live just one street over from Mr. and Mrs. Harte also have virtually the same combination of household habits. David Morantz, a lawyer, starts tomatoes indoors every spring with his wife, Carrie. The tomatoes are kept under fluorescent grow lights for 24 hours a day. (Exh. 68 at ¶6). Mr. Morantz states: "We have been starting seeds indoors with indoor gardening equipment for the last five or six years. One other Brookwood [elementary] family also starts

tomatoes indoors from seeds under grow lights. In my experience, indoor gardening is not uncommon or rare." (Exh. 68 at ¶6). Mr. Morantz also notes that his wife, Carrie, drinks loose leaf tea from Teavana and discards the leaves in the trash or compost. (Exh. 68 at ¶7). He finds it "disturbing to learn that such innocent and common activities, such as indoor gardening and drinking loose leaf tea, can be the basis of a military-style raid of a family's home." (Exh. 68 at ¶7).

43. Controverted in part. Plaintiffs dispute whether Sheriff Denning has personal knowledge of the results of "thousands" of field tests. They do note, in addition, that Denning stated that not only had he never heard of the existence of false positive results, he also stated that he "was not aware that a false positive could be rendered." (Exh. 2 at 48:1-6). He also testified that, prior to 2012, that he did not think even the Director of the Johnson County Crime Lab, Gary Howell, was aware that false positives results could occur with field tests. (Exh. 2 at 61:16-62:12). He also stated that he did not think anyone in the lab knew about false positive results. (*Id.*). Lab analyst Valerie Kamb testified, however, that it's "well known" that false positives exist and that "any field test can have a false positive." (Exh. 50 at 107:8-9, 125:19-126:5).

44. Uncontroverted.

45. Controverted in part. Plaintiffs dispute this assertion to the extent it suggests there was no force or coercion involved in the raid. In her Declaration, Mrs. Harte described the raid as follows:

When the tactical team arrived at our house on the morning of April, 20, 2012, I was asleep, and both of our children were still in bed. I heard screaming and loud banging, so hard that the walls were rattling and it sounded as though our front door was coming off the hinges. My initial thought was that a criminal had broken into our house and the police were there to help us. I immediately feared for my children, especially

when I heard someone scream, “Are there kids in the house?” I was terrified. I jumped out of bed, threw on my work slacks under my nightgown and ran down the stairs to determine what was happening. Once on the stairs, I saw armed officers dressed in tactical gear—wearing black and bullet proof vests. This tactical unit was flooding my house, there were officers everywhere. Bob was lying face down, shirtless, in our foyer. Commands were flying, “Get down!”, “Hands behind your head!” A tactical team officer wearing what struck me as swat-style gear and a bullet proof vest was holding an assault rifle over my husband. It felt as though I was in a dream. Everything was surreal. Our children and I were quickly ordered to sit against the wall with our legs crossed. The officers searched our living room and then commanded that we sit on the couch, with an armed officer standing before us. Photographs of our foyer and our couch are appended hereto as Attachment A (P-005297, P-005331 and P-005257, P-005301, P-005333). As one can see from the photographs, our couch is positioned directly in front of a large picture window. We were made to sit there for the vast majority of the 2.5 hour raid, with an armed officer standing guard over us for every passerby to see. It was humiliating.

> The officers were not “accommodating.” Our every move was under the direction of an armed officer. An officer with an AR-15 assault rifle stood over my husband in plain view of my children and myself. Every officer in our home carried at least one firearm. It was clear if we did not comply with every command that these officers were prepared to use the multitude of firearms available
> We had to ask permission to use the bathroom in our own home. We had to ask permission to move. We had to ask permission to reach for our phones. We were told when to enter the kitchen for the reading of our Miranda rights. We were told very little, until nearly the end of the raid, about why the officers were searching our home. We were not allowed to leave our home at any point, and that was made clear both before and during the phone call I made to my brother, who is an attorney and former police officer. We were treated as criminals, and, towards the end of the raid, when I asked whether any officer had found narcotics, they responded “Not yet.” Comments about our Chinese-American daughter not being able to speak English and sarcastic remarks about my son, who was clearly upset about the raid, were made aloud for us and my children to hear. It was strongly suggested that our seventh-grade son was a drug user and that we should have our pediatrician perform drug testing on him, even though he was barely thirteen years old, and a search of his room and personal items had turned up no evidence of drug use. There was nothing accommodating about the raid, nor the officers in charge of the raid. To say otherwise is false. (Exh. 66 at ¶¶ 6, 13, 14).

46. Controverted. Blake's records are notably inaccurate in many respects. The notation of 7:38 a.m. is taken from handwritten notes on which other errors appear. (Exh. 74 at 1467). For instance, Blake's notes reflect the presence at the Harte search of Lieutenant Pfanenstiel, whom everyone testified was *not* present, though he (as Reddin's supervisor) was a line commander and in communication with both Reddin and Cossairt throughout the day. (*See* Exh. 87, 88; phone calls between Pfannenstiel and Cossairt and Reddin). Blake's handwritten notes also err in the other direction; he failed to document Deputy Vrabac's radio number or the presence at all of Deputy Tyson Kilbey, who was carrying the assault rifle of Deputy Farkes. (Exh. 33 at 158:8-24; Exh. 62 at 65:23-67:25).

Mrs. Harte very clearly recalls that the deputies were in the house before 7:30 a.m. Her alarm is set for 7:30, and when she first heard the loud banging at the front of the house, she was still in bed. She states in her declaration:

> My alarm was set to go off at 7:30 a.m. I have a history of trouble sleeping, so it was my habit to allow myself to sleep as long as I could before leaving to take L.H. to school shortly before 8:00 a.m…… When the tactical team arrived at our house on the morning of April, 20, 2012, I was asleep, and both of our children were still in bed. I heard screaming and loud banging, so hard that the walls were rattling and it sounded as though our front door was coming off the hinges. My initial thought was that a criminal had broken into our house and the police were there to help us. I immediately feared for my children, especially when I heard someone scream, "Are there kids in the house?"

(Exh. 66 at ¶¶5-6).

The deputies' cell phone records and the account of Leawood officer Daniel Reedy support Mrs. Harte's account that the deputies entered before 7:30 a.m. Reviewing the Leawood dispatch report, Officer Reedy testified that when he arrived the first of two times at the Harte home, the deputies were already inside the residence. (Exh. 63 at 41:15-67:20). As the Leawood officer, he was dispatched by his Department as a courtesy to provide a visible, marked presence to the deputies, who had driven to the Harte home in unmarked cars. Officer Reedy believes he arrived the first time at the Harte residence at 7:23 a.m. (Exh. 63 at 65:4-67:20). When he arrived, the deputies were already inside the Harte home. (Exh. 63 at 42:16-17). One of the

deputies, who saw him outside, told him he wasn't needed and Reedy left. (Exh. 63 at 17:22-25). He was soon summoned back a second time, and entered the home, where he found the Harte family seated on the floor of the foyer, cross-legged with their backs against the wall. Exh. 63 at 54:6-10. According to his dispatch records, Reedy believes his second arrival was at 7:28 a.m., and that time would match closely with Mrs. Harte's recollection.

The deputies' cell phone records also reflect the deputies entered the home before 7:30 a.m. A demonstrative chart of the phone calls between the on-scene deputies and their supervisors shows that Deputy Shoop, who was present at the scene, spoke with supervisor Reddin at 7:29 a.m. and at 7:38 a.m. (Exhs. 87, 88; demonstrative chart, with phone records attached to sealed Exh. 88). During one of those phone calls, Shoop informed Reddin that: "Hey, all we have is a full on hydroponic grow operation that appears to have tomato plants in it and he pretty much said, 'You're lying to me.'" (Exh. 14 at 210:18-22). Shoop then said: "Okay," and then shortly after Reddin called Blake, and Blake said: "Yeah, all we have right now is a hydroponic grow operation that has tomato plants in it.' (Exh. 14 at 210:23-211:2). The phone records reflect that Reddin's call to Blake occurred at 7:41 a.m. (Exhs. 87-88). Thus, it is clear from the deputies' own phone records that they entered the Harte home before 7:30, and that they knew by no later than 7:38 a.m. (when Shoop spoke with Reddin the second time) that the hydroponic garden held only tomato plants. (Exhs. 87, 88).

47. Uncontroverted,

48. Controverted in part. The deputies wore what most people would regard as "tactical" gear or "raid" gear. Their vests were bullet resistant, black and very thick. (Exh. 83). Their convergence on the Harte home and their entry were frightening, not just to the Hartes, but also to the neighbors, including one of the Hartes' next door neighbors, Lisa Jameson, who watched the incidernt unfold:

At first, I noticed two unmarked vehicles parked on opposite sides of our street making passage through the street difficult. In the past, we have had trouble with construction and maintenance crews parking

that way, and I was headed outside to tell them to move one of the vehicles so that cars could pass between them safely. As I was approaching our front door to go outside to speak with the drivers of the vehicles, I saw several law enforcement officers, dressed in black swat-type uniforms exiting the vehicles. The officers carried firearms. I immediately retreated back into our house and yelled for my husband.

> Randy and I knew almost immediately that the individuals exiting the vehicles were law enforcement officers of some kind because they carried firearms, and most of them were wearing jackets or shirts that had "Sheriff" on the back. Soon, there were additional unmarked vehicles, and at least one vehicle marked "Leawood Police Department." We went to our extra bedroom which faces the Hartes' house looking toward their backyard. We saw armed officers approaching the Hartes' front door and going through our yard into the Hartes' backyard. Randy yelled "Get down!" or something similar because we were close to the windows and the officers carried guns drawn at their sides while they were running through our yard into the Hartes' backyard. We had no idea what was going on, and we were frightened. There were several armed officers both in the front and the back of the Hartes' house.
>
> (Exh. 69 at ¶¶4-5; declaration of Lisa Jameson)

49. Uncontroverted.

50. Controverted. Mrs. Harte described the raid team as follows:

> I was terrified. I jumped out of bed, threw on my work slacks under my nightgown and ran down the stairs to determine what was happening. Once on the stairs, I saw armed officers dressed in tactical gear—wearing black and bullet proof vests. This tactical unit was flooding my house, there were officers everywhere. Bob was lying face down, shirtless, in our foyer. Commands were flying, "Get down!", "Hands behind your head!" A tactical team officer wearing what struck me as swat-style gear and a bullet proof vest was holding an assault rifle over my husband. It felt as though I was in a dream. Everything was surreal. Our children and I were quickly ordered to sit against the wall with our legs crossed. The officers searched our living room and then commanded that we sit on the couch, with an armed officer standing before us.
>
> Whether the unit was officially a SERT team or a SWAT team, I do not know. What I do know is that the officers were dressed and armed in a way that indicated that they were a part of a special unit. No reasonable lay person would describe the majority of the officers that flooded our home as "typical" police officers. There was one officer dressed in a typical police uniform, and one may have changed into khaki pants and a sweater. Two who I noticed later were sloppily dressed in "plain clothes."

(Exh. 66 at ¶6 and n.1). Mr. Harte also believes that swat-style would be a fair characterization of the tactical team.

51. Controverted in part. With respect to the entry time, Plaintiffs reiterate the deputies entered before 7:30 a.m., indeed, several minutes before 7:30 a.m. Plaintiffs reassert and incorporate by reference their response to #46, *supra*.

52. Controverted. There is substantial conflicting evidence over which deputies were where at the front of the house. For instance, Deputy Farkes states that Shoop and Blake were the closest to the Hartes' front door at the time of entry – that Shoop knocked and that Blake opened the door. (Exh. 15 at 89:25-90:10). Farkes stated that he was right behind Shoop and that Kilbey was right behind him. (*Id*). Kilbey agrees that Shoop and Blake "were right at the front of the door" at the time of entry. (Exh. 62 at 78:4-19). While Farkes and Kilbey agree that Blake was at the door, Blake says he was not even on the Hartes' front porch, that he stood back behind a tree to watch or monitor the team's entry. (Exh. 33 at 147:2-148:4). He said that it was Farkes who knocked on the door, but he did not recall who else was lined up on the porch. (Exh. 33 at 97:20-21). Shoop disagrees with with Farkes and Kilbey as well, and states that Farkes was up front knocking on the door and announcing the Sheriff's Department. (Exh. 14 at 31:8-32:25). Shoop said he was "maybe the third guy" and that Smith was somewhere up front. (Exh. 14 at 31:8-32:25).

Kilbey stated that he was the only deputy carrying an assault rifle, but he insists he was nowhere near Mr. Harte. He stated held the assault rifle, an AR-15, in a "low ready" position

89-92, but he stated he "wanted to be clear" that he was not close enough to the front of the line up to have contact with Mr. Harte once he entered the house. (Exh. 62 at 113:5-14). Kilbey testified:

> When I came in, people contacted them [the Hartes]. I don't know who was standing over him [Mr. Harte]. And I just want to be clear that I wasn't close enough to see that. I saw a contact with the initial entry officers and contact with people I didn't see anyone standing over him [Mr. Harte]. And I did have a rifle, but I just want to be clear I had no contact with Mr. Harte or anyone inside of the house….

(Exh. 62 at 113:5-14).

Deputy Smith stated he did not know who knocked at the door and that he did not know where Blake was at the time of entry. (Exh. 64 at 43:4-45:23). He also stated he had no interaction with Mr. Harte and was not the first person in the door. (Exh. 64 at 53:11-56:2).

As the testimony makes clear, each deputy at the front of the house stated he was not the first in the door, and Kilbey – who had the rifle – wanted to be "clear" that he had no contact with Mr. Harte. While Kilbey insists that he and his rifle were nowhere near Mr. Harte, Mrs. Harte has a very clear recollection of an armed deputy wearing swat-style gear standing over her husband with an assault rifle. (Exh. 66 at ¶6).

53. Controverted in part. The deputies did not merely "knock[] loudly" – they knocked loud enough that the they rattled the walls of the house. (Exh. 66 at ¶6).

54. Controverted. Plaintiffs assert that the description in this paragraph is misleading, as it suggests a calm encounter with mere "instructions" and people acting "voluntarily." In reality, the deputies' entry to the home was threatening and extremely frightening, and their conduct and weapons made clear to the Hartes that they were prepared to secure compliance with force, if need be. (Exh. 66 at ¶6, 13). Mrs. Harte, who was still in bed when the deputies pounded at the front of the house, remembers the entire event as frightening and surreal, with heavily armed officers treating them like criminals and forcing them to sit on the floor on the floor, cross-legged, before securing the couch and placing them there, in full view of passersby in the neighborhood. (Exh. 66 at ¶6, 13).

55. Controverted in part. Vrabac testified that when she entered the house, the Hartes were still in the foyer, seated on the floor. (Exh. 65 at 33____)

56. Uncontroverted.

57. Uncontroverted.

58. Controverted in part. The deputies were not searching the house "according to the warrant" because none of the deputies at the search read the warrant or the affidavit before the search. (Exh. 33 at 94:4-9; Exh. 62 at 56:23-27:4; Exh. 65 at 16:5-6; Exh. 64 at 31:6-9; Exh. 13 at 46:1-15; Exh. 14 at 7:18-8:17;

Exh. 15 at 65:16-17). Kilbey stated he knew the warrant existed, but did not know the basis of probable cause (Exh. 62 at 56:23-27:4). Shoop testified that deputies knew within the first 15 or 20 minutes that they would not find a "massive grow operation" as they "had speculated." (Exh. 14 at 200:15-20). But, he said, they continued to search to see if they could find "remnants" of a "dismantled" grow operation, and when they didn't find that, they decided to look for "personal use" amounts of marijuana. (Exh. 14 at 201:1-215:17) Blake spoke to Reddin on the phone, who told him to just "continue on" searching. (Exh. 33 at 113:16-114:21). Blake testified: "Everyone was just looking for *any kind of criminal activity* that was involved in the house." (Exh. 33 at 188:2-3) (emphasis added). Sheriff Denning testified that he agreed with Blake's statement. (Exh. 2 at 229:10-230:7). Denning further stated that the search should encompass "[a]ny instrumentalities of a crime, those are my words." (*Id*).

59. Uncontroverted. Mr. Harte adds that he was indeed read the *Miranda* warning, but he has no independent knowledge of the time that occurred. He did decline to allow Blake to interview his son.

60. Uncontroverted. Mrs. Harte did not decline an interview until after she had spoken with her brother, Brad Kustin. (Exh. 66 at ¶8). Mrs. Harte describes that phone call:

> While I was being read my *Miranda* rights, I asked permission to make a call, and was able to reach my brother, who is an attorney and an ex-New York City police officer. The call to my brother was made at 7:52 a.m. A record of that telephone call is appended hereto as Attachment B (P-004520). My brother asked me whether I was free to leave, so I asked the officer who was reading me my *Miranda* rights, "Am I allowed to leave?" and he said I was not.

(Exh. 66 at ¶8). Brad Kustin also remembers that phone call:

> During our phone call, her first words to me were in the nature of, "You're not going to believe this." She then described being detained at her kitchen table as heavily armed police officers in military-style gear searched her home, held her husband at gunpoint, detained her children in the living room, and monitored and restricted her movements in the house. At this point, she seemed to believe that the deputies were part of a SWAT team and had made a forced entry to the house. She seemed upset and bewildered about what was happening and why it was happening.
>
> I was flabbergasted by the deputies' conduct. It was already evident that the deputies had entered the wrong home to search for a marijuana grow operation. I thought the fact that they continued to search the house even though they had found no marijuana was terrible.
>
> I told Addie to ask the officers whether she was free to leave. Addie left the phone to ask the question, and when she returned to the phone, she said the officers had told her she could not leave. When she told me this, I believed she and her family were under arrest.

