

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION**

JAMES A. SIMON, Individually and as)	
Father and Legal and Natural Guardian of)	Cause No. 1:09CV301 JTM
R.S.; ESTATE OF DENISE J. SIMON,)	
James Simon, Personal Representative of Estate,)	
Plaintiffs,)	
)	
v.)	
)	
SPECIAL AGENT PAUL MUSCHELL;)	
SPECIAL AGENT IN CHARGE ALVIN)	
PATTON; SPECIAL AGENT LINDA PORTER;)	
UNKNOWN AGENTS OF THE INTERNAL)	
REVENUE SERVICE; and UNKNOWN)	
INDIVIDUALS JOHN DOES AND)	
JANE DOES, each in his or her individual capacity,)	
Defendants.)	

ANSWER OF DEFENDANTS SPECIAL AGENT PAUL MUSCHELL, SPECIAL AGENT IN CHARGE ALVIN PATTON AND SPECIAL AGENT LINDA PORTER

Defendants Special Agent Paul Muschell, Special Agent in Charge Alvin Patton, and Special Agent Linda Porter hereby answer and respond to the Complaint filed in the above-captioned lawsuit by James A. Simon.¹

FIRST DEFENSE

Defendants have acquired knowledge through an ongoing Internal Revenue Service criminal investigation and grand jury proceeding, which they believe would aid materially in presenting their defenses in this lawsuit, including threshold immunity defenses, and in

¹ This answer is not made on behalf of “unknown agents of the Internal Revenue Service; and unknown individuals John Does and Jane Does” as described in the caption of the complaint, as no persons other than the three answering defendants have been served with a summons and a copy of the complaint in the action. The undersigned attorneys are authorized to represent only the named defendants.

providing more meaningful responses to the allegations of the complaint than what they are able to present below. Defendants are precluded from using this information, or even communicating it to their attorneys, by both grand jury secrecy and a determination by a delegate of the Secretary of the Treasury, pursuant to 26 U.S.C. § 6103(h)(4), that disclosure of taxpayer return information would seriously impair an ongoing criminal investigation. Accordingly, many of the responses below are required to be cautiously phrased as lacking knowledge which may legally be disclosed at this point.

Further, defendants anticipate that the United States, in vindication of the greater public interest in the precedence of criminal matters over civil litigation, will seek to stay this matter to allow the criminal investigation and proceeding to go forward unimpaired. Defendants expect to support such a motion because of their own disability to disclose, even to their attorneys, information material to their defense which constitutes an impediment to obtaining the representation of properly and fully informed counsel at the present time.

SECOND DEFENSE

Defendants are protected from suit by the doctrine of qualified immunity.

THIRD DEFENSE

Plaintiffs' Complaint fails to state a claim upon which relief can be granted.

FOURTH DEFENSE

The district court is without *in personam* jurisdiction over defendant Alvin Patton, if he is not a resident of Indiana.

PARTIES

1. Plaintiff, James A. Simon (“Simon”) is a citizen of the United States of America and was at all times relevant to this Complaint a resident of Allen County, State of Indiana.

ANSWER: Defendants admit the allegations of paragraph 1.

2. Denise J. Simon (the “Decedent”), prior to her death on November 9, 2007, was a citizen of the United States of America and a resident of Allen County, State of Indiana.

ANSWER: Defendants admit the allegations of paragraph 2.

3. Plaintiff, the Estate of Denise J. Simon (the “Estate”), is an estate that was opened in Allen County, Indiana on February 11, 2008 on behalf of Decedent. Simon, for purposes of this action, is the Personal Representative of the Estate.

ANSWER: Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 3.

4. R.S., a minor child of Decedent, is a citizen of the United States of America and was at all times relevant to this Complaint a resident of Allen County, State of Indiana. Simon is the father and legal guardian of R.S.

ANSWER: Defendants admit the allegations of paragraph 4.

5. Upon information and belief, defendant Paul Muschell (“Muschell”) is a Special Agent with the Internal Revenue Service (“IRS”), Criminal Investigation Division (the “CID”), and has been employed in this capacity since November 2001. In his employment with the IRS, Muschell is responsible for investigating possible Internal Revenue Code (the “IRC”) violations. Muschell is being sued in his individual capacity.