(Exh. 70 at ¶¶8, 9, 10).

61. Controverted. Neither Sergeant Cossairt nor any other deputy told Mrs. Harte or any member of the family that the house would be left substantially as it was found and the search would not be like those on TV. Mrs. Harte states in her Declaration:

> At no point during the raid of our home did any deputy inform us that our house would be left as the law enforcement officers found it.
>
> At no point during the raid of our home did any deputy tell us that the search would not be like searches commonly seen on television, where homes are ransacked and left in disarray.

(Exh. 66 at ¶¶9-10). In his Declaration, Mr. Harte states the same thing – that at no point did any deputy inform the Hartes that their house would be left as the officers found it and that the search would not be like those commonly seen on television.

62. Controverted. During the phone call with her brother, Mrs. Harte asked Blake if she was free to leave and he told her no. At no point did any deputy tell her she was free to leave. (*See* Exh. 66 at ¶8, 11). Mrs. Harte's phone call with her brother was at 7:52 a.m. (*Id*. at ¶8). At that point, Blake and Shoop had already spoken to Reddin (*see* response to #46, *supra*, which is hereby incorporated by reference), and told him that no marijuana "grow operation" had been found. At that point, it was clear that any wisp of probable

cause had fully dissipated and that the deputies had no legal basis to remain in the Harte home. Mrs. Harte states in her Declaration:

> The call to my brother was made at 7:52 a.m. A record of that telephone call is appended hereto as Attachment B (P-004520). My brother asked me whether I was free to leave, so I asked the officer who was reading me my *Miranda* rights, "Am I allowed to leave?" and he said I was not. *The reading of my Miranda rights was after the officers had searched the basement and found our vegetable garden instead of a "marijuana grow" operation. Notwithstanding that realization, we were held under armed guard for the duration of the raid.*

(Exh. 66 at ¶8) (emphasis added).

63. Controverted. This paragraph is false and misleading, as it seems to suggest that Mr. and Mrs. Harte were being "assisted" in a friendly manner and that their daughter was having an enjoyable day. Nothing could be further from the truth. Mrs. Harte states in her Declaration:

> We had to ask permission to use the bathroom in our own home. We had to ask permission to move. We had to ask permission to reach for our phones. We were told when to enter the kitchen for the reading of our Miranda rights. We were told very little, until nearly the end of the raid, about why the officers were searching our home. We were not allowed to leave our home at any point, and that was made clear both before and during the phone call I made to my brother, who is an attorney and former police officer. We were treated as criminals, and, towards the end of the raid, when I asked whether any officer had found narcotics, they responded "Not yet." Comments about our Chinese-American daughter not being able to speak English and sarcastic remarks about my son, who was clearly upset about the raid, were made aloud for us and my children to hear. It was strongly suggested that our seventh-grade son was a drug user and that we should have our pediatrician perform drug testing on him, even though he was barely thirteen years old, and a search of his room and personal items had turned up no evidence of drug use. There was nothing accommodating about the raid, nor the officers in charge of the raid….

(Exh. 66 at ¶14).

64. Controverted. No member of the Harte family was ever free to leave at any time during the raid and search. No deputy ever told them they were free to leave, nor did any deputy ever suggest they could leave to take their children to school. Mrs. Harte states in her Declaration:

> At no point during the raid did any deputy tell us that we were free to take our children to school. I had to ask permission to obtain my cell phone so I could call my children's schools to inform them that the children would not be attending school that day. I made a call to L.H.'s school at 8:56 a.m. and a call to J.H.'s school at 9:00 a.m. A record of those calls is appended hereto as Attachment B. I also called my boss at 8:16 a.m. to let her know that I would not be at work. We were not free to leave. I would have immediately removed our children from that situation had I been free to do so.

(Exh. 66 at ¶11). Lisa Jameson, a next door neighbor of Mr. and Mrs. Harte, spoke during the raid to one of the deputies who came outside, and she asked if the officer would allow her to take the Hartes' young children from the house. The officer told her: "No. They are fine." Mrs. Jameson was concerned for the children's well-being and the fear they might be experiencing:

> The presence of the officers went on for quite some time. At some point after the raid began, I went outside and spoke with a police officer who was walking from the Hartes' home toward his vehicle. I asked the officer if he would allow me to take L[redacted] and J[redacted] H[redacted], the Hartes' children, from the house. The officer told me "No. They are fine." As a mother, I was concerned about the children being in the house with so many armed officers. I was an adult and I was frightened—and I knew that a child would be terrified.

(Exh. 69 at ¶7).

65. Uncontroverted.

66. Controverted in part. Although Shoop testified as described, his beliefs regarding a "recent harvest" of marijuana – if he indeed had that belief – was not reasonable, and was not a belief that a reasonable, well-trained officer would adopt. At no point did any deputies find any drug paraphernalia or other evidence of drug use in the house. (Exh. 15 at 125:16-130:22); Exh. 33 at 190:9-192:20). Contrary to Shoop's representations, the garden in the Hartes' basement was quite a simple one. Unlike many hydroponic gardens, it did not have certain equipment or features commonly found in indoor marijuana grows, including high intensity lights, Mylar reflective panels, special ventilation or black out windows. (Exh. 14 at 108:13-112:12) Shoop himself identified these items as being common to indoor marijuana grows. (*Id.*). He also added: "I never saw a grow op with cheap lights from Home Depot." (Exh. 14 at 112:2-5). In fact, Mr. Harte obtained his lights – inexpensive fluorescent tube lights – from Walmart. (Exh. 46 at ¶8; *see also* attached

photos to Exhibit 46, showing the Harte garden). In short, there was nothing about the Hartes' hydroponic garden that should have prompted Shoop to conclude that there had been a "recent harvest" at the residence. The baseless nature of Shoop's claimed belief is further underscored by the fact that Blake tested dead or dried leaves found on the floor around the hydroponic garden, and found nothing suggestive of marijuana. (Exh. 3 at 110-12; Exh. 13 at 102:1-103:3)

67. Controverted. Deputies Smith and Farkes claimed to have smelled a faint odor of marijuana, but their descriptions are dubious, and the Overland Park officer who brought his canine to the residence stated that he was "advised a faint odor of marijuana was noticed by a few deputies at various places in the residence" and that he was advised that the residence "had been thoroughly searched prior to" his arrival. Hardin stated he "did not notice the odor of marijuana" while he was in the residence, and that his dog, "Cezer" also did not detect any marijuana in the residence. (Exh. 53 at 854-55). The claim that anyone smelled anything like "fresh" marijuana in the residence is an extremely dubious claim, given that the entire residence was searched, from attic to basement, and from one side to the other, prior to the canine's arrival and nothing whatsoever was located.

68. Controverted. This is not a "fact" but an opinion that is not based on facts. As noted above, the Hartes' garden was a simple one, lacking many of the features an equipment typically seen in indoor marijuana grows, and the lights used for it were inexpensive fluorescent lights obtained from Walmart. (Exh. 46). Plaintiffs hereby reassert and incorporate by reference their response to #66, *supra*.

69. Uncontroverted.

70. Uncontroverted.

71. Controverted in part. The Hartes do not know the exact time the deputies left. They believe it was approximately 10:00 a.m.

72. Controverted in part. Although the JCSO announced a press conference at 2:00 p.m., it was not with the intent to truthfully disclose the results of the day. As Reddin admitted, the JCSO did not seize a

single live plant on April 20, 2012, but that fact was not disclosed at the press conference by anyone, nor did anyone from JCSO acknowledge that at least one of the day's raids had turned up no contraband whatsoever.

73. Controverted in part. Three local television stations identified "Leawood" as one of the cities where the Operation Constant Gardener raids had occurred. (Exh. 10 at 1759, 1763, 1771); *see also* Exhs. 8 and 9 [discs with clips of local broadcasts re Operation Constant Gardener).

74. Controverted in part. The JCSO did not provide the "full results" of Operation Constant Gardener to the press. Had the JCSO done so, it would have had to admit that on April 20, 2012, it seized no live plants and that at one residence at least, no contraband whatsoever was seized.

75. This factual statement is not supported by a citation to the record and is in violation of District of Kansas Rule 56.1.

PLAINTIFFS' ADDITIONAL FACTS

76. Sheriff Denning is the final policymaker for the Johnson County Sheriff's Office. (Exh. 2 at 64:5 – 65:9)

77. Sheriff Denning agrees with all decisions made with regard to the execution of the Harte search warrant. (Exh. 2 at 76:23 – 77:2)

78. Sheriff Denning testified that the deputies involved in the Harte search warrant and execution followed the Sheriff's office protocols, practices and policies and state statutes. (Exh. 2 at 137:8-18)

79. At the time of the Harte search, getting a lab result before executing a search warrant was not part of the protocol and policy of the Sheriff's Office. (Exh. 2 at 113:14-22).

80. The Sheriff's Office did not have a policy governing field test kits in 2012; it now has such a policy. (Exh. 2 at 295:18-23; *see also* Exh. 92)

81. The new policy states that: no field tests using the KN reagent shall be used; training on the use of field kits must be done by trainers certified by the kit's manufacturer; that a sample of the controlled substance "should be examined by the Criminalistics Laboratory, and the controlled substance confirmed,

prior to search warrant and/or arrest warrant application; and that a positive result on a drug field test kit "shall not constitute the one and only probable cause basis identifying a controlled substance in support of a search warrant or arrest affidavit." (Exh. 92). The date of issue on the policy was October 28, 2013, with revisions to its present form on December 9, 2014. (Exh. 92).

82. Sheriff Denning testified that it would have been feasible in 2012 to submit the plant material in the Hartes' trash to a crime lab analyst prior to seeking a search warrant, but "that was not part of their practice" at that time. (Exh. 2 at 299:13-17) (*see also* Exh. 94 [excerpt from new training field test training program which expressly teaches about false positives])

83. Sheriff Denning is familiar with a magazine called Law and Order; it is a readily available magazine and he has read some articles in it. (Exh. 2 at 52:19-53:5).

84. In June 2003, Law and Order magazine published an article on "Narcotic Field Testing" by Matt Johnson which stated that: "Field testing does not establish probable cause. Field testing is the confirmation of probable cause. Other circumstances already should have occurred before the use of a specific field test is utilized." (Exh. 80 at 2304-05).

85. During the search of the Harte home, Sergeant Cossairt called Lieutenant Pfannenstiel and told him there was a "grow operation" but no marijuana. (Exh. 19 at 72:16 – 74:15). He also told Pfannenstiel they had searched the basement, around the entire residence and still did not locate any marijuana. (*Id*) He asked for guidance and Pfannenstiel suggested that he call in a canine. (Exh. 19 at 183:6-20)

86. During the search, Blake tested dry or dead leaves found on the floor around the garden, with negative results. (Exh. 3 at 110:23-111:9; Exh. 13 at 102::-103:4)

87. Defendants stipulated to Plaintiffs more than two years ago that the "Board of Commissioners of the County of Johnson" is the correct legal identity of Johnson County, Kansas, as a defendant in a lawsuit. "Where Plaintiff names 'Johnson County, Kansas' the correct name of the defendant is the 'Board of Commissioners of the County of Johnson." Exh. 91, KORA Pleading, p. 5, fn 1 (emphasis added).

88. After the raid at the Harte residence, Lieutenant Pfannenstiel researched field tests online and found articles discussing false positives. (Exh. 19 at 64:17 – 65:20).

89. A forensic test certification company has posted online its assessment of Lynn Peavey drug field kits for cocaine and methamphetamine. In its report, dated January 3, 2008, the certification company noted that "false positives" were observed throughout it study and that presumptive drug field tests do not provide any structural information and are subject to false positives. (Exh. 79 at 837-38).

90. A search through the internet with regard to drug field tests locates numerous news articles and blog posts from 2012 and earlier in which the problem of false positives is discussed. (Exhs. 81, 90).

91. Prior to the Harte case, Shoop thought drug field tests were infallible. (Exh. 14 at 58:15-20).

92. Shoop was one of the deputies who attended the training by Sergeant Wingo on indoor marijuana grows. He did not find the seminar very informative because it was "pretty brief." (Exh. 14 at 113:6). Shoop explained: "It's a pretty brief training. You have to think police takes breaks every hour, and so, you know, a four-hour training ends up, by the time you BS and stuff, ends up being two or three hours maybe; your taxpayers' money at work." (Exh. 14 at 113:6-13).

93. Tom Erickson began drafting his news release for Operation Constant Gardener 2012 two weeks before any investigations were completed or warrants signed. (Exh. 93)

94. The press conference was set at 2 p.m. on April 20, 2012 so that the media would have time to edit film before the evening news. (Exh. 1 at 67:18-24).

95. The April 20, 2012 raid by Johnson County Sheriff's deputies has made a deep impact on the Harte family, and Mrs. Harte is very concerned about the stress and emotional impact of the event on her children. (Exh. 67 at ¶¶17-27)(sealed). District of Kansas Rule 56.1.

III. ARGUMENT AND LEGAL AUTHORITY

A. Summary Judgment Standard of Review

Summary judgment extinguishes a claim without affording the losing party an actual day in court and without opportunity to have a jury hear the evidence. That right should be cut off only in the clearest of cases. Accordingly, a court ruling on a motion for summary judgment must construe the facts in a light most favorable to the nonmoving party and credit to that party's advantage every disputed factual point. *Mickelson v. New York Life Ins. Co.*, 460 F.3d 1304, 1310 (10th Cir. 2006); *Plotke v. White*, 405 F.3d 1092, 1093-94 (10th Cir. 2005). Moreover, the nonmoving party must receive the benefit of any reasonable inference that might be drawn from the evidence in the record. *Mickelson*, 460 F.3d at 1310; *Plotke*, 405 F.3d at 1093-94.

At the summary judgment stage, the court may not entertain or decide credibility issues. Those determinations must be left for a jury in its role as the ultimate finder of fact. *Plotke*, 405 F.3d at 1094. So long as the favorable rendition of the evidence, coupled with all reasonable inferences found in the record, would support a jury finding for the nonmoving party on any material fact, summary judgment must be denied in deference to a trial. *Zamora v. Elite Logistics, Inc.*, 449 F.3d 1106, 1112 (10th Cir. 2006). A fact is "material" for summary judgment purposes if it might affect the determination of the case. *Id.* Moreover, claims that turn on issues of intent or state-of-mind are especially inappropriate for summary judgment. *Plotke*, 405 F.3d at 1102 (holding that "[j]udgments about intent are best left for trial and are within the province of the jury.").

B. Qualified Immunity Standard of Review

Summary judgment will not lie if disputed issues of fact affect the proper qualified immunity analysis. *Walter v. Morton*, 33 F.3d 1240, 1242 (10th Cir. 1994). (holding "[o]nce the plaintiff has sufficiently *alleged* the conduct violated clearly established law, then the defendant bears the burden, as a movant for summary judgment, of showing no material issues of fact remain that would defeat a claim of qualified immunity."); *see also Plemmons v. Roberts*, 439 F.3d 818, 822 (8th Cir. 2006) (holding that the defendant is not entitled to qualified immunity at summary judgment stage if there remains a factual dispute material to the immunity issue);

Wilkins v. DeReyes, 528 F.3d 790, 805-06 (10th Cir. 2008) (noting that at the summary judgment stage, the trial court must decide if "the alleged facts [of plaintiff], if true, amount to a constitutional violation.").

C. Plaintiffs' Counts I-IV

Plaintiffs' claims in Counts I-IV invoke protections under both the Fourth and Fourteenth Amendments. Because the Fourteenth Amendment incorporates the Fourth Amendment's protections against the states, Fourth Amendment claims against state actors are also Fourteenth Amendment claims. *See Mondragon v. Thompson*, 519 F.3d 1078, 1082 n. 3 (10th Cir. 2008). "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." *Wolf v. Colorado*, 338 U.S. 225, 28 (1949).

D. Invalid Search Warrant (Count I)

1. There Was No Probable Cause for a Search and the Search Warrant Was Not Supported by Probable Cause and Replete with Misrepresentations and Omissions

Probable cause is a fluid concept–turning on the assessment of probabilities in particular factual contexts–not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates,* 462 U.S. 213, 232 (1983). The Supreme Court has found it sufficient to say that probable cause is more than a mere suspicion, but considerably less than what is necessary to convict someone. *United States v. Ventresca,* 380 U.S. 102 (1965); *see United States v. Wicks,* 995 F.2d 964, 972 (10th Cir. 1993) ("The existence of probable cause is a 'common-sense standard' requiring 'facts sufficient "to warrant a man of reasonable caution in belief that an offense has or is being committed.'") (quoting *United States v. Mesa-Rincon,* 911 F.2d 1433, 1439 (10th Cir. 1990) (quoting *Brinegar v. United States,* 338 U.S. 160 (1949)), *cert. denied,* 114 S. Ct. 482 (1993)).