ANSWER: Defendants admit that Muschell is a Special Agent with the CID, and that his official duties include investigating possible violations of the Internal Revenue Code.

Answering further, defendant Muschell admits that and has been employed as a Special Agent of CID since November 2001, and defendants admit that plaintiffs have sued Muschell in his individual capacity.

6. Upon information and belief, Defendant Linda Porter (“Porter”) is a Special Agent with the IRS, responsible for executing search warrants on behalf of the IRS. Porter is being sued in her

individual capacity.

ANSWER: Defendants admit that defendant Porter is a Special Agent with the Internal Revenue Service (the “IRS”), that at the times relevant to this action, her official responsibilities included executing search warrants, and that plaintiffs have sued her in her individual capacity.

7. Upon information and belief, Defendant Alvin Patton (“Patton”) is the Special Agent in Charge of Defendant Muschell, responsible for the training and supervision of Muschell. Upon information and belief, Patton was in charge of Muschell at all relevant times. The Special Agent in Charge of Muschell is being sued in his individual capacity.

ANSWER: Defendants admit that defendant Patton is a Special Agent in Charge with the CID, that at the times relevant to this action, he supervised defendant Muschell as part of his official duties, and that plaintiffs have sued him in his individual capacity. Answering further, defendants state that the phrases “responsible for training and supervision” and “in charge of” are vague and, therefore, they lack knowledge or information sufficient to form a belief as to the truth of these allegations.

8. Defendants Unknown Agents of the Internal Revenue Service (“Unknown Agents”) are believed to be agents, in-house legal counsel or any other employee with the IRS involved in the process of supervising IRS personnel; reviewing and approving requests for search warrants; and/or responsible for processing and/or executing search warrants; and are involved in setting policies regarding search warrants; and/or in training IRS agents on behalf of the IRS. On or about November 2007, Unknown Agents were involved in the ultimate approval and the execution of a search warrant on Simon’s residence located at 10607 Monte Vista Court, Fort Wayne, Allen County, Indiana (“Simon Residence”). The number of Unknown Agents involved in the ultimate warrant approval and in the Search is unknown at this time. Unknown Agents are being sued in their individual capacities.

ANSWER: Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 8.

9. Unknown Individuals John Does and Jane Does (“Unknown Individuals”) are non-IRS employees whose identity is unknown and who provided information and/or otherwise influenced the IRS and/or any other governmental entity or participated in the process of reviewing and approving any request for a search warrant with regard to Simon and Decedent.

The names of the Unknown Individuals are unknown at this time. The number of Unknown Individuals is unknown at this time. Unknown Individuals are being sued in their individual capacities.

ANSWER: Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 9.

JURISDICTION AND VENUE

10. This is a civil action brought pursuant to *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

ANSWER: Defendants admit that plaintiffs purport to bring this action pursuant to *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and admit this Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

11. Venue is proper in the Northern District of Indiana, Fort Wayne Division under 28 U.S.C. § 1391(b), which allows for an action to be brought in the district where the Defendants reside or in which the cause of action arose. This cause of action arose in Allen County, State of Indiana, which is in the Northern District of Indiana.

ANSWER: Defendants admit that venue is properly laid in the Northern District of Indiana.

12. Defendants, other than Unknown Individuals, are employees of the IRS and their offices are located at 201 East Rudisill Boulevard, Fort Wayne, IN 46808, which is in the Northern District of Indiana, as well as locations at: 230 S. Dearborn Street, Chicago, IL 60604 and 500 N. Capitol Street, NW Washington DC, 20221.

ANSWER: Defendants admit that defendant Muschell's office is located at 201 East Rudisill Boulevard, Fort Wayne, IN 46808 and that defendant Patton's office is located at 230 S. Dearborn Street, Chicago, IL 60604, beyond the jurisdiction of this court. Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 12.

BACKGROUND

13. At least as early January 2007, the IRS began investigating Simon (the “Investigation”) for possible violations of the IRC.

ANSWER: Defendants are without legally disclosable knowledge or information sufficient to form or to state a belief as to the truth of the allegations of paragraph 13.