With respect to a search warrant, "[p]robable cause exists when the facts presented in the affidavit would warrant a man of reasonable caution to believe that evidence of a crime will be found at the place to be searched." *Poolaw v. Marcantel*, 565 F.3d 721, 729 (10th Cir. 2009) (quoting *United States v. Harris*, 369 F.3d 1157, 1165 (10th Cir. 2004)). A warrant's validity is evaluated "on the basis of the information that the officers disclosed, or had a duty to discover and disclose, to the issuing magistrate." *Garrison*, 480 U.S. at 85. The court will consider "both . . . the facts that support probable cause and those that militate against it." *Poolaw*, 565 F.3d at 729 (citing *United States v. Valenzuela*, 365 F.3d 892, 897) (10th Cir. 2004)). The issuing magistrate's role has been described as more than the "mere ratification of the bare conclusions of the affiant;" the supporting affidavit must provide more than "[b]ald conclusions, affirmations of belief, and suspicions," and include "sufficient factual information to support an independent judgment . . . that probable cause to search exists." *Kansas v. Bennett*, 113 P.3d 274, 2005 WL 1429919, *3 (Kan. App. 2005) (unpublished) (internal quotations omitted).

"To assess the validity of a search warrant under the Fourth Amendment, we review whether the totality of the circumstances in the affidavit provided … a substantial basis for finding a fair probability that contraband or other evidence of a crime would be found at the searched premises. *United States v. McCarty*, 82 F.2d 943, 947 (10th Cir.) (quotations omitted). *United States v. Myers*, 106 F.3d 936, 939 (10th Cir. 1997)

Defendants cite to the *Franks* case for the general proposition that search warrant affidavits are presumed valid; however, that presumption is rebuttable. *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978); *Wolford v. Lasater*, 78 F.3d 484, 489, 1996 U.S. App. LEXIS 4459, *10-11 (10th Cir. N.M. 1996). While Plaintiffs recognize that a judge's determination to issue a warrant is accorded deference, that deference is not boundless. The deference accorded to a magistrate's finding of probable cause does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based." *Id.* at 914.

It is a violation of the Fourth Amendment for an officer to rely on false information for a determination of probable cause or to fabricate information or omit information that either creates or vitiates probable cause.

Wolford, 78 F.3d at 489 (citing *Franks*, 438 U.S. at 155-56); *Stewart v. Donges*, 915 F.2d 572, 581-82 (10th Cir. 1996)). A search warrant affiant may not "knowingly, or with reckless disregard for the truth" includes false statements in the affidavit." *Franks*, 438 U.S. at 155-56. Likewise, an affiant may not "knowingly or recklessly omit from the affidavit information which, if included, would have vitiated probable cause." *Stewart*, at 581-83 (10th Cir. 1990). Where false statements have been included in an arrest warrant affidavit, the existence of probable cause is determined by setting aside the false information and reviewing the remaining contents of the affidavit. *Franks*, 438 U.S. at 155-56. In a case involving information omitted from an affidavit, the existence of probable cause is determined "by examining the affidavit as if the omitted information had been included and inquiring if the affidavit would still have given rise to probable cause for the warrant." *Stewart*, 915 F.2d at 582, n. 13.

While, a judge's issuance of a warrant is "the clearest indication that the officers acted in an objectively reasonable manner or . . . in 'objective good faith,'" the fact that a judge has issued a warrant authorizing the allegedly unconstitutional search or seizure does not end the inquiry into objective reasonableness." *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1245 (2012) (citing *United States v. Leon*, 486 U.S. 897, 922-23 (1984)). If "it is obvious that no reasonably competent officer would have concluded that a warrant should issue," the warrant offers no protection. M*alley v. Briggs*, 475 U.S. 335, 341(1986). Qualified immunity will not be granted "where the warrant was based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Messerschmidt*, 132 S. Ct. at 1245 (internal quotation marks omitted). Nor will a warrant protect officers who misrepresent or omit material facts to the magistrate judge. *Stonecipher v. Valles*, 759 F.3d 1134, 1141-1142 (10th Cir. N.M. 2014). The burden is on the plaintiff to "make a substantial showing of deliberate falsehood or reckless disregard for truth" by the officer seeking the warrant. *Snell v. Tunnell*, 920 F.2d 673, 698 (10th Cir. 1990). This test is an objective one: when there is no dispute over the material facts, a court may determine as a matter of law whether a reasonable officer would have found probable cause under the circumstances. *Cortez*, 478 F.3d

at 1120-21 ("The conduct was either objectively reasonable under existing law or it was not."); *see also Fleming v. Livingston Cnty*., 674 F.3d 874, 881 (7th Cir. 2012) (describing the inquiry into reckless disregard as objective). Qualified immunity applies equally to reasonable mistakes of law and fact. *See Herrera v. City of Albuquerque*, 589 F.3d 1064, 1070 (10th Cir. 2009).

To establish reckless disregard in the presentation of information to a magistrate judge, "there must exist evidence that the officer in fact entertained serious doubts as to the truth of his allegations . . . and [a] factfinder may infer reckless disregard from circumstances evincing obvious reasons to doubt the veracity of the allegations." *Beard v. City of Northglenn*, 24 F.3d 110, 116 (10th Cir. 1994).

In this case, Defendants misrepresented and omitted key facts to Judge Ruddick in order to obtain a search warrant in a case completely lacking in any probable cause. The Defendants targeted the Hartes as people running "a major marijuana grow operation" on the flimsy basis of Defendant Wingo's identification of Robert Harte as a suspect based on a single innocent purchase Mr. Harte made from the Green Circle, some eight months earlier, and the misidentification of tea leaves for marijuana. The JCSO, motivated to obtain search warrants to further their OCG April 20th media spectacle, failed to conduct a thorough investigation and then made material misrepresentations and omitted key facts in order to deceive Judge Ruddick into signing a search warrant to allow the JCSO deputies to conduct their high-publicity, swat-style raid of the Hartes' home. Coming up empty handed post-raid, Defendants now attempt to defend defenseless actions and hide behind an immunity defense that offers them no protection.

Defendants contend that their reliance on Defendant Wingo's "tip" establishes probable cause, but no reasonable officer would conclude that one man's small purchase, on one occasion some eight months earlier, at a store that sold a wide variety of gardening equipment is a reason to suspect someone of operating a large scale indoor marijuana grow operation, especially a gardening store with his two young children. Defendants cite cases where courts have looked at shopping at a hydroponic gardening store as one of several probative facts, but those cases are wholly distinguishable from the facts at bar. Mr. Harte had

absolutely no criminal record unlike the defendant in *U.S. v. Jones* who was seen shopping at a hydroponic gardening store after being on parole for a prior drug offense. 701 F.3d 1300, 1315-1316 (10th Cir. 2012). Further, it was not reasonable for Defendants to have relied on Defendant Wingo's tip as reasonable suspicion that Mr. Harte was engaged in criminal activity in violation of the law. This is particularly true given that Mr. Harte had been seen shopping at the Green Circle on just one occasion; given that Defendants had no visual identification of the purchase Mr. Harte had made, given that Defendants had no information about what item(s) Mr. Harte had purchased; given that it was common knowledge among law enforcement that shopping at a gardening store that sells hydroponic equipment does not mean you are guilty of growing marijuana; and given that law enforcement officers understand that hydroponic gardening is a gardening method used to grow vegetables, not just marijuana. Taking all of this into account, i.e. the totality of the circumstances, a reasonable officer would not have concluded Mr. Harte's shopping at the Green Circle to have been evidence of unlawful conduct. Likewise, no reasonable officer with any drug training whatsoever would have visually mistaken tea leaves for marijuana.

Moreover, Defendants misrepresented and omitted material facts to Judge Ruddick in order to obtain a search warrant. Judge Ruddick, who had no knowledge of the Green Circle, relied on representations that "affiant knows from personal past experience sells hydroponic grow equipment and materials commonly used in the cultivation of marijuana." However, Burns had never been inside the Green Circle and had little idea what it sold or whether, it fact, it bore any relationship to marijuana growing. Burns represented that the vegetation seized from the trash "contained a sizable quantity … of green vegetation which appeared to be wet marijuana plant material (leaves and stems) … [that] appeared as though it may have been processed for the extraction of tetrahydrocannabinol (THC) from the plant material." However, only an untrained or utterly incompetent officer would have thought that the material looked like processed marijuana. Further, Burns represented that the field test kit he used consisted of "reagents similar to those utilized by the Johnson County Criminalistics Laboratory to conduct its initial screening of marijuana." This was untrue. The field test

used contained a KN reagent, not the Duquenois-Levine reagent that the crime lab uses for presumptive screening of suspected drugs. While the crime lab does uses the KN reagent, it is used in the lab for a completely different purpose, thin layer chromatography. Burns also omitted that the field test kits he used are known to yield false positives. Burns also represented that on April 17, 2012, they found "approximately ¼ cup of saturated marijuana plant material (leaves and stems)." He misrepresented to the Court that the plant material found was in fact marijuana, not just something that looked like marijuana. Moreover, his affidavit omitted any mention of the fact that the plant material found in the Hartes' trash did not have the appearance (no serrated leaf edges) or the odor of marijuana.

Burns, with Reddin and/or Pfannenstiel's approval, clearly withheld important details Judge Ruddick would have wanted to know. Motivated to obtain search warrants to execute on April 20 at any cost to promote the JCSO's high-publicity OCG media campaign, Burns made boilerplate statements in the affidavit that he did not know to be true, misrepresented facts, and omitted probative and exculpatory information. Defendants had methods to investigate whether their hunch was accurate – monitoring the comings and goings of the home to see if there were unusual patterns visitors, utility checks, conducting a knock and talk, and sending the plant material to the crime lab for analysis. Obviously, the overeager deputies did not do so in their rush to execute four searches on April 20, all in an effort to garner media attention for OCG.

Had the search warrant affidavit not been littered with misleading statements and material omissions – including the fact that the field test has a very high false-positive rate and yields false positives for common kitchen herbs, spices, and caffeine – the affidavit would have been insufficient to establish probable cause. These misrepresentations and omissions show reckless disregard. An officer does not act reasonably when he knows the information he is acting on is false. *See Wilkins v. DeReyes*, 528 F.3d 790, 805 (10th Cir. 1990). If the jury finds Plaintiffs' facts to be true, the jury would effectively find that Defendants violated Plaintiffs constitutional rights by providing misleading information and/or omitting material information from the search warrant affidavit.

The fact that Burns had the Assistant District Attorney review the affidavit also does not prove he acted objectively reasonable since "review by another member of the prosecution team cannot be dispositive as to whether the officer acted reasonably[.]" *Stonecipher*, 759 F.3d at 1145 (citing *Messerschmidt*, 132 S. Ct. at 1249-50). Further, the facts in *Stonecipher* are distinguishable from the facts here. In *Stonecipher*, the issue was whether a conviction for which the sentence was suspended was a qualifying domestic violence conviction for purposes of federal firearms law. The officer presented an affidavit and underlying documents about the prior conviction to the AUSA for review, allowing for meaningful review of his determination that for purposes of affidavit the conviction was a qualifying domestic violence offense. 759 F.3d at 1143.

Further, Defendants' argument that the staleness of the "tip" received by the JCSO is irrelevant, necessarily fails. "The amount of time that must lapse before information regarding a crime becomes stale is a particularized inquiry that takes into account the facts and circumstances of each case." *State v. Hensley*, 313 P.3d 814, 821 (Kan. 2013). The facts in *Hensely* are readily distinguishable from the facts presented here. In *Hensely*, ". . . officers discovered a bag of marijuana containing Hensley's fingerprints at an apartment across the hall from Hensley's apartment approximately 20 months before the warrant was executed on his home and the fact that an individual named in the affidavit reported in July 2005 that Hensley had been his marijuana dealer in 2004." The court concluded the older information had more probative value given that there was a bag of marijuana found that had his fingerprints on it and possibly connected Hensley with a continuing activity – selling marijuana – thus increasing the likelihood that he might remain engaged in the same criminal activity. *Id.* at 822. The fact that Mr. Harte made a purchase a gardening store some eight months prior to OCG does not suggest there is probable cause to believe he is engaged in criminal activity.

For all these reasons, there was no probable cause for a search and the search warrant was not supported by probable cause.

2. Defendants Are Not Entitled to Qualified Immunity

Qualified immunity operates "to ensure that before they are subjected to suit, officers are on notice that their conduct is unlawful." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). The doctrine of qualified immunity protects government officials from liability from damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Clark v.* Wilson, 625 F.3d 686, 690 (10th Cir. 2010). The inquiry is "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Becker v. Bateman*, 709 F.3d 1019, 1023 (10th Cir. 2013) (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)).

While generally speaking law enforcement officers are entitled to qualified immunity if they act reasonably under the circumstances, what's reasonable for a particular officer depends on his/her role in the search since searches often "require cooperation and division of labor." *Guerra v. Sutton*, 783 F.2d 1371, 1374 (9th Cir, 1986). Here, Blake and Cossairt led the search team that executed the warrant. In *Rameriz v. Butte-Silver Bow Cnty.*, 298 F.3d 1022, 1028 (9th Cir. 2002), relied on by Defendants, the court noted that the leaders of the search team "may not simply assume that the warrant authorizes the search and seizure. Rather, they must actually read the warrant and satisfy themselves that they understand its scope and limitations, and that it is not defective in some obvious way." (emphasis added); *see United States v. Leon*, 468 U.S. 897, 922-23 (1984) (search pursuant to a warrant is invalid if no reasonable officer could have believed the warrant was valid). In the present case, it is undisputed that neither Blake nor Coissart read the warrant, let alone took any action to satisfy themselves that they understood the scope and limitations of the warrant. Similarly, Farkes, Kilbey, Shoop, Smith and Vrabac had a duty to "make inquiry as to the nature and scope of [the] warrant," but failed to do so and are thus also liable. *Rameriz*, 298 F.3d at 1028. How could they possibly make inquiry when the deputies leading the search had not read the warrant or undertaken any action to understand the warrant's scope and limitations?

Defendants maintain that "officers aiding other officers in the execution of police activities" are allowed to rely on the alleged constitutionality of those actions; however, the cases cited by Defendants are

factually distinct from the lack of probable cause for a warrant and the resulting search. For instance, in the *Marshall v. Columbia Lea Regional Hospital*, the issue was whether a nurse drawing blood could rely on an officer's determination that blood could be drawn (Marshall would not consent to blood draw, but indicated he would not fight it). The officer "consented" to search for him and the nurse drew blood). Those facts are a far cry from this case.

With respect to the first prong of the qualified immunity test, for the reasons articulated above, Defendants violated Defendants' Fourth Amendment right to be protected from unreasonable searches and seizures. "The Fourth Amendment protects the public from unreasonable searches and seizures." *U.S. v. Jones*, 701 F.3d 1300, 1312 (10th Cir. 2012). "[T]he 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" *Id.* at 1312 (quoting *United States v. U.S. Dist. Court*, 407 U.S. 297, 313 (1972). "Probable cause must support the warrant authorizing the Government's search of Defendant's residence." *U.S. v. Biglow*, 562 F.3d 1272, 1275 (10th Cir. 2009). Defendants Denning, Burns, Blake, Reddin, Pfannensteil, Cossairt, Shoop, Smith, Farkes, Kilbey and Vrabac, all of whom were involved in the investigation of the Hartes' home and/or the April 20, 2012 raid of their home, violated Defendants' Fourth Amendment right to be protected from unreasonable searches and seizures since no probable cause existed to believe that Plaintiffs were engaged in any criminal activity.

Further, the second prong of the qualified immunity test is met since the right violated by Defendants in the present case was a clearly established constitutional right. For a law to be "clearly established," the issue must have been addressed by a Supreme Court or Tenth Circuit decision on point, "or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Id.* (quoting *Morris v. Noe*, 672 F.3d 1185, 1196 (10th Cir. 2012)). As *Morris* establishes, "The more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation." When the § 1983 claim arises out of a warrantless arrest, "the arresting officer is entitled to qualified immunity *if a reasonable officer could have believed* that probable

cause existed to make the arrest." *Id.* at 1195 (emphasis added). The reasonableness of an officer's actions is measured using an "objective standard." *United States v. Winder*, 557 F.3d 1129, 1134 (10th Cir. 2009). Under this objective standard, the question is "whether 'the facts available' to the detaining officer, at the time, warranted an officer of 'reasonable caution' in believing 'the action taken was appropriate.'" *Id*. (citations omitted).

To determine whether reasonable suspicion exists, one "must look to the 'totality of the circumstances,'" rather than assessing each factor or piece of evidence in isolation." *U.S. v. McGehee,* 672 F.3d 860, 867 (quoting *United States v. Salazar*, 609 F.3d 1059, 1068 (10th Cir. 2010). The Court "must consider, under the totality of the circumstances, whether probable cause – defined as a 'fair probability' that contraband or other evidence will be found in a particular place – exists to conduct a search." *U.S. v. Biglow*, 562 F.3d at 1280-81. Under this totality-of-the-circumstances test, "[n]o one factor is determinative." *McGehee*, 672 F.3d at 867 (quoting *United States v. Holt*, 264 F.3d 1215, 1220 (10th Cir. 2001) (en banc), *abrogated on other grounds as stated in United States v. Stewart*, 473 F.3d 1265, 1268-69 (10th Cir. 2007)) (internal quotation marks omitted). Moreover, reasonable avenues of investigation must be pursued especially when, as here, it is unclear whether a crime has taken place. *Id.* at 1121, 1117 (quoting *BeVier v. Hucal*, 806 F.2d 123, 128 (7th Cir. 1996)). In this case, Defendants repeatedly bypassed well-recognized and widely used avenues of investigation in their haste to get a warrant for a high-publicity initiative. For the reasons articulated above, it is clear that when viewed in the light most favorable to Plaintiffs, there is evidence that Defendants violated the law and that they are not immune from liability.