14. Upon information and belief, Unknown Individuals provided inaccurate and/or misleading information to the U.S. government and/or the IRS. Upon information and belief, the Unknown Individuals influenced the IRS to conduct an investigation which resulted in a search warrant being issued.

ANSWER: Defendants are without legally disclosable knowledge or information sufficient to form or to state a belief as to the truth of the allegations of paragraph 14.

15. Upon information and belief, the Investigation was performed by Muschell and other Unknown Agents.

ANSWER: Defendants admit that Muschell has been engaged in an investigation of Mr. and Mrs. Simon, and are without legally disclosable knowledge or information sufficient to form or to state a belief as to the truth of the remaining allegations of paragraph 15.

16. Upon information and belief, Muschell signed a probable cause affidavit (the “Affidavit”) on or about November 2, 2007, in support of a request for a search warrant to authorize IRS agents to enter and search the Simon Residence.

ANSWER: Defendants admit the allegations of paragraph 16.

17. In order for the IRS to obtain a warrant, it must demonstrate that there is probable cause to believe evidence supporting the commission of a crime is located on the property to be searched.

ANSWER: Defendants admit the allegations of paragraph 17.

18. On November 2, 2007, the United States District Court, Northern District of Indiana, Fort Wayne Division (“Court”), by the Honorable Theresa Springmann reviewed the Affidavit and issued a search warrant (“Warrant”) to allow the IRS to search the Simon Residence.

ANSWER: Defendants admit the allegations of paragraph 18.

19. Muschell intentionally willfully and/or recklessly made false and/or misleading statements in his Affidavit in support of a request for search warrant, and omitted facts known and available to him that would be relevant to a judicial determination as to whether or not to issue the Warrant.

ANSWER: Defendants deny that Muschell intentionally willfully and/or recklessly made false and/or misleading statements in his Affidavit, and are without legally disclosable knowledge or information sufficient to form or to state a belief as to the truth of the remaining allegations of paragraph 19.

20. Such false and misleading statements and omissions misled the Court and obstructed justice. Some of his false statements and omissions are as follows:

20.1 Muschell portrayed the Simon case as a tax shelter case.

20.2 Upon information and belief Muschell knew or should have known, most tax shelter cases involve persons who live and work in the United States, and who do not have any legitimate reason or need to have foreign bank accounts, to be involved with foreign corporations or to have trusts.

20.3 Muschell did not state in the Affidavit that Simon worked outside of the United States and maintained a secondary residence in Ukraine, and that the case was not a tax shelter case. Muschell's portrayal of the Simon investigation being a tax shelter case was misleading to the Court.

20.4 Muschell stated in the Affidavit that countries that do not have treaties with the United States are often referred to as "tax havens" and later states that Cyprus is a "tax haven." Muschell misled the Court into believing that Cyprus does not have a treaty with the United States when in fact it did and does have a comprehensive income tax treaty.

20.5 Muschell stated that William R. Simon Farms, Inc. did not file certain federal tax forms, and that James and Denise Simon received federal farm subsidies. Muschell did not advise the Court in the Affidavit that the farm subsidies were less than \$3,000 a year, that the William R. Simon Farms, Inc. tax returns that had been filed in previous years showed mainly losses which generated significant carry forward losses leading to a conclusion that no tax was due and owing.

20.6 Upon information and belief, Muschell previously obtained documents on William R. Simon Farms, Inc. from the United States Department of Agriculture

and/or court filings.

20.7 Muschell stated in his Affidavit that James and Denise Simon personally received federal farm subsidies when they did not personally receive any federal farm subsidies.

20.8 Muschell's misstatements and failure to provide the full picture of William R. Simon Farms and its tax matters was misleading to the Court.

20.9 Muschell declared in his Affidavit that the Simon Family Trust ("Trust") was a foreign trust established in the Cook Islands, and that federal "foreign trust" tax returns were required to be filed and were not filed for the Trust. Muschell failed to mention that the Trust was classified as a domestic trust under the Internal Revenue Code for federal tax purposes and that no "foreign trust" returns were required to be filed.

20.10 Muschell failed to state in the affidavit that the income received by the Trust was passed through and reported on the personal tax returns for James and Denise Simon and was clearly marked "SF TRUST" on over forty locations on their returns, leaving the Court to wrongly believe that Trust income was not reported for income tax purposes.