E. The Execution of the warrant was unreasonable (Count II)

Never have the Defendants possessed any evidence that the Hartes grew marijuana or extracted THC from marijuana plants. Even assuming, however, that the pretense of probable cause upon which Defendants obtained the search warrant for the Harte residence somehow constituted probable cause, it is clear that the Defendants nonetheless violated the Plaintiffs' constitutional rights by unreasonably continuing

their arrest or detention even as the unrelenting search of their home eroded any claim to probable cause and yielded only further evidence of the Hartes' innocence.

1. Defendants cannot ignore 'material and obvious' facts pointing toward the innocence of individuals they investigate.

The Fourth Amendment protects against unreasonable seizures. *Maresca v. Bernalillo Cty.*, No. 14-2163, 2015 WL 6384984, at *5 (10th Cir. Oct. 22, 2015). At least since 1998, the 10th Circuit has clearly articulated the long-established responsibilities of officers to protect the rights of citizens during investigations, searches, and arrests by objectively and continuously evaluating probable cause.

> In determining whether an officer has sufficient reasonably trustworthy information to constitute probable cause, clearly established case law requires officers to look at the "totality of the circumstances." *See United States v. Morgan,* 936 F.2d 1561, 1569 (10th Cir.1991); *United States v. Fox,* 902 F.2d 1508, 1513 (10th Cir.1990) [additional citations omitted] While officers may weigh the credibility of witnesses in making a probable cause determination, they may not ignore *available and undisputed* facts. *Cf. Romero v. Fay*, 45 F.3d 1472, at 1476–77 & n. 2 ([...] the probable cause standard "requires officers to reasonably interview witnesses readily available at the scene, investigate basic evidence, or otherwise inquire if a crime has been committed at all before invoking the power of a warrantless arrest and detention"); *Clipper v. Takoma Park, Md.,* 876 F.2d 17, 19–20 (4th Cir.1989) (sustaining jury verdict that police officer lacked probable cause to arrest plaintiff because officer relied on speculative information while ignoring readily available exculpatory evidence); *BeVier v. Hucal,* 806 F.2d 123, 128 (7th Cir.1986)(stating that "police officer may not close her or his eyes to facts" and that "[r]easonable avenues of investigation must be pursued").

Baptiste v. J.C. Penney Co., 147 F.3d 1252, 1259 (10th Cir. 1998)(emphasis added).

From the moment Defendants shouted their way into the Harte household's early-morning routine, their pretense of probable cause steadily withered away. In the Hartes' basement, the officers found scrawny vegetable plants, not robust cannabis shrubs stoked to hyper-growth with maximum fertilization and carbon dioxide generators. They found weak fluorescent lamps casting a dull blue glow over the plants, not 1,000-watt megalights capable of turning night to day. The only green leafy substances in the house were fruity and floral-infused potpourri-like teas, not pungent cannabis buds. "These differences are *not* minor: they are material and obvious," the 10th Circuit emphasized in *Maresca*, where a rookie police officer arrested an entire family, including children and their dog, after mistyping the license plate number of the family's red

2004 Ford pickup into her cruiser's NCIC computer and obtaining a report of a stolen maroon 2009 Chevrolet sedan with expired plates. *Maresca v. Bernalillo Cty.*, No. 14-2163, 2015 WL 6384984, at *1 (reversing summary judgment granted to the police officer in district court and holding she is not entitled to qualified immunity on the plaintiffs' unlawful arrest claim). Here, the differences were equally great between the Defendants' fantastic expectations of finding criminality inside the Harte home, compared with the plain reality of the Plaintiffs' law-abiding daily existence, shown in an abundance of "readily available exculpatory evidence." *Maresca*, 2015 WL 6384984, at *7. As the sum of the evidence grew, all of it pointed innocence: The Hartes were not marijuana growers, and did not possess marijuana in even a miniscule or residual quantity. Nonetheless, the unreasonable detention of the Hartes inside their home continued for 2½ hours, as did the Defendants' unsuccessful search for contraband and "any evidence of criminal activity."

2. Continuing the search

Probable cause is a required constant throughout the execution of a search warrant. When probable cause has vanished during a search, the search must end. The life span of probable cause during the execution of the Harte warrant was as fleeting, if it existed at all, as that in *Peterson v. Jensen*, 371 F.3d 1199 (10th Cir. 2004)(Affirming the district court's denial of Rule 12(b)(6) dismissal for qualified immunity). In *Peterson*, officers rushed past a moving van, charged into a residence with guns drawn, ordered everyone inside to get down on the floor of the nearly empty apartment unit, heard that it was move-in day for the newest occupants of the unit and that no previous occupant was present, but still searched the apartment and interrogated people at the scene on the basis of a stale search warrant targeting previous occupants. *Id.* at 1201.

3. Deputies Burns, Pfannenstiel, and Reddin are liable because it was reasonably foreseeable that their supervisory and investigative participation would result in violations of the Hartes' rights.

Defendants seek to exclude Burns, Pfannenstiel, and Reddin from liability for the unreasonable execution of the search warrant at the Harte home by arguing that none of the three deputies was present at

the scene. However, it was reasonably foreseeable that the actions of each of the three men would result in the constitutional violations that occurred when the search party overstayed its mandate in the Harte home.

> Section 1983 imposes liability on a government official who "subjects, or causes to be subjected, any citizen .... to the deprivation of any rights." 42 U.S.C. § 1983. Thus, "[a]nyone who 'causes' any citizen to be subjected to a constitutional deprivation is also liable." *Trask v. Franco*, 446 F.3d 1036, 1046 (10th Cir.2006) (internal quotation marks omitted). "The requisite causal connection is satisfied if [Defendants] set in motion a series of events that [Defendants] knew or reasonably should have known would cause others to deprive [Plaintiffs] of [their] constitutional rights." Id. (internal quotation marks omitted). Indeed, "[s]ection [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe v. Pape*, 365 U.S. 167, 187, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); *see also McKinley v. City of Mansfield*, 404 F.3d 418, 438–39 (6th Cir.2005). Thus, Defendants are liable for the harm proximately caused by their conduct. *Trask*, 446 F.3d at 1046. … "That conduct of other people may have concurrently caused the harm does not change the outcome as to [Defendants]." Lippoldt v. Cole, 468 F.3d 1204, 1220 (10th Cir.2006).

Martinez v. Carson, 697 F.3d 1252, 1255 (10th Cir. 2012).

It is undisputed that Deputy Burns was the affiant on the application for a search warrant at the Harte residence. Plaintiffs allege that but for Burns's misleading application for a search warrant, the violations of their rights by deputies who detained them too long and searched their home after probable cause evaporated would not have occurred, and Burns is a proper defendant.

It is also undisputed that Deputy Reddin was the sergeant in charge of the DPU, that he was an important conduit through which Missouri Trooper James Wingo inserted his theories on marijuana grow investigations into the JCSO, that Reddin was a major booster and promoter of Operation Constant Gardener within the JCSO, that he sought out the publicity binge that generated fawning news coverage for the JCSO during Operation Constant Gardener, and that as Reddin learned that the search of the Harte home failed to bear fruit he radioed or telephoned to deputies the orders to "keep searching." Plaintiffs allege that but for these activities of Reddin, the violations of their rights by deputies who detained them too long and searched their home after probable cause evaporated would not have occurred, and Reddin is therefore a proper defendant.

Finally, it is undisputed that Lieutenant Pfannenstiel was commander of the DPU force and was responsible for its day-to-day operations. His supervision of the OCG searches as shown by his appearance in April 20, 2012, news coverage is the "affirmative link." Moreover, he also directed the deputies to keep searching the Harte house and told Cossairt to request a drug dog.

Plaintiffs allege that but for his supervisory acts that caused the DPU to become a major sponsor and participant in Operation Constant Gardener, the violations of their rights by deputies who detained them too long and searched their home after probable cause evaporated would not have occurred, and Reddin and Pfannenstiel are therefore a proper defendant.

4. The Deputies' search exceeded the scope of the warrant

Defendants are not entitled to quasi-judicial immunity since they engaged in search activity that exceeded the bounds the search warrant. In *Moss v. Kopp*, 559 F.3d 1155, 1162 (10th Cir. 2009), the court outlined the limitations to the quasi-judicial immunity protections, stating "for the defendant state official to be entitled to quasi-judicial immunity . . . the officials executing the order must act within the scope of their own jurisdiction, and the officials must only act as prescribed by the order in question." *Id.* at 1163 (emphasis added). In this case, the scope of the warrant was limited to "[m]arijuana in all forms . . .," "[d]rug [p]araphernalia used to cultivate and/or process marijuana . . .," and "indicia of occupancy." Rather than adhere to these specific boundaries, the deputies became desperate to find any indication of criminal activity to promote at the pre-scheduled OCG press conference. Having found absolutely no marijuana or drug paraphernalia in the home, deputies began looking "for any kind of criminal activity that was involved in the house." Exh. 33 at 185-186 (emphasis added). Agreeing with this approach, Sheriff Denning testified that the search would encompass "[a]ny instrumentalities of a crime . . ." Exh. 2 at 229:10-230:7. Moreover, based on Coissart's testimony, a reasonable juror could infer that the drug dog may have roamed the Hartes' home as a training exercise just to get experience. Exh. 13 at 112:19-113:2. These admissions defeat any quasi-

judicial immunity protections and demonstrate that probable cause to continue searching the house for marijuana or drug paraphernalia had long eroded.

Defendants, as an after-the-fact justification, now theorize that the deputies searched the home for an extended period of time because allegedly "the deputies knew at the time" that "it had been months since Mr. Harte had been seen at the Green Circle and the deputies had found what they believed was processed left over leaves and stems." This reasoning is flawed since there is no evidence that any deputy searching the home had even read the search warrant affidavit, much less knew the Mr. Harte had shopped at the Green Circle "months" ago. Further, the "leftover leaves and stems," that were near the hydroponic vegetable growing area, were immediately field tested, and these alleged "leftovers" tested negative for marijuana. Thus, it was plainly unreasonable for the search of the home to continue for as long as it did.

5. Defendants are not entitled to qualified immunity because they violated clearly established law

The Fourth Amendment prohibits unreasonable searches and seizures which means that an officer must act reasonably in executing a search warrant. *United States v. Wood*, 6 F. Supp. 2d 1213, 1228, 1998 U.S. Dist. LEXIS 6139, *43 (D. Kan. 1998) (citing *United States v. Hargus*, 128 F.3d 1358, 1363 (10th Cir. 1997), cert. denied, 118 S. Ct. 1526, 140 L. Ed. 2d 677 (U.S. 1997)). Further, "[t]he Fourth Amendment requires that a search warrant describe with particularity the things to be seized in order to avoid a general exploratory rummaging of a person's belongings". *United States v. Mink*, 613 F.3d 995, 1010 (10th Cir. 2010) (citing *United States v. Campos*, 221 F.3d 1143, 1147 (10th Cir. 2000). "The particularity requirement was included in the Fourth Amendment as a response to the evils of general warrants" and "ensures that a search is confined in scope to particularly described evidence relating to a specific crime for which there is demonstrated probable cause. *Id.* (*citing Voss v. Bergsgaard*, 774 F.2d 402, 404 (10th Cir. 1985).

Contrary to Defendants' representation, the issue in question is not so narrowly defined. The inquiry is simple. Did the search exceed the scope of the particularity set out in the warrant? The answer is yes. As

set forth above, Defendants, in addition to searching for the specific items described in their warrant, also searched "for any kind of criminal activity that was involved in the house." Therefore, the Defendants' unauthorized expansion of the warrant violated the Plaintiffs' clearly established right to a reasonable search. For these reasons, the second prong of the qualified immunity test requiring law be clearly established is satisfied and the Defendants may not evade liability.

F. Use of Excessive Force (Count III)

1. Defendants' Liability

Defendants Burns, Blake, Cossairt, Farkes, Kilbey, Pfannenstiel, Reddin, Shoop, Smith and Vrabac are each liable for violating the Hartes' constitutional rights by using excessive force during the protracted 2½ hours during which they searched the Hartes' home. Defendants claim that Deputies Farkes, Kilbey, Shoop, Smith, and Vrabac cannot be held liable for their use of force because "they only had discretion over the type of firearm they carried and were entitled to rely on the other deputies' judgment and direction as to the 'garb' and 'tactics.'" This is a bizarre argument indeed, because at *all* times prior to and during the search, each officer had the ability to observe and consider the circumstances around him or her, and discretion – and duty, under the Fourth Amendment – to tailor their conduct to what was reasonable under the facts presented them.

The entry team was an ad hoc assemblage, apparently guided by no one person or plan. Kilbey, for example, exercised the discretion to bring an AR-15 into the Harte home, knowing that children were expected to be present; certainly, this choice added to the coercive, intimidating atmosphere of the search, and was not called for by any protocol or the circumstances he faced. Each member of the team is responsible for drawing his or her weapon and flooding the foyer of the Harte home. It would be apparent to any of them that the Harte house, with its modest yard and attached garage, was not large enough to justify 7 officers being used to effect entry – a show of force greater than was used for other residences targeted on April 20, 2012. Any of the officers surveying the scene after entry, faced with two adults who had submitted

immediately to the officers' control and two minor children who posed no threat, could have made the determination that it was not necessary for officer safety or any other legitimate law enforcement goal to continue to hold them in their living room under guard. Any of the officers had the opportunity to, for example, suggest that the children might be released to go to school. That none of them considered the reasonableness of their conduct, or modified their conduct as facts unfolded showing the Hartes were not a threat and not involved in a criminal undertaking, is proof of their liability.

Although they were not physically present, the conduct of Burns and Reddin also caused the use of excessive force: they did not properly investigate the Hartes, an investigation that would have shown there was no need to deploy seven armed deputies to the house to execute the search warrant. If the deputies, as Defendants claim, "had no reason to suspect the Plaintiffs did not pose an immediate threat, and thus had to prepare for the possibility they were," it is only because Burns and Reddin failed to initiate any meaningful pre-search investigation into the Hartes. Likewise, they authorized the search to begin at 7:30 on a school morning when children were suspected to be in the home, increasing the likelihood the children would encounter the armed officers' intimidating show of force.

2. Legal Standard

Well-settled law prohibits police officers from using excessive force to effect a search and seizure under the Fourth Amendment. *Graham v. Connor*, 490 U.S. 389, 396 (1989) (The test is one of "reasonableness," taking into account the circumstances of the interaction between the law enforcement officers and the citizen, particularly the extent of the intrusion on the individual's Fourth Amendment rights as balanced against the government's specific interests. *Tennessee v. Garner,* 471 U.S. 1, 8 (1985); *Allen v. Muskogee*, 119 F.3d 837, 840 (10th Cir. 1997). Ultimately, the court must ask whether the actual forced deployed comported with the "objectively reasonable" actions an officer would have taken "in light of the facts and circumstances." *Graham*, 490 U.S. at 397. In that analysis, the officer's subjective intent, whether evil or benign, makes no practical difference. *Id.* Reasonableness is judged from the vantage point of a reasonable

officer at the scene, including information possessed by the officers. *Weigel v. Broad*, 544 F.3d 1143, 1151-52 (10th Cir. 2001).

Factors such as the seriousness of the alleged crime and whether the suspect may pose a danger to the arresting officers or others if not immediately taken into custody inform the degree of force, up to and including use of deadly weapons, that law enforcement officers may constitutionally deploy to effect the seizure of an individual and to maintain custody of that person. *Garner*, 471 U.S. at 11-12; *Jiron v. City of Lakewood*, 392 F.3d 410, 414-15 (10th Cir. 2004). The courts also consider whether the law enforcement officers themselves bear some responsibility for creating circumstances requiring greater force than otherwise might have been necessary. *Jiron,* 392 F.3d at 415; *Sevier v. City of Lawrence,* 60 F.3d 695, 699 (10th Cir. 1995). Thus, "[t]he reasonableness of the use of force depends not only on whether the officers were in danger at the precise moment that they used force, but also on whether the officers' own 'reckless or deliberate conduct during the seizure unreasonably created the need to use such force.'" *Jiron,* 392 F.3d at 415 (quoting *Sevier*, 60 F.3d at 699).

Factual disputes on those points will preclude summary judgment for defendant law enforcement officers on constitutional claims of using excessive force. *See Allen*, 119 F.3d at 841. The Tenth Circuit has historically treated excessive force claims under §1983 as presenting fact-bound issues best left for juries to consider. *Buck v. City of Albuquerque*, 549 F.3d 1269, 1288 (10th Cir. 2008) (citations omitted).

3. Defendants' use of excessive force violated the Hartes' Fourth Amendment rights.

Contrary to Defendants' assertions, there need not be contact, verbal threats or physical injury to sustain an excessive force claim: what is needed is "patently unreasonable conduct." *Cortez v. McCauley*, 478 F.3d 1108, 1132 (10th Cir. 2007)(quoting *Martin v. Board of County Comm'rs*, 909 F.2d 402, 406 (10th Cir. 1990)). "Humiliation, embarrassment, and mental suffering" may suffice. *Id.* at 1131. However, "absence

of injury in the context of the totality of the circumstances may suggest the absence of excessive force." *Id.* at 1129.