20.11 Muschell, having reviewed James and Denise Simon's tax returns, certainly was aware of the reporting of trust income by James and Denise Simon on their personal returns and well knew, as a CPA, that no foreign trust returns were due and that the method of reporting the trust's income on the Simon's returns was a proper and correct method to report the Trust's income.

20.12 Muschell stated in the Affidavit that the Trust did not file certain federal tax returns, but as a CPA he knew or should have known that filing the returns was in fact the responsibility of the trustee, not James Simon. Failing to inform the Approving Judge that Simon was not responsible for the filing of the trust returns mislead the Court.

20.13 Muschell's misstatements and failure to present all the relative facts regarding the Trust was misleading to the Court.

20.14 Upon information and belief, IRS procedure requires Muschell to demonstrate in the Affidavit a likelihood that there was criminal activity. This would have required Muschell to establish a likely source of taxable income in the Affidavit which he failed to do.

20.15 Muschell listed in the Affidavit a number of what he refers to as "tax offender characteristics," such as sham transactions; assigned income; shell

corporations; concealing income; artificial business losses; and artificial investments. Muschell failed to show that any of these characteristics were present in the Simon case. Failure to show how these “tax offender characteristics” were present in the case misled the Court.

20.16 Muschell stated in his Affidavit that tax returns were not filed for JS Elekta Limited, Elekta Limited or ICHUA Limited. Such allegations imply that these entities violated the Internal Revenue Code. However, these allegations are misleading because foreign corporations such as JS Elekta, Elekta, and ICHUA (the “Foreign Entities”) are not required to file United States tax returns.

20.17 Muschell, a CPA, knew or should have known that foreign corporations JS Elekta Limited, Elekta Limited, and ICHUA Limited did not have a United States tax return filing requirement. Muschell’s failure to disclose this fact misled the Court.

ANSWER: Defendants deny that Muschell intentionally willfully and/or recklessly made false and/or misleading statements in his Affidavit, and are without legally disclosable knowledge or information sufficient to form or to state a belief as to the truth of the remaining allegations of paragraph 20, including subparagraphs 20.1-20.17.

21. The Affidavit’s conclusion is one long, incomplete sentence which does not reach a conclusion and failed to say what probable cause existed to search the Simon Residence.

ANSWER: Defendants deny that the conclusion does not summarize the existence of probable cause; admit that the statement does not comport with the rules of English grammar; and aver further that paragraph 21 does not state a material fact.

22. Upon information and belief, Muschell, Patton, and Unknown Agents improperly reviewed and/or approved the Affidavit prior to it being submitted to the Court in support of a request for a search warrant.

ANSWER: Defendants deny that the Affidavit was not properly reviewed or approved, and are without legally disclosable knowledge or information sufficient to form or to state a belief as to the truth of the remaining allegations of paragraph 22.

23. The Affidavit should have been reviewed for completeness and accuracy by the Group

Manager, the Special Agent in Charge, and the Criminal Tax Office. Defendants failed to review the Affidavit for completeness and accuracy.

ANSWER: Defendants deny that the Affidavit was not properly reviewed, and are without legally disclosable knowledge or information sufficient to form or to state a belief as to the truth of the allegations of paragraph 23.

24. Upon information and belief, the Defendants improperly and unlawfully tendered the Affidavit to the Court and procured the issuance of the Warrant when they knew or should have known that there was no probable cause for the issuance of said Warrant.

ANSWER: Defendants deny the allegations of paragraph 24.

25. Upon information and belief, Defendants failed to follow and/or enforce IRS policies and procedures in obtaining and executing the Warrant. For example:

25.1 Internal Revenue Manual (the “Manual”) section 9.4.9.2 states that “CID will employ the least intrusive means necessary to acquire evidence in tax and tax-related Title 18 investigations.” Search warrants are to be used when crucial evidence “cannot be obtained by any other means.”

25.2 Muschell could have used traditional and less intrusive methods of obtaining records such as IRS and Grand Jury summons and subpoenas, as opposed to use of a search warrant.

25.3 Upon information and belief, Muschell had already obtained and reviewed bank records, including the Simon’s personal bank accounts and other bank accounts used by entities associated with Simon, prior to obtaining the Warrant.