The excessive force analysis is particularized, comparing the force used in the particular arrest/detention with the force that would be reasonably necessary to effect an arrest of the same person under the same circumstances. For example, in *Cortez*, the 10th Circuit found Rick Cortez—who was handcuffed painfully tightly and roughly pulled into a police car—had not been subjected to excessive force: Cortez was being investigated for a serious felony involving harm to a child, so police felt there was a need to act quickly to remove Rick from the house in case there were any other children there. *Cortez*, 478 F.3d at 1128-29. The *Cortez* Court determined that "[a] small amount of force … is permissible in effecting an arrest," and in this case "there was no evidence of an actual "physical or emotional injury" Cortez suffered that was "not *de minimis*." *Id.* However, the court found that Rick Cortez's co-plaintiff, Tina, was subjected to excessive force, *even though* she was treated much less forcefully and alleged no physical discomfort: police escorted her to their car by the arm, took her keys and locked her house, and locked her in the back of the patrol car for an hour. *Id.* at 1130-31. Ms. Cortez did not allege any pain or physical injuries – rather, she was "intimidated by the circumstances and the officers' show of force," which was sufficient, under the circumstances, to support her excessive force claim. *Id.* Unlike Mr. Cortez, Ms. Cortez was never a suspect, was unarmed, submitted immediately to the officers, and no reasonable officer would believe under the circumstances she posed a threat of physical danger or of destroying evidence. *Id.* at 1130. In the Court's opinion, "[n]o evidence suggests that this level of *intrusiveness* was warranted for officer safety concerns." *Id.* at 1130 (emphasis added). Similarly, in the present case, the officers used far more force than was required, in light of officer safety issues and the crime suspected, in their detention of the Hartes, and even if they did not sustain physical injuries, the *intrusiveness* of the search, with 7 law enforcement officers, guns at the ready, flooding the Hartes' foyer, was disproportionate in light of the facts the JCSO Defendants were presented with – it was "force far greater than that normally applied in police encounters with citizens."

Holland ex rel. Overdorff, 268 F.3d 1179, 1190. Our Fourth Amendment interests—which include our "sense of security and individual dignity"— are at their highest in the safety of our homes. *Id.* at 1195 (internal quotations omitted). Where children are involved, the situation "calls for even greater sensitivity to what may be justified or what may be excessive under all the circumstances." *Id.* at 1193.

The raid the Hartes experienced, in which deputies garbed in bulletproof vests and armed with a battering ram infiltrated their home and surrounded the outnumbered family, certainly represented an overwhelming show of force. The degree of force was additionally heightened because all of the officers were armed – 6 deputies carried Glocks that were drawn and at the "low ready," while one brandished an AR-15 – as this Court stated in *Holland*, "[t]he display of weapons ... inescapably involves the immediate threat of deadly force." 268 F.3d at 1192. Such a show of force must be – but in this case decidedly was not – objectively reasonable in light of the government's interests and the facts before the officers. Resistance or flight were not issues: Mr. Harte immediately opened the door to the deputies and submitted to them, lying on the floor; similarly, Mrs. Harte and the two children came downstairs and did exactly as they were directed, without resistance. Officer endangerment was not an issue: It would have been obvious to a reasonable officer that the children posed no threat. Bob Harte was shirtless and clearly unarmed, and there was no indication the officers had reason to believe Addie was armed. The crime the Hartes were suspected of, cultivating marijuana, was serious, but certainly nonviolent. Based on what the deputies knew at the time, for all seven of them to brandish weapons (including an assault rifle) as they flooded the Hartes' residence was not objectively reasonable. Because the deputies gained "immediate and unquestioned control of the situation," the justification for continuing to hold the Hartes – particularly their young children – captive in their living room, guarded by multiple deputies, "simply evaporated." *Id.* at 1197. Yet the JCSO deputies did not yield to the apparent circumstances, and continued their intrusion into the sanctity of the Hartes' home for 2½ hours. In circumstances similar to those the Hartes encountered, this Court in *Ealum v. Schirard*, 46 Fed.Appx. 587 (10th Cir. 2002) (unpublished), found excessive force where, while executing search for drugs,

a SWAT-style team "herded a grandmother and three minor children into the living room at gunpoint, despite an indication that any of the occupants were a threat[,]" conduct that was "unreasonable in light of the circumstances" and "violated the Fourth Amendment."

"At all times," the court in *Holland* cautioned, officers executing search warrants "must keep it clearly in mind that we are *not* at war with our own people." *Holland*, 268 F.3d at 1194-95. The Hartes were unreasonably held captive by armed officers; the family was cowed, intimidated, and to this day suffers from the trauma of the home invasion, which is certainly injury enough to support an excessive force claim.

4. The Defendants are not entitled to qualified immunity because their conduct violated clearly established law.

Clearly established law unquestionably establishes the right to be free from excessive force. *See Holland*, 268 F.3d at 1195-96. As the Supreme Court indicated in *Saucier*, the "relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. Defendants argue that absent case law that has held a search of 2½ hours, in which the individuals seized were not "touched, threatened, or held at gunpoint," there is no violation of a clearly established right. But this puts too fine a point on it: the question is whether holding the Hartes for 2 ½ hours, entering their home at 7:30 in the morning while children were present with drawn weapons (including an assault rifle) was *objectively reasonable under the circumstances that the Defendants were presented with* – for certainly, there are factual scenarios in which such conduct might be appropriate. The clearly established law is that the reasonableness of an officer's actions "depends both on whether the officers were in danger at the precise moment that they used force and on whether [the officer's] own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." *Tenorio v. Pitzer*, 2015 U.S. App. LEXIS 17540 at *10, 802 F.3d 1160 (10th Cir. 2015). Here, viewed in the light most favorable to the Hartes, there is ample evidence upon which the trier of fact might find the deputies' conduct was objectively unreasonable. With no criminal history or

history of violence, the Hartes posed little threat at the time the deputies entered the home; seven officers bearing seven firearms were far more than was necessary to gain entry to the house. Even if the Hartes had posed a potential threat at the time the deputies entered the home, within moments all of the Hartes had yielded to the deputies' show of authority and the situation was under control, obviating the need for the multiple deputies' continued level of force and degree of intrusion. For these reasons, this Court should not grant Defendants' qualified immunity relative to this claim.

G. FAILURE TO TRAIN (COUNT IV-*MONELL* CLAIMS)

1. BOCC is a proper party

Defendants stipulated to Plaintiffs more than two years ago that the "Board of Commissioners of the County of Johnson" is the correct legal identity of Johnson County, Kansas, as a defendant in a lawsuit. "Where Plaintiff names 'Johnson County, Kansas' the correct name of the defendant is the 'Board of Commissioners of the County of Johnson." Exh. 91, KORA Pleading, p. 5, fn 1 (emphasis added). Yet now they incorrectly argue that the BOCC is not a proper party in this 42 U.S.C. 1983 suit. *See* G.3, Doc. 46, pp. 46-47. The Defendants' argument does not warrant judgment in favor of the BOCC.

2. Kansas statutes empower county commissioners to 'be sued' in actions against the county itself

It is well established that a victim of constitutional violations committed by a local government through employees carrying out or laboring under that government's policies may sustain a suit for damages against that local government under 42 U.S.C. 1983. See Miller v. Maddox, 51 F. Supp. 2d 1176, 1193 (D. Kan. 1999) (citing *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 (1978)) (Congress intended local government units "to be included among those persons to whom § 1983 applies").

Under Kansas law, to sue a county, plaintiffs must sue the county commissioners. Each organized county within this state is a body corporate and politic and is empowered to sue and be sued. K.S.A. 19-101. The powers of the county are to be exercised by the board of county commissioners. K.S.A.

19-103. Among these is the power to examine and settle and allow all accounts chargeable against the county. K.S.A. 19-212. The board of county commissioners is the executive branch of county government and is the tribunal provided by law to examine and settle claims against the county. *Concannon v. Bd. of Cty. Comm'rs of Linn Cty.*, 6 Kan. App. 2d 20, 23, 626 P.2d 798, 800 (1981) (citations omitted, emphasis added); *see also* K.S.A. 19-212 ("Powers of board of commissioners. Sixth. To represent the county and have the care of the county property, and the management of the business and concerns of the county, in all cases where no other provision is made by law.")

Clearly, BOCC represents Johnson County and is empowered by statute to be sued for damages caused by the county, and it is therefore an appropriate Defendant in a lawsuit over the conduct of the Johnson County Sheriff's Office and its employees.

3. Plaintiffs may sue the BOCC for damages that arise from policies, practices, or customs set by another county official with 'final policymaking authority'

Defendants argue futilely that the BOCC cannot be sued in this case because the commissioners had no authority over the conduct of the sheriff's deputies whose acts violated the Plaintiffs' rights. However, under 42 U.S.C. 1983, a county government, represented by the commissioners, may be liable for damages attributable to decisions, policies, and customs adopted by any of the county's final government policy makers respecting an activity that causes a constitutional violation. "[A] municipality is responsible for both [1] actions taken by subordinate employees in conformance with preexisting official policies or customs and [2] actions taken by final policymakers, whose conduct can be no less described as the 'official policy' of a municipality." *Seifert v. Unified Gov't of Wyandotte Cty./Kansas City*, 779 F.3d 1141, 1159 (10th Cir. 2015) (quoting *Simmons v. Uintah Health Care Special Dist.*, 506 F.3d 1281, 1284 (10th Cir. 2007)). Whether a local government official has final policymaking authority is a question of state law. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 470 (1986).

Looking to Kansas law, the Defendants declare, and the Plaintiffs agree, that Sheriff Frank Denning had final decision-making authority over the Johnson County Sheriff's Department. "His official acts, conduct, and function with respect to the management and administration of law enforcement operations of his deputies are simply not subject to any review by the BOCC." Doc. 286, pp. 46-47. This is correct, but unhelpful to the BOCC because the board represents Johnson County, which is liable for the county sheriff's actions and policies. *See Seifert*, 779 F.3d at 1159 (Sheriff is final policy maker, responsible for conduct of undersheriff and deputies under Kan. Stat. Ann. §§ 19–805 (West 2008), and subjects county government to potential liability.). Adopting the Defendants' view would leave aggrieved Kansans with no damages remedy from a county government whose law enforcement agency violated constitutional rights. This is because a sheriff's department does not have the capacity to be sued. *Creamer v. Ellis Co. Sheriff Dept.*, 2009 WL 1870872 at *5 ("the Kansas legislature has not expressly nor impliedly provided a county sheriff's department with the capacity to be sued"), and it cannot appropriate funds to pay a judgment or settlement. The BOCC can, so it is a properly named party.

Defendants' deployment *of Lee v. Wyandotte Cty.*, Kan., 586 F. Supp. 236, 241 (D. Kan. 1984), in a string cite is perplexing because Lee presents a strong precedent to deny Defendants' motion.

> Because defendant Quinn, as sheriff of Wyandotte County, was an elected official "whose edicts or acts may fairly be said to represent official policy," it appears that the plaintiffs may be able to demonstrate the existence of the requisite "affirmative link" between the County and at least one of the alleged tortfeasors. Accordingly, defendant Wyandotte County is not entitled to summary judgment on this issue.

Lee v. Wyandotte Cty., 586 F. Supp. at 241.

This is not a case *like Marks v. Lyon Cty. Bd. of Cty. Comm'rs*, 590 F. Supp. 1129 (D. Kan. 1984), which Defendants cite for a theory that "K.S.A. §19-811 did not impose … liability upon county commissioners for the actions of deputies." Doc. 286, pp. 47. The *Marks* complaint failed because the plaintiff neglected to identify acts taken by the sheriff, deputies, or commissioners that caused violations of his constitutional rights,

and consequently the court could not discern a viable claim under § 1983. *Marks*, 590 F. Supp. at 1131-32, citing *Monell* generally.

Here, Plaintiffs' suit alleges and subsequent discovery shows that Johnson County's law enforcement agency and Sheriff Frank Denning, the final policy maker for the law enforcement agency, had policies, practices, customs, and procedures that operated to deprive the Hartes of their constitutional rights. "[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." Monell, 436 U.S. at 694.

Finally, this is not a case like *Estate of Belden v. Brown County*, Kansas, 46 Kan. App. 2d 247, 287 (2011), a Kansas state court case in which no *Monell* claim was adjudicated.

4. The BOCC, representing Johnson County, is liable for the policy-based actions of JCSO deputies that violated the Plaintiffs' constitutional rights

Johnson County, represented by Defendant BOCC, is liable in this case because the deputies' actions occurred pursuant to the official policies or customs endorsed by Johnson County Sheriff Frank Denning, a final policy maker for the county. "[A] municipality is responsible for … actions taken by subordinate employees in conformance with preexisting official policies or customs …" *Seifert*, 779 F.3d at 1159.

Plaintiffs have identified evidence of numerous policies or customs that caused the JCSO to violate Plaintiffs' rights, many of which Sheriff Frank Denning has admitted fell under his policy-making power, including:

- A policy of executing search warrants in reliance upon untrained personnel's interpretation of positive results from field chemical tests, with which the JCSO persuaded local judges to find "probable cause" sufficient to issue search warrants, in violation of the spirit of the law at K.S.A. 22-2902c(a)(1)(B), which bars the use of a positive field chemical test to establish probable cause at a preliminary hearing on drug charges

unless "the field test has been administered by a law enforcement officer trained in the use of such field test by a person certified by the manufacturer of that field test."

- A policy of deliberate ignorance regarding the widely known and long-stated warnings of field test kit manufacturers, scientists, and law enforcement experts regarding the likelihood that a marijuana field test kit will produce a false positive result for common substances such as caffeine, various spices, and other innocent materials.

- A policy of carrying out tactical raids without developing safety plans and without supervisory limits on the weaponry carried by deputies.

- A policy of carrying out tactical raids without planning to minimize the exposure of children to this dangerous and traumatic activity.

- A custom of allowing personnel to participate in tactical entries without having received training in tactical entries.

5. The BOCC, representing Johnson County, is liable for Frank Denning's failure to train deputies to avoid violations of constitutional rights

Johnson County, represented by Defendant BOCC, is also liable in this case because violations of the Plaintiffs' rights resulted from final policymaker Frank Dennings' decisions, particularly decisions not to provide adequate training to deputies in five areas: (1) the proper investigation of suspected drug crimes; (2) the identification of illicit substances, particularly marijuana plants and processed marijuana; (3) the proper use of field test kits for drugs and their reliability and limitations; (4) the establishment of probable cause to support a search warrant, conduct a search or make an arrest; and (5) the reasonable use of force, including the proper deployment of SWAT-style teams.

The "inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact[,]" because only when the failure to train "in a relevant respect" rises to that level can "such a shortcoming be

properly thought of as a city 'policy or custom' that is actionable" under *Monell*. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388-89 (1989) (emphasis added). The foreseeability of constitutional violations occurring during high-risk duties must be considered in evaluating whether a failure to train is actionable.

> [I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.

Id. at 389-90. Further, "the identified deficiency in a … training program must be closely related to the ultimate injury." *Id.*

To establish a local government's liability for inadequate police training in the use of force, a plaintiff must show: (1) officers exceeded constitutional limitations on the use of force; (2) the use of force arose under circumstances that constitute a usual and recurring situation with which police officers must deal; (3) inadequate training demonstrates a deliberate indifference on the part of the local government toward persons with whom the police officers come into contact; and (4) there is a direct causal link between the constitutional deprivation and the inadequate training. *Allen v. Muskogee, Oklahoma*, 119 F.3d 837, 841-42 (10th Cir. 1997) (citing *Zuchel v. City and County of Denver*, 997 F.2d 730, 734-35 (10th Cir. 1999)). The plaintiff need not show that "a pattern of constitutional violations ... put the City on notice that its training program is inadequate. Rather, evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, is sufficient to trigger municipal liability." *Id.* at 842.

No Supreme Court or Tenth Circuit failure-to-train cases requires the plaintiff to prove existence of a pervasive problem or that the lead policy maker for a law enforcement agency was personally aware of and chose to ignore the problem. Rather, the plaintiff must show that a policymaker was deliberately indifferent. *Brown v. Gray*, 227 F.3d 1278, 1289 (10th Cir. 2000).

Here, the Johnson County Defendants cling to a position that the Harte incident arose unexpectedly from a very successful, proven investigative pattern that had led to many successful drug arrests without prior constitutional violations. Even if that is true, it doesn't matter: the JCSO's (foreseeable) violation of the Hartes' rights alone suffices because investigating possible drug manufacture/sale/cultivation/possession was a routine part of the DPU's job – in fact, other than providing security for events like Olathe Settlers' Day, this was the DPU's thing, the task, according to Reddin, they started having "withdrawals" from when they didn't do it often enough. Visually identifying and field testing suspected controlled substances was, as a necessary corollary, a routine part of their job, as was developing probable cause, applying for search warrants, and executing search warrants. Annual reports from Johnson County and the Sheriff's Office indicate they executed 15 drug search warrants in 2010 and 25 in 2011 – this is not a once-in-a-blue-moon kind of activity.

Executing a search warrant and finding evidence of nothing is not unusual, as common sense would suggest and Farkes made clear in his deposition:

> Q: Was there anything about that situation [at the Hartes'] that seemed unusual to you, that you are at a search location and there is absolutely no evidence of anything?
> A: No.
> Q: Why is that not unusual?
> A: People get tipped off and move their stuff, and grow operation could have been done at another location. Variety of reasons.

Exh. 15. Farkes depo at p. 149.

Clearly, officers on occasion execute a warrant and find nothing criminal, and thus should be trained about when and how probable cause dissipates and a search/arrest should be terminated without violating the target's constitutional rights. Further, their training should tell them that when they execute a search and find nothing, it often means there really is nothing criminal afoot – it does not necessarily mean that the target was tipped off and moved his grow, or that the target has a particularly effective means of concealing a grow.

Of course, officers should also be properly trained in what establishes probable cause initially, leading to the related issues of field test kits and marijuana identification. The unconstitutional search of the Hartes was a "highly predictable consequence" of the lack of training the JCSO deputies received regarding field testing kits and visual identification of marijuana – possibly the most common drug of abuse – which are two specific skills police officers need to handle common, frequently recurring situations such as car stops and trash pulls. Deputy Blake, for example, acknowledged having used the KN reagent pouch test alone "hundreds of times" during his time at the JCSO. (Blake depo at p. 197). Any test used with such regularity requires training, as the JCSO and County must have had notice of, given that K.S.A. 22-2902c – enacted since 2004 – bars use of field test results in a preliminary hearing unless the test was administered by a law enforcement officer trained by an instructor certified by the test's manufacturer.

The deputies' training was clearly inadequate as to both issues – none of the deponents professed awareness of the possibility of false positive results prior to April 20, 2012, and though they were familiar with and parroted that the field test results were "presumptive," they clearly did not know what that term meant. Deputy Farkes, who had a better sense of the visual recognition of marijuana than most of the deputies, described a marijuana plant as "a stalk with leaves," and said the "distinctive features" of the plant are that "generally there is five or seven leaves, [and] jagged edges." Sgt. Wingo's training did not cover visual identification of marijuana plants. Reddin considered himself to be "on solid ground" and comfortable visually identifying something as marijuana "if I had the entire leaf," which he described as having serrated edges, "jagged edges" in a "fairly regular" pattern. Blake, who didn't recall exactly how or when he had been trained to recognize marijuana visually, described the distinctive botanical characteristics of raw marijuana as "green leafy vegetation with stems, you may have seeds or buds" and that had an odor. Moreover, as we know, Burns relied on YouTube videos to train himself in identifying marijuana that had been processed to extract THC. The deputies' training did not equip them to identify marijuana visually.

Finally, the failure to train the JCSO Defendants is causally linked to the violation(s) suffered by the Hartes. A sighting at a hydroponics store, in and of itself, is not enough to establish probable cause for a search warrant: Judge Ruddick agreed that leaving a hydroponics store with a purchase "wouldn't be significant to me standing alone" in determining whether there was probable cause to search. As the deponents testified, the expectation was that they had to additionally have two trash pulls with positive field tests. But for the misidentification of the vegetation in the Hartes' trash as marijuana, the JCSO had nothing else establishing probable cause – unlike other cases, the trash contained no additional evidence of cultivation, sale, or even personal use of the drug. But for that visual misidentification, they would not even have attempted to field test anything. But for deputies' use of an unreliable field test that they had been inadequately trained to administer – and which the manufacturers themselves indicate is not alone sufficient to establish probable cause – they would not have had facts sufficient to support a search warrant application. They would have had to either (a) develop additional investigative facts through investigation or seek consent to search. As Reddin testified, their practice was "[i]f we couldn't get what we needed to get into the house [with a warrant], we would go do a knock and talk, just chat with them." (Reddin depo p. 188). Without those field test results, the officers didn't have "what we needed to get in" and would have had to resort to a knock-and-talk. This would have completely prevented the Hartes' rights ever being violated.

The proof of this lies in the comparison of the 2011 investigation of suspected marijuana cultivation at 1212 Loula to that of the Hartes. In that case, a car registered to the Loula address was spotted by Denton and Wingo at the Green Circle on a single occasion. Deputies conducted two trash pulls, both of which yielded negative results. As a result, Deputies Denton and Shoop conducted a knock and talk, got consent to search, and were able to close the case without incident when they found nothing illegal. This is what – at most – should have happened to the Hartes. Similarly, Bob was spotted at the Green Circle on one occasion; two trash pulls were conducted which should have yielded negative results (but for deputies' misidentification of what was plainly not marijuana as marijuana, and their use of a field test with a high false positive rate and

the results of which we now know they likely either misinterpreted or flat out lied about). The Hartes and the Loula residents were similarly situated, and had adequately trained officers searched and tested the Hartes' trash, they would have taken no more intrusive action than a knock-and-talk and consent search – if they even elected to proceed that far before closing the investigation.

In *Olsen v. Layton Hills Mall*, the 10th Circuit reversed the district court's grant of summary judgment to Davis County where the county jail's staff had no training on OCD and took away Olsen's medication even though he told them he needed it and was having a panic attack (escalated in part because he was required to take off his shoes and socks and they disregarded his concerns about cleanliness when fingerprinting him): "Given the frequency of the disorder, Davis County's scant procedures on dealing with mental illness and the prebooking officers' apparent ignorance to his requests for medication, a violation of federal rights is quite possibly a 'plainly obvious' consequence of Davis County's failure to train its prebooking officers to address the symptoms [of OCD]." 312 F.3d 1304, 1320 (10th Cir. 2002). If a county can be liable for failing to train jail staff to recognize the symptoms of OCD – which, according to the Olsen decision, "occurs in more than 2 percent of the population" – then failure to train deputies how to visually identify marijuana, which probably accounts for a majority of the controlled substances they routinely encounter, and how to properly conduct, interpret, and rely on field testing kits must be an inadequacy that would obviously, inevitably lead to the violation of some citizens' rights.

H. PLAINTIFF'S STATE LAW CLAIMS

1. Trespass

Plaintiffs' Second Amended Complaint states a cause of action for intentional trespass under Kansas state law. (Petition at ¶ 129). "There are two elements to the tort of trespass. The actor must have been (1) intentionally (2) on the property of another." *AMOCO Prod. Co. v. Hugoton Energy Corp.*, 11 F. Supp. 2d 1270 (D. Kan. 1988) (applying Kansas law) (citing *United Proteins, Inc., v. Farmland Indus., Inc.*, 259 Kan. 725, 729-30, 915 P.2d 80, 83 (1996)). "The intention required to make the actor liable for trespass is an

intention to enter upon the particular piece of land in question, irrespective of whether the actor knows or should know that he is not entitled to enter." *United Proteins*, 259 Kan. at 730 (citing Am. Jur. 2nd, Trespass, § 29).

Plaintiffs have adduced sufficient facts to withstand Defendants' Motion for Summary Judgment. Defendants admit they were intentionally on Plaintiffs' property. (*See* County Defendants' Answer to Plaintiffs' Second Amended Complaint at*, inter alia,* ¶¶ 38, 39, 87, and 99). Defendants' Motion only asserts a defense of privilege or immunity. Immunity is an affirmative defense which Defendants must plead and prove. *Gomez v. Toledo*, 446 U.S. 635, 641 (1980); *Alvarado v. Dodge City*, 10 Kan. App. 2d 363, 702 P.2d 935 (1985). In the present case, Defendants have not proven this affirmative defense where they acknowledge the lack of "any Kansas case on point." (Defendants' Memo at p. 62).

To support their Motion, Defendants resort to misquoting *Pagel v. Burlington Northern Santa Fe Ry. Co.* 316 F. Supp. 2d 984, 988-89 (D. Kan. 2004) (applying Kansas law).

Defendants' assertion of the holding in Pagel (Memo at p. 61)	*Actual quote from Pagel*
"To support their trespass claim, Plaintiffs must show defendants intentionally entered or remained upon their property without a privilege or justification."	"Under Kansas law, to establish a claim for trespass, a plaintiff must prove that defendants . . . enter[ed] or remain[ed] upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise."

Defendants' Motion for Summary Judgment is based on their erroneous reading, application, and pronouncement of *Pagel.* Plaintiffs need only establish that Defendants entered upon Plaintiffs land without Plaintiffs' consent. *See also Riddle Quarries, Inc. v. Thompson*, 177 Kan. 307, 311, 279 P.2d 266 (1955). Defendants may argue that they have a privilege, but not just any alleged privilege will do. Only a privilege created by the Plaintiffs' consent is a defense to trespass.

"Consent is, of course, an absolute defense to an action for trespass provided the consent is given by the possessor of the land or one competent and authorized to give such consent and provided further

that the acts of the party accused of the trespass do not exceed, or are not in conflict with, the purposes for which such consent was given.' *Belluomo v. Kake TV & Radio, Inc.*, 3 Kan. App. 2d 461, 596 P.2d 832 (Kan. Ct. App. 1979) (quoting *Fletcher v. Florida Publishing Co.*, 319 So. 2d 100, 104 (Fla. App. 1975) (emphasis added).

a. Privilege for warrant exception

Defendants may attempt to argue that privilege may be "otherwise" established (i.e., established by means other than Plaintiffs' consent). The problem, of course, is that the alleged "warrant exception" does not entitle Defendants to Summary Judgment.

In *Waller v. City of Middletown*, a case cited by Defendants, police officers claimed a right to summary judgment based on their alleged entitlement to immunity for entering the plaintiff's residence. The court disagreed with the officers and held that summary judgment was improper. 50 F. Supp. 3d 171, 197 (D. Conn. 2014). The court in *Waller* noted the general proposition that police officers who enter private property in the performance of official duties are generally not considered trespassers. However, the court held summary judgment was improper where genuine issues of material facts as to whether the police officers exceeded the scope of a protective sweep when they damaged plaintiff's personal effects. *Id.* The court also held that summary judgment was improper, and the police officers were not entitled to immunity, where there were genuine issues of fact "concerning whether the actions of [the police officers] were malicious or wanton [and, therefore,] imply conduct outside the scope of official police business." *Id.* at 197-198. Wantonness and maliciousness are questions of fact "'that cannot be resolved on a motion for summary judgment'." *Id.* at 183 (quoting *Notice v. Koshes*, 386 F. Supp. 2d 23, 27 (D. Conn. 2005)); s*ee also Koller v. Hilderbrand*, 933 F. Supp. 2d 272, 279-80 (D. Conn. 2013). Clearly, *Waller* is not as helpful as Defendants had hoped. Instead, *Waller* stands for the proposition that summary judgment in cases like the one *sub judice* is improper and a jury is entitled to consider the actions of the police officers.

Similarly, in *Voskerchian v. United States*, the Defendants cite only dicta and, had they read closer, would have noted that summary judgment in the present case is improper. 1999 WL 66709, at *4 (W.D.N.Y. 1999). In *Voskerchian*, the court refused to dismiss the plaintiff's trespass claim against certain police officers because factors such as reasonableness, consent, probable cause, and exigent circumstances cannot be decided as a matter of law. *Id.* at *18-21. Furthermore, the *Voskerchian* case cited to cases holding that police officers' privilege is limited to constitutional searches and seizures and does not extend to searches executed pursuant to an allegedly invalid warrant. *Id* at * 13 (citing *Jericho Corp. v. Elias*, 559 N.Y.S.2d 358, 361 (App. Div. 2nd Dept. 1990) and *People v. Johnson*, 66 N.Y.2d 398, 414 (1985)). The final case cited by Defendants, *Cormier v. Kansas Dep't of Revenue*, is inapposite. 235 P.3d 1268 (Kan. Ct. App. 2010). *Cormier* involved a challenge to a fine imposed by the Department of Revenue for sale of alcohol to a minor and the court considered criminal trespass and controlled-buy procedures that were statutorily authorized. The Court did not consider intentional trespass or search warrant-based privilege.

Defendants' reliance on the above-cited cases is predicated on the erroneous assumption that "Deputy Burns obtained a valid warrant based upon probable cause" which "justified all officers' entry onto the Plaintiffs' property." (Defendants' Memo at p. 63). Defendants assumptions are not justified as the foregoing cases – cases cited by Defendants – make clear and for the reasons articulated above in Section D, *supra*. These are jury questions, not issues to be decided as a matter of law.

b. Immunity under the discretionary function exemption of the Kansas Tort Claims Act; K.S.A. § 75-6104(e)

Defendants next argue that they are entitled to summary judgment based on the discretionary function exemption of the Kansas Tort Claims Act. "Under the KTCA, liability is the rule, and the exceptions granting immunity are to be narrowly construed." *Estate of Belden v. Brown County*, 46 Kan. App. 2d 247, 261 P.3d 943 (2011). Defendants bear the burden of establishing that they are entitled to any of the exceptions to liability set forth in the Act. *Woodruff v. City of Ottawa*, 263 Kan. 557, 563, 951 P.2d 953 (Kan.

1997). Defendants have failed to meet that burden where their *entire* argument is based on the conclusory statement that "[t]he officers' search of Plaintiff's residence and their decision to continue the search after initially finding the vegetable garden was a discretionary act." (Defendants' Memo at p. 64).

In support of their Motion, Defendants cite to decisions which have little, if any, application to this case. Defendants cite to *Estate of Belden*, 46 Kan. App. 2d 247 and *Woodruff,* 263 Kan. 557 for the proposition that nonsupervisory personnel may engage in discretionary functions. Defendants cite to other cases to bolster their argument that whether a given individual has exercised discretion depends on multiple factors and the totality of the circumstances. *See Carpenter v. Johnson*, 231Kan. 783 and *Mitchell v. Unified Government of Wyandotte County/Kansas City*, 96 P.3d 695, 2004 WL 1965583 (Kan. 2004) (unpublished). Finally, Defendants, for unknown reasons, cite to *Robertson v. City of Topeka*, 231 Kan. 358, 644 P.2d 458 (1982), a case addressing liability under K.S.A. § 75-6104(d), *not* K.S.A. § 75-6104(e), the latter being the statute which Defendants claim bless them with immunity.

What Defendants have not discussed is the law, as applied to the facts of this case which would entitle them to judgment as a matter of law. "The discretionary element in [K.S.A. § 75-6104(e)] is crucial to resolution of the issue." *Carpenter v. Johnson*, 231 Kan. 783, 784, 649 P.2d 400 (1982). Resolution of whether specific actions were discretionary as contemplated by the statute requires an analysis of statutory requirements, manuals, policies, and procedures of the governmental entity. *Id.* Choosing between taking an action and refusing to take an action does not invoke discretionary function immunity. Estate of Belden, 46 Kan. App. 2d at 291. Instead, discretionary function immunity under the KTCA "must involve some element of policy formulation." *Kansas State Bank & Trust Co. v. Specialized Transportation Services, Inc.*, 249 Kan. 348, 365, 819 P.2d 587 (1991).

All the cases to which Defendants cite may very well stand for the propositions for which Defendants claim, but that is rather meaningless. With respect to the trespass claim, Defendants have not introduced a single piece of evidence which addresses how the officers *in this case* engaged in policy formulation and why

specific decisions would invoke privilege. Defendants have not discussed any statutes, policies, procedures, or manuals *in this case* which point to the exercise of discretion so as to warrant immunity. Nor have Defendants discussed how the alleged immunity applies to intentional trespass. Defendants have simply failed to produce a shred of evidence on which to base the narrowly construed grant of immunity.

c. *Good faith or quasi-judicial immunity*

Again, Defendants' citations to general rules, without discussing how or why these general rules apply to the instant case, do not rise to the level necessary for a Motion for Summary Judgment. For example, Defendants cite to *Cunningham v. Blythe*, for the general proposition that individuals acting in quasi-judicial capacities may be entitled to quasi-judicial immunity. 155 Kan. 689, 127 P.2d 489 (1942). While this case may provide a good starting point for an analysis, it cannot, and does not, resolve the case *sub judice*. Defendants also cite to *Moss v. Kopp*, a case applying Utah law, and claim it stands for the rule of law that police officers executing a facially valid court order enjoy the same immunity as judges when faced with a § 1983 action. 559 F.3d 1155 (10th Cir. 2009). First, Defendants omit from their presentation what the *Moss* court wrote next: "However, we have never held that 'the unquestioning execution of a judicial directive may never provide a basis for liability against a state officer.' . . . Rather, there are limits to how unlawful an order can be and still immunize the officer executing it." *Id.* at 1163. Second, the decision in *Moss* is not binding on this Court. Third, the cause of action under scrutiny (Count V) alleges intentional trespass in violation of Kansas law, not a § 1983 action which is addressed *supra*.

If Defendants want the benefit of quasi-judicial immunity, they are obligated to clearly establish the law (not just misleading cut and paste language from cases) and cogently explain how the facts *in this case* apply to the law. Defendants have done neither with respect to any defense they assert (privilege, discretionary function, and quasi-official immunity). As this Court well knows, it is Defendants burden to establish the right to judgment as a matter of law. Defendants have not met this burden and, with respect to Plaintiffs' cause of action for trespass, Defendants' Motion for Summary Judgment must be denied.

2. Assault

Plaintiffs' Second Amended Complaint states a cause of action for assault under Kansas state law. (Petition at Count VI, ¶¶ 133-136). "An assault is an intentional threat or attempt, coupled with apparent ability, to do bodily harm to another, resulting in immediate apprehension of bodily harm. No bodily contact is necessary." *Smith v. Welch*, 265 Kan. 868, 876, 967 P.2d 727 (citing *Taiwo v. Vu*, 249 Kan. 585, 596, 822 P.2d 1024 (1991)). Defendants suggest that no assault occurred because "no Plaintiff was touched and no deputy pointed a gun at any Plaintiff." (Defendants' Memo at p. 66). This, however, is not the test for assault.

Defendants further suggest that, even though they arrived at Plaintiffs' front door with a battering ram (Defendants' Answer to Plaintiffs' Second Amended Complaint at ¶ 38), the police officers apparently merely casually sauntered into the Hartes' home with their harmless "un-holstered weapons." (Defendants' Memo at p. 66). To the contrary, Plaintiffs have adduced evidence that this was a "raid" in every sense of the word with Defendants brandishing deadly weapons and striking fear in the hearts of every member of the Harte family. Defendants' narrow focus ignores the shock and fear the entire Harte family felt when a group of raid-garbed Sheriff's deputies, all of whom had their hands on their Glocks, ready to be drawn, and one toting an AR-15 assault rifle entered the Hartes' home without warning. The family was then held hostage while this group of armed officers searched every inch of their home. Resolution of the question of whether Plaintiffs' subjective fears of bodily harm were objectively reasonable is a jury determination.

Defendants' reliance on *Hinojosa v. Terrell*, 834 F.2d 1223 (5th Cir. 1988) is misplaced. In *Hinojosa*, the court of appeals considered the matter *after* a jury verdict and *after* all facts were in evidence. Contrary to Defendants' assertion, *Hinojosa* actually supports the denial of summary judgment and encourages the jury resolution of the factual discrepancies.

Defendants' argument then continues that, even if an assault occurred, they were either a) were justified in assaulting Plaintiffs because they are police officers; or b) they are immune from liability for their

assault of Plaintiffs because they are police officers. Neither defense is appropriate under the facts of this case.

a. *Defendants have no privilege attendant their execution of the search warrant*

Defendants claim that, even if there was an assault, they have the absolute privilege to engage in assaultive conduct and cite to *Hutchison v. West Virginia State Police* as setting forth this standard. 731 F. Supp. 521, 547–48 (2010). What *Hutchison* actually says, is that "[a]n activity that would otherwise subject a person to liability in tort for assault and battery, however, does not constitute tortious conduct IF the actor is privileged to engage in such conduct." *Id.* at 547. Hutchison does not say that there is a privilege, just that there may be a defense IF there is a privilege. This is not a trivial distinction as made clear by the Hutchison decision in which the court, after considering the totality of the circumstances, found that there were genuine issues of material fact regarding the assault claim to deny defendant's summary judgment motion and to proceed to a jury trial. *Id.* at 548. Defendants' reliance on the other cases to which they cite are similarly misplaced because the cases found facts that supported probable cause and reasonableness – fact issues which cannot be presumed in this case and must be decided by a jury. *See Muehler v. Mena*, 544 U.S. 93 (2005); *Michigan v. Summers*, 452 U.S. 692 (1981).

b. The Defendant deputies are not entitled to immunity under the discretionary function exemption of the KTCA.

As discussed, *supra*, in § H.1.b., Defendants have not met their burden of establishing that the narrowly construed "discretionary function" is applicable to their actions. *Estate of Belden,* 46 Kan. App. 2d 247; *Woodruff*, 263 Kan. 557. Defendants have produced no "law" (i.e., statutes, manuals, policies, or procedures) and no facts addressing how these officers engaged in "policy formulation" that could even remotely point to the exercise of discretion so as to warrant immunity under the KTCA. *Carpenter*, 231 Kan. 783; *Kansas State Bank & Trust Co.*, 249 Kan. 348.

For the foregoing reasons, Defendants' Motion for Summary Judgment must be denied with respect to Plaintiffs' assault claims.

3. False Arrest and Imprisonment

Plaintiffs' Second Amended Complaint states a cause of action for false arrest and imprisonment under Kansas state law. (Count VII at ¶¶ 137-140). False arrest is the "restraint of the personal freedom of an individual without legal excuse by any words, acts, threats, or personal violence that under the circumstances the one being restrained fears to disregard." *Mendoza v. Reno County*, 235 Kan. 692, 695 (1984). "[N]egligent conduct by law enforcement officers which results in false arrest and consequent damages is a cause of action for false arrest and imprisonment." *Soto v. City of Bonner Springs*, 38 Kan. App. 2d 382, 385 (2007).

The Hartes (adults and children) were not merely detained, as Defendants seem to suggest, they were arrested without warrants. Generally, "the use of firearms, handcuffs, and other forceful techniques" distinguish an arrest from other types of seizure that do not require probable cause (i.e., consensual encounters, investigative stops), as they make the encounter "involuntary" and "highly intrusive." *Cortez v. McCauley*, 478 F.3d 1108, 1115-16 (10th Cir. 2007) (quoting *United States v. Melendez-Garcia*, 28 F.3d 1046, 1052 (10th Cir. 1994)). The well-armed SWAT team effectively arrested the Hartes when they forced Bob Harte to the floor, confined Addie Harte and the two children, and kept the Hartes surrounded by armed guards during the 2½ hour fruitless search. The deputies specifically told the Hartes that they were not free to leave, another hallmark of an arrest. Even if the detention may have been initially justified (highly suspect, to be sure), it quickly transformed into a warrantless arrest.

An officer may validly arrest a person without a warrant only when he has probable cause to believe the person committed a crime. *Id.* at 1115. Such probable cause arises "only when the *facts and circumstances within the officers' knowledge*, and of which they have *reasonably trustworthy* information, *are sufficient in themselves* to warrant a man of reasonable caution in the belief that an offense has been or is

being committed." *Cortez*, 478 F.3d at 1116 (quoting *United States v. Valenzuela*, 365 F.3d 892, 896 (10th Cir. 2004)) (emphasis added). Probable cause "is measured at the moment the arrest occurs," and the determination is based on the totality of the circumstances, keeping in mind that the officer "'may not close her or his eyes to facts that would help clarify the circumstances of the arrest. Reasonable avenues of investigation must be pursued especially when, as here, it is unclear whether a crime has taken place.'" *Cortez,* 478 F.3d at 1117 (quoting *BeVier v. Hucal*, 806 F.2d 123, 128 (7th Cir. 1996)).

Finally, the length of time during which the Harte family was unlawfully arrested further substantiates the imposition of liability on Defendants. *See United States v. Edwards*, 103 F.3d 90 (10th Cir. 1996). *Lundstrom v. Romero,* a Tenth Circuit case, parallels the Hartes' situation. 616 F.3d 1108 (10th Cir. 2010). In *Lundstrom*, officers responded to a 911 report that someone heard, but did not see, a woman yelling loudly and beating what sounded like a small child. When the officers arrived at the address where Lundstrom and his girlfriend Hibner lived, Lundstrom became hostile to police officers because he insisted there was no child there and slammed the door. The officers drew their weapons. Hibner left the house, was handcuffed and patted down, but officers asked her no questions relating to a child. Lundstrom eventually came out of the house with his hands up. He was handcuffed and remained locked in a police car for 30 to 45 minutes. The officers searched the house but found no child. The court found that both Lundstrom and Hibner had been unreasonably seized, noting that the "actions [officers] took were not reasonably related in scope to the investigation." *Id.* at 1123. Stressing "the lack of corroborating evidence," the court stated that "every fact presented to [the officers] since their arrival at the home indicated there was no ongoing emergency," and that Hibner and Lundstrom posed no safety threat. *Id.* at 1123-24. Moreover, the prolonged duration of the detention "add[ed] to the level of its unreasonableness," because "the breadth and length of a detention [even if justified at its inception] must be reasonably tailored to the legitimate law enforcement purposes to be served by it." *Id.* at 1125.

Under the 4th Amendment analysis for probable cause articulated above, a reasonable officer executing a warrant at the Hartes' residence would have known that they were sent into the home to locate a large-scale marijuana growing operation. Upon seeing that the hydroponic equipment was being used to grow legitimate, healthy, and certainly non-criminal, vegetables and when a cursory sweep of the home yielded no evidence of marijuana use, let alone cultivation, a reasonable, objective officer would have questioned the propriety of the search warrant and doubted that any crime had taken place at all. The officers were not entitled to "close their eyes" to the clarifying facts signaling their mistake and establishing the lack of any "ongoing emergency." At that point, it is doubtful they even had articulable facts sufficient to support a reasonable suspicion of illegal activity. Clearly, at the point the officers decided that they needed the assistance of narcotic-detecting canine to "sniff out" the major growing operation (if not sooner), there was no longer a particularized and objective factual basis for them to continue to holding the family under arrest. If a 45-minute arrest was unreasonable in *Lundstrom* when the evidence suggested to officers no crime was afoot, a 2½ hour arrest by officers displaying weapons must be unreasonable given the apparent lack of wrongdoing in the Hartes' home. Of course, the alternative justifications for arrest of officer safety and preventing the destruction of evidence were lacking because Mr. and Mrs. Harte (former CIA employees) and their two young children immediately submitted to the SWAT team's authority. *See also, supra*, the discussion regarding Excessive Force.

Defendants do not really dispute the Plaintiffs' contention that the Harte family was detained and arrested. Defendants simply argue that (i) they were privileged to detain Plaintiffs while the search warrant was being executed; and (ii) the officers are entitled to discretionary immunity under the Kansas Tort Claims Act. (Defendants' Memo at pp. 68-69).

a. Defendants were not privileged to detain Plaintiffs while the search warrant was being executed.

Apparently, Defendants believe that *Michigan v. Summers* holds that, any time there is a warrant, the police have the absolute right to detain, by any means and regardless of the show of force, the occupants of a house. 452 U.S. 692 (1981). This is not the holding in *Summers*. First, *Summers* involved a criminal defendant's assertion of unreasonable search and seizure under the Fourth Amendment, not a state law claim for false imprisonment or false arrest. Second, Summers recognizes the general rule that "every arrest and every seizure having the essential attributes of a formal arrest, is unreasonable unless it is supported by probable cause." *Id.* at 700. In order to determine if a case is controlled by this general rule, "it is necessary to examine both the character of the official intrusion and its justification." *Id.* at 701. When examining the intrusion in this case (involving a SWAT team, a battering ram, and assault rifles) in light of the alleged justification (one small purchase of an unknown item at a store selling hydroponic items and discarded tea leaves without any other evidence whatsoever) rises to the level of unreasonableness. It is only when the search warrant is founded on probable cause (i.e., there is justification) is there the implicit authority to detain the occupants of a premises. *Id.* at 705. Plaintiffs contend, and the facts support their contention, that the search warrant was not based on probable cause because the Defendants misrepresented the nature of the alleged evidence and failed to disclose relevant facts in support of the application for the warrant. Without probable case, any justification for the arrest or imprisonment disappears.

In *Howard v. United States*, the court dismissed actions against federal agents because the plaintiffs did not bring the action against the individual agents, not, as Defendants contend, because of an absolute right to detain in the presence of a search warrant regardless the deception employed in obtaining the warrant. Civ. A. No. 99-3865, 2000 WL 1272590, at *2 (E.D. Pa. Aug. 28, 2000). In *Cole v. United States* the Court noted that a cause of action may exist where important information from the statements in support of the search warrant or where the statements made in the application for the search warrant were either false (with deliberate knowledge of their falsity) or made with reckless disregard for the truth. 874 F. Supp. 1011, 1024 (D. Neb. 1995). Although summary judgment was granted in that case, it does not suggest that

summary judgment is appropriate where, as here, the Defendants obtained a search warrant through misrepresentation. Finally, Defendants' citation to *Hernandez v. Conde* has no application because it only addressed immunity in § 1983 actions, not state law claims for which Defendants seek immunity pursuant to the Kansas Tort Claims Act. 442 F. Supp. 2d 1141 (D. Kan. 2006).

b. Defendants are not entitled to immunity under the Discretionary Function Exemption of the KTCA

As with the other state law claims, Defendants assertion that their actions were "unquestionably discretionary functions" (Defendants' Memo at p. 69), is blatantly false. Whether an act is discretionary requires more than just the unsupported, self-serving declaration of the Defendants. "Under the KTCA, liability is the rule, and the exceptions granting immunity are to be narrowly construed." *Estate of Belden*, 46 Kan. App. 2d at 261. Defendants bear the burden of establishing that their actions fit squarely within the narrowly defined exceptions. *Id.*; *Woodruff,* 263 Kan. at 563. Defendants point to no facts whatsoever, much less apply the law to those facts, in support of its conclusory assertion. Summary Judgment should be denied.

4. Abuse of Process

Plaintiffs' Second Amended Complaint states a cause of action for abuse of process under Kansas state law. (Count VIII at ¶¶ 141-146). Under Kansas Law, abuse of process exists when "[o]ne uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed." *Bloom v. Arnold*, 45 Kan. App. 2d 225, 231, 248 P.3d 752 (2011) (following the Restatement (Second) of Torts § 682 (1977)). The legal process includes "'proceedings begun by a writ, warrant, summons, order or mandate.'" *Id.* (quoting *Robbins-Leavenworth Floor Covering, Inc. v. Leavenworth Nat'l Bank Trust Co.,* 229 Kan. 511, 514, 625 P.2d 494 (1981)) (emphasis added). It is undisputed that a warrant is the legal process at issue. *See* Defendants' Answer to Plaintiffs' Second Amended Complaint, ¶¶ 1 and 11 (Defendants admit that the search of Plaintiffs' home was conducted pursuant to a warrant). Therefore, this case falls squarely within the ambit of abuse of process.

The elements for the tort of abuse of process have been stated in number of different ways. However, the "essential elements" are: "the existence of an ulterior motive and an improper act in the regular prosecution of a proceeding" or "in the use of whatever process was employed." *Lindenman v. Umscheid*, 255 Kan. 610, 621, 875 P.2d 964 (1994)(citations omitted).

Defendants contend that this element requires Plaintiff to prove that the Defendants knowingly used "illegal or improper . . . process . . . for the purpose of harassing or causing hardship." (Defendants' Memo at pp. 70-71). Although there are some cases which contain the language to which Defendant cites, the cases do not change the fundamental element of abuse of process that requires the existence of an ulterior motive. Instead, these cases merely elucidated "ulterior motive." In other words, harassing or causing hardship may be an ulterior motive but that does not foreclose other ulterior motives. This interpretation is supported by case law.

a. and b. Defendants had an ulterior motive when they obtained and executed the search warrant.

In Defendants' subsections (i) and (ii), Defendants combine two elements that are properly addressed together. Defendants argue that there was no "knowingly illegal or improper use of process" (subsection (i)) and that there was no "purpose of harassing or causing hardship to Plaintiffs" (subsection (ii)). These are not separate discussions but are subsumed within the element requiring the existence of an ulterior motive. As previously discussed, the first element of the tort of abuse of process requires evidence that the Defendants had an ulterior motive. *Lindenman*, 255 Kan. 610; *Tappen*, 599 F.2d 376. That is, the motive which prompted Defendants to obtain and execute the search warrant was not to arrest Plaintiffs or to seize evidence of a crime. Plaintiffs are not required, as Defendants contend to establish that Defendants "made a knowingly illegal or improper use of any law enforcement process." (Defendants' Memo at p. 70). Although, even if this is the standard, the evidence still meets this higher burden.

Defendants pervert the holding in *Hall v. Hupp* to support Defendants argument that summary judgment is required. 523 Fed. App'x 521 (10th Cir. 2013). In support of its incorrect assumption that Plaintiffs must show Defendants' intent was to harass or cause undue hardship, Defendants argue that *Hall* requires dismissal even where a plaintiff contends that a search warrant was used as revenge and to harass and retaliate against him. (Defendants' Memo at p. 71). Defendants then invoke a "malice or wanton conduct" standard which is devoid of any legal support.

Hall is of no help to Defendants. In the present case there is substantial evidence that the Defendants used legal process (the search warrant), not because they suspected the Hartes of criminal activity, but because they wanted to conduct raids on April 20th (National Pot Smoking Day) to generate media attention. The jury may reasonably conclude, based on the evidence in this case, that Defendants applied for the search warrant because they needed the Hartes' home to be searched on April 20th because they needed searches to support their media campaign. These abhorrent motivations outweighed the existence of *any* evidence indicating criminal activity. Furthermore, Plaintiffs have satisfied a higher standard (the standard which Defendants argue must be met) that Defendants "made a knowingly illegal or improper use of any law enforcement process." (Defendants' Memo at p. 70). The foregoing evidence meets this standard because Defendants knew that a search of Plaintiffs' residence was not in furtherance of a legitimate criminal investigation. Instead, Defendants knew that, by suppressing evidence and being deceitful, they were obtaining and executing a search warrant based on the goal of 4/20 raids.

c. *Defendants are not entitled to immunity under the Discretionary Function Exemption of the KTCA*

As with the other state law claims, Defendants assertion that their actions were "unquestionably discretionary functions" (Defendants' Memo at p. 72), is blatantly false. Whether an act is discretionary requires more than just the unsupported, self-serving declaration of the Defendants. "Under the KTCA, liability is the rule, and the exceptions granting immunity are to be narrowly construed." *Estate of Belden*, 46 Kan.

App. 2d at 261. Defendants bear the burden of establishing that their actions fit squarely within the narrowly defined exceptions. *Id.*; *Woodruff,* 263 Kan. at 563. Defendants point to no facts whatsoever, much less apply the law to those facts, in support of its conclusory assertion. Summary Judgment should be denied.

5. Intentional Infliction of Emotional Distress

Plaintiffs' Second Amended Complaint states a cause of action for intentional infliction of emotional distress (IIED) under Kansas state law. (Count IX at ¶¶ 147-148). The four elements to this cause of action are:

> (1) [t]he conduct of the defendant must be intentional or in reckless disregard of the plaintiff; (2) the conduct must be extreme and outrageous; (3) there must be a causal connection between the defendant's conduct and the plaintiffs mental distress; and (4) the plaintiffs mental distress must be extreme and severe."

Reindl v. City of Leavenworth, Kansas, 443 F. Supp. 2d 1222, 1233 (D. Kan. 2006) (quoting *Nicol v. Auburn-Washburn USD 437,* 231 F.Supp.2d 1107, 1118 (D. Kan. 2002).

Defendants have wholly failed to address the extreme and outrageous character of their conduct as it relates to the IIED tort. Instead, they claim an entitlement to summary judgment merely by citing to language, often taken out of context, in several cases and then minimizing the extent of Plaintiffs' distress. (Defendants' Memo at p. 73). This falls far short of establishing the right to judgment as a matter of law, particularly where the evidence in this case establishes Defendants' extreme and outrageous conduct.

The only question this Court needs to consider is whether, based on the evidence, severe emotional distress can be found. *Taiwo v. Vu*, 249 Kan. 585, 594, 822 P.2d 1024 (1991) ("It is for the court to determine whether on the evidence severe emotional distress can be found; it is for the jury to determine whether, on the evidence, it has in fact existed.") (citing Restatement (Second) of Torts § 46(1)(1963)). When deciding if emotional distress can be found, the Court must consider "the extreme and outrageous character of the defendant's conduct [because it] is in itself important evidence that the distress has existed." *Id.*

In the present case, Defendants' extreme and outrageous conduct is evidence that distress can exist and did. Defendants obtained a search warrant, not because they suspected the Hartes of criminal activity, but because they wanted to conduct raids on April 20th (National Pot Smoking Day) to generate media attention. The Hartes were convenient, not criminal. Defendants were in no way concerned with what, to them, was apparently the trivial issues of innocence and lack of probable cause. Defendants, fully aware that they had no basis to suspect criminal activity, nevertheless obtained a search warrant by suppressing evidence and being deceitful, all in furtherance of their goal of 4/20 raids. Despite a dearth of evidence of criminal activity, and fully aware that the search warrant was improperly obtained, Defendants executed the search warrant early in the morning while the Hartes' two young children were home. Keeping in mind that Mr. and Mrs. Harte are former employees of the CIA, have no prior criminal record (or even suspicion of criminal activity), and have held top secret security clearance, the fully-clad SWAT team showed up at the Hartes' suburban home brandishing assault rifles and prepared to use a battering ram to gain access to the house. While brandishing their weapons, they ordered Mr. Harte, half-clothed, to the floor and then kept the family on the sofa for more than two hours while they waited for drug-detection dogs to arrive to sniff out the location of the apparently invisible marijuana cultivation operation. All of this was done based *solely* on Mr. Hartes purchase, eight months earlier, of a small item (Defendants did not know even what the item was) from a store to help his son with a science project, a store which Defendants suspected of may be selling items that some people may buy to grow marijuana.

In *Taiwo, v. Vu*, a jury awarded plaintiffs $20,000 on their claim of intentional infliction of emotional distress. 249 Kan. 585, 594, 822 P.2d 1024 (1991). On appeal, the defendants argued that there was no evidence that the plaintiffs suffered extreme and severe mental distress because neither plaintiff consulted a doctor or mental health professional, neither exhibited any physical symptom of extreme stress such as weight fluctuation, and neither missed any time from work because of stress. *Id*. The Court of Appeals noted that the defendant's "conduct by itself is important evidence that the [plaintiffs'] distress existed." *Id.*

Plaintiffs have the right to have the jury consider Defendants conduct, notwithstanding Defendants' trivializing Plaintiffs' emotional distress. The raid has affected the emotional health of the entire family and has resulted in members of the seeking medical treatment for the psychological and emotional damage they have suffered as a result of the raid. *See Ex. 67*, ¶¶ 17-22. Defendants' argue that Plaintiffs' emotional distress claims must fail because plaintiffs did not need "significant" medical treatment, Mrs. Harte has received pay raises, the family has been able to go on family vacations, and plaintiffs "launched a media campaign" a year and a half after the incident. (Defendants' Memo at pp. 73-74). However, these "facts," are irrelevant to this Court's function of finding that the outrageous conduct of Defendants, particularly in light of their positions of authority, could result in emotional distress. After this threshold finding, the issue must go to the jury. *Roberts v. Saylor*, 230 Kan. 289, 294, 637 P.2d 1175 (1981) (If "fact finders might differ as to whether plaintiff's emotional distress was genuine and so severe and extreme as to result in liability," then the jury must determine liability.); s*ee also Dawson v. Associates Financial Services, Co.*, 215 Kan. 814, 824 529 P.2d 104 (1974) (it is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, or whether it is necessarily so, and where reasonable men may differ, the question is for the jury to determine.").

For the foregoing reasons, Defendants have not met their burden of establishing the right to judgment as a matter of law and this Court should deny Defendants' Motion for Summary Judgment.

6. Invasion of Privacy (False Light)

Plaintiffs' Second Amended Complaint states a cause of action for false light/invasion of privacy under Kansas state law. (Count X at ¶¶ 149-154). "One who gives to another publicity which places him before the public in a false light of a kind highly offensive to a reasonable man, is subject to liability to the other for invasion of his privacy." *Rinsley v. Frydman,* 221 Kan. 297, 559 P.2d. 334 (1977). To establish a case for false light/invasion of privacy Plaintiffs must show (1) publication of some kind must be made to a

third party; (2) the publication must falsely represent the person; and (3) that representation must be highly offensive to a reasonable person. *Castleberry v. Boeing Co.,* 880 F. Supp. 1435, 1442 (D. Kan. 1995).

In support of their Motion for Summary Judgment, Defendants argue that nothing they reported was technically false, that there was no adequate publication, and there was no highly offensive representation. (Defendants' Memo at pp. 75-77).

a. Defendants' actions falsely represented the Plaintiffs.

With respect to this element, Plaintiffs are only required to adduce evidence that the publication (see discussion under (b, *infra*), "falsely represents" the Plaintiffs. Defendants feign innocence because they allegedly did not release Plaintiffs' name and only truthfully reported the collective results of the 4/20 raids. Defendants' reliance on the lack of technical falsity completely misses the point.

"In a false light privacy action, as in a defamation action, a court should not consider words or elements in isolation, but should view them in the context of the whole article to determine if they constitute an invasion of privacy." *Rinsley v. Brandt*, 700 F.2d 1304, 1310 (10th Cir. 1983). When viewed as a whole, the public and the Hartes' neighbors knew that, on 4/20 (a marijuana "holiday") law enforcement conducted numerous raids in the area, that a SWAT team and drug-sniffing dogs descended on the Hartes' home in the early morning on 4/20, that the raids were (according to the press conference) an unmitigated success and led to the confiscation of drugs and contraband. Although Defendant Wingo *knew* the April 20 raids were unsuccessful and expressed to Erickson that the press conference should be cancelled, the press conference went forward as scheduled. The "fact" that the media did not report that controlled substances were found at the Plaintiffs' specific address does not detract from the message given to the public that the drug raid on the Hartes' home was successful. Defendants cannot use "technical truth" as a shield where they have wielded the sword of defamation.

b. Defendants' argument of inadequate publication is without merit.

Defendants' arguments with respect to publication are two-fold, and neither argument is persuasive. First, Defendants claim that the publication was not sufficiently wide-spread. Second, Defendants argue that Mrs. Harte is the publisher.

In support of the first argument, Defendants cite to *Frye v. IBP, Inc.*, for the proposition that publication to a small group of individuals will not support a false light/invasion of privacy claim. 15 F. Supp. 2d 1032 (D. Kan. 1998). While *Frye* may provide some guidance on what *is not* publication, it is not enlightening about what *is* publication. For this we turn to *Ali v. Douglas Cable Communications*, 929 F. Supp. 1362 (D. Kan. 1996). Publication for the purpose of false light/invasion of privacy means "that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." *Id* at 1383. The communication at issue in this cases was made via press conferences and media coverage which unquestionably satisfies the publicity requirement.

> Any publication in a newspaper or magazine, even of small circulation, . . .or broadcast over the radio, or a statement made in an address to a large audience, is sufficient to give publicity within the meaning of the term as it is used in this Section.

Id. at 1383. It is undisputed that statements regarding the raids and the confiscation of drugs and contraband were made to a large audience – law enforcement held a press conference and statements were made on television. Although *Ali* does not reference publication via television, it is axiomatic that if radio broadcast suffices for publication, television broadcast meets the standard.

Plaintiffs have also satisfied the publication element through the presence of the police officers on the morning of the raid on the Harte's. In *Watson v. City of Kansas City*, the plaintiff filed a cause of action for, *inter alia*, false light and alleged that defendants had submitted a false application for a search warrant and then improperly executed the search warrant. 185 F. Supp. 2d 1191, 1209 (D. Kan. 2001). The court

considered an issue of first impression – whether the publication element of false light/invasion of privacy is met "where the public is informed by passing by the conduct in question." *Id*. at 1211. Although the plaintiff's complaint contained many factual allegations, the gist of the claim was that "defendants' actions in having a presence on plaintiffs' property [included armed officers] for extended periods of time . . . constitutes publication." The court concluded that the allegations were sufficient to withstand a motion to dismiss. Although *Watson* did not involve summary judgment, it is, nevertheless, instructive in the instant case where Plaintiffs have adduced evidence of Defendants' presence on their property for more than two hours, effectively publicizing to the entire neighborhood the armed raid.

Defendants' second argument is that summary judgment is proper because "Plaintiffs cannot prove they were not the source of the publication." (Defendants' Memo at p. 76). First, the publication made by Defendants' presence on Plaintiffs' property, as in *Watson*, conclusive refutes Defendants suggestion that Plaintiffs were a source of the publication. Second, Plaintiffs, having satisfied each element of the cause of action, do not need to disprove what amounts to nothing more than Defendants' pondering about "what ifs." This is particularly true where, as here, Defendants have not pled an affirmative defense to false light/invasion of privacy (*See* Defendants' Answer to Plaintiffs' Second Amended Complaint at pp. 16-17). In furtherance of its general speculation, Defendants claim that Mrs. Harte is perhaps responsible for the publication because she spoke to neighbors trying to minimize the effect of the events the morning of April 20th. Defendants cite to no authority in support of this supposition, likely because such a position is utterly ridiculous. Defendants cannot be rewarded for Plaintiffs attempt to protect their good reputation against the very defamation (false light) Defendants have caused. At best, Defendants may be able to present this information to a jury, but it does not support summary judgment.

c. *Defendants' actions cast Plaintiffs in a false light that was highly offensive and would be considered highly offensive to a reasonable person.*

Defendants' convoluted argument offers no cogent analysis discounting the offensiveness and irresponsibility of their actions. Instead, Defendants make the conclusory statement that "any representation was not a major one." (Defendants' Memo at p. 77).

In *Watson*, the court found plaintiff's allegation that defendants' plaintiff in a false light that was highly offensive to an ordinary person where plaintiff alleged that "defendants' actions, . . . 'would impute to those persons [viewing the actions] that such a show of force indicated a crime of substantial nature had taken place, [although this] was in fact false.'" 185 F. Supp. 2d at 1215. Similar evidence is presently before the Court.

In the present case, the Defendants needed houses to raid to bring attention to Operation Constant Gardener. Defendants' suppressed information and employed deceitful tactics to obtain a search warrant. Defendants executed the search warrant in a manner befitting the apprehension of America's Most Wanted. Defendants then held a press conference proclaiming the success of their raids. Defendants did not represent that Plaintiffs were guilty of rather benign offenses of, for example, speeding or jaywalking. Instead, without a scintilla of probable cause, Defendants misrepresented that Plaintiffs were guilty of narcotics offenses. So guilty and, apparently, so dangerous, that a SWAT team with assault rifles and a battering ram was required to carry out the search. So guilty that drug-sniffing dogs were needed to uncover the true extent of the marijuana grow operation. So guilty that they needed to be targeted during Operation Constant Gardener. So guilty that the public should applaud law enforcement for apprehending these blights on society. A reasonable person would be highly offended under these circumstances.

By claiming that "any representation was not a major one," Defendants have made it abundantly clear the enmity with which they hold individual rights, their lack of concern for the damage they inflict, and their willingness to flagrantly ignore the truth in exchange for publicity. Defendants' argument that "any representation was not a major one" is just that – an argument. It does not establish the lack of material facts

and does not warrant the grant of summary judgment. *See Mickelson v. New York Life Ins. Co.*, 460 F.3d 1304, 1310 (10th Cir. 2006); *Plotke v. White*, 405 F.3d 1092, 1093-94 (10th Cir. 2005).

For the foregoing reasons, Defendants have not met their burden of establishing the right to judgment as a matter of law and this Court should deny Defendants' Motion for Summary Judgment.

IV. Plaintiffs' Recoverable Attorneys' Fees and Punitive Damage Claims

a. Attorneys' Fees from the KORA Litigation

Because 42 U.S.C. § 1983 is silent with regard to damages, damages are to be determined in accordance with principles of the common-law of torts. *Memphis Community School Dist.,* 477 U.S. 299 (1986). Under Kansas law, attorneys' fees and expenses are recoverable under the Kansas Open Records Act (KORA). K.S.A. § 45-222(c), and these fees may be recovered in this case under 42 U.S.C. § 1988(b) which provides:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983… the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

Defendants contend that Plaintiffs cannot recover their KORA attorneys' fees and expenses, but the cases relied upon by Defendants do not support their position and Defendants argument fails to address the fee shifting provisions of 42 U.S.C. § 1988. For these reasons, Defendants argument fails.

b. Punitive Damages

Plaintiffs agree that punitive damages may not be imposed against municipalities or counties in a 42 U.S.C. § 1983 lawsuit. However, punitive damages may be awarded in a § 1983 action against an individual defendant when the defendant exhibits "reckless or callous disregard of, or indifference to, the rights or safety of others . . ." *Smith v. Wade*, 461 U.S. 30 (1983); *Hardeman v. City of Albuquerque*, 377 F.3d 1106, 1120-21 (10th Cir. 2004). Additionally, punitive damages are available under Kansas state law and permitted and

appropriate on each of Plaintiffs' state law claims. *See* K.S.A. § 75-6105(c); *Ultimate Chemical Co. v. Surface Transp. International, Inc*., 232 Kan. 727, 658 P.2d 1008 (1983) (punitive damages available for trespass [Plaintiffs' Count V]); *Gould v. Taco Bell*, 239 Kan. 564, 722 P.2d511 (1986) (punitive damages available for assault [Plaintiff's Count VI]); *Thurman v. Cundiff*, 2 Kan. App. 2d 406, 580 P.2d 893 (1978) (punitive damages available for false arrest and false imprisonment [Plaintiff's Count VII]); *Bethea v. Wells Fargo Bank, N.A*., 2011 U.S. Dist. LEXIS 72026, 2011 WL 2650580 (D. Kan. 2011) (punitive damages available for abuse of process [Plaintiff's Count VII]); *Taiwo v. Vu*, 249 Kan. 585, 822 P.2d 1024 (1991) (punitive damages available for intentional infliction of emotional distress [Plaintiff's Count IX]); *Thomson v. Stephan*, 696 F. Supp. 1407 (D. Kan 1988) and *Monroe v. Dorr, 221 Kan. 281*, 559 P.2d 322 (1977) (punitive damages available for false light/invasion of privacy [Plaintiff's Count X]).

While Plaintiffs believe that it is premature for the court to make a legal determination on whether the Plaintiff has presented a submissible case of punitive damages at this time, Plaintiffs firmly believe, for all of the reasons articulated above in greater detail, that they have presented sufficient evidence to show "reckless or callous disregard of, or indifference to, the rights or safety of others," given the absence of evidence to support probable cause to target the Hartes as marijuana growers; Defendants' reliance on a facially deficient warrant that relied on materially false and misleading statements; the unreasonable execution of the search warrant by Defendants; the continued search by Defendants of the Plaintiffs' home after probable cause had vanished; Defendants' use of excessive force due to their swat-style raid and tactics; the abundance of evidence demonstrating Defendants lack of training regarding 1) field test kits, 2) using reliable investigative techniques, 3) conducting drug investigations, 4) identifying marijuana, 5) finding probable cause to support a search warrant, and 6) the proper deployment of swat-style teams; Defendants' trespass on Plaintiffs' property, Defendants assault on Plaintiffs, Defendants false arrest of Plaintiffs; Defendants' intentional infliction of emotional distress on Plaintiffs; the evidence of establishing Defendants' abuse of process and the invasion of Plaintiffs' rights to privacy.

V. CONCLUSION

For all of the reasons articulated above, Defendants' Board of County Commissioners, Denning, Burns, Blake, Pfannenstiel, Coissart, Shoop, Smith, Farkes, Reddin, Denton, Kilbey and Vrabac's Motion for Summary Judgment and Memorandum in Support of Summary Judgment should be denied in its entirety.

MORGAN PILATE, LLC

By /s/Cheryl A. Pilate

Cheryl A. Pilate, Ks. Bar No.: 14601
Mark Kind, Ks. Bar No. 26735
926 Cherry Street
Kansas City, MO 64106
Ph: (816) 471-6694
Fax: (816) 472-3516
E-Mail: Cpilate@morganpilate.com

and

EMPLOYEE AND LABOR LAW GROUP OF KANSAS CITY, LLC

By /s/Kristi L. Kingston
Kristi L. Kingston, Ks. Bar No.: 19126
3699 SW Pryor Road
Lee's Summit, MO 64082
Ph: (816) 945-2122
Fax: (816) 945-2120
kristi@elgkc.com

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was electronically filed on this 17th day of November, 2015, with the Clerk of the Court via the CM/ECF system which automatically Transmits a Notice of Electronic Filing to the following Counsel:

Lawrence L. Ferree, III
Kirk T. Ridgway
Brett T. Runyon KS
Ferree, Bunn, Rundberg,
Radom, & Ridgeway, Chtd.
9393 W. 110th Street, Suite 200
Overland Park, Kansas 66212

and

P. Benjamin Cox
Office of the Missouri Attorney General – Kansas City
615 W. 13th Street, Suite 401
Kansas City, MO 64106-2829

/s/Cheryl A. Pilate
Attorney for Plaintiff