ANSWER: Defendants deny that they failed to follow and/or enforce IRS policies and procedures in obtaining and executing the Warrant, and aver that the defendants exercised appropriate discretion in obtaining and in executing the Warrant; furthermore, the Manual is for internal guidance and does not confer substantive rights. The defendants are without legally disclosable knowledge or information sufficient to form or to state a belief as to the truth of the remaining allegations of paragraph 25, including subparagraphs 25.1-25.3.

26. Furthermore, to secure the Warrant, Muschell needed to show in his Affidavit pursuant to

the Manual that:

26.1 There was “objective evidence indicating the subject may destroy the evidence”;

26.2 There was “objective evidence of the subject’s attempt to obstruct the investigation”; or,

26.3 There were “facts that establish that other attempts to acquire the records were ineffective.”

ANSWER: Defendants are without legally disclosable knowledge or information sufficient to form or to state a belief as to the truth of the allegations of paragraph 26, including subparagraphs 26.1-26.3; furthermore, the Manual is for internal guidance and does not confer substantive rights.

27. Muschell made no such showings in his Affidavit. Muschell’s omissions and failure to provide the required information misled the Court.

ANSWER: Defendants deny that Muschell “misled the Court,” as alleged in paragraph 27; furthermore, the Manual is for internal guidance and does not confer substantive rights.

28. Defendants failed to inform the Court that they were not following IRS regulations and procedures in obtaining the Warrant.

ANSWER: Defendants deny the allegation of paragraph 28 that they were not following appropriate IRS regulations and procedures in obtaining the Warrant.

29. Neither James nor Denise Simon had any history of IRS conflict, and neither had ever been involved in any kind of tax protest activity.

ANSWER: Defendants are without legally disclosable knowledge or information sufficient to form or to state a belief as to the truth of the allegations of paragraph 29.

30. On November 6, 2007, Muschell and Unknown Agents, using the wrongfully obtained Warrant, searched the Simon Residence (the “Search”).

ANSWER: Defendants deny that the November 6, 2007 Search was conducted pursuant to a “wrongfully obtained” warrant.

31. The Defendants’ execution of the wrongfully obtained Warrant resulted in an improper and unlawful search of the Simon Residence in violation of the Plaintiffs’ Fourth and Fifth Amendment rights under the United States Constitution.

ANSWER: Defendants deny the allegations of paragraph 31.

32. At the initiation of the Search, Decedent and R.S. were the only individuals present with the Defendants. Simon was not even in the United States, which left Decedent alone to deal with the trauma and/or horror of armed federal agents executing the wrongfully obtained Warrant in her home in the presence of her minor child, R.S.

ANSWER: Defendants admit that Denise J. Simon and R.S. were present at the time the search warrant was served, admit that James A. Simon was not present at that time, and deny the remaining allegations of paragraph 32.

33. At all relevant times, neither James nor Denise Simon ever had a weapon.

ANSWER: Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 33.

34. Upon information and belief, more than one Defendant conducted the Search in bullet proof vests with guns visible.

ANSWER: Defendants deny that either Muschell or Porter drew their weapons, admit that they were both armed and wore appropriate protective clothing; are without knowledge or information sufficient to form a belief as to whether any gun was visible to any plaintiff; and are without legally disclosable knowledge or information sufficient to form or to state a belief as to the truth of the remaining allegations of paragraph 34.

35. Upon information and belief, Defendants violated IRS procedures by creating an unsafe operation. Agents are directed in the Manual that a warrant “involves extensive preplanning and background work to ensure a safe and efficient operation” in executing a search warrant. Defendants knew R.S. was an 11 year old female child who was in the Simon Residence when

they executed the Warrant shortly after 7:00 a.m. on a school day.

ANSWER: Defendants deny that they created and “unsafe operation”; furthermore, the Manual is for internal guidance and does not confer substantive rights. Defendants are without legally disclosable knowledge or information sufficient to form or to state a belief as to the truth of the remaining allegations of paragraph 35.

36. Upon information and belief, during the Search, there were at least ten or more bullet proof vested and visibly armed IRS agents and/or employees present. Their acts clearly and unnecessarily placed R.S., an innocent child in harm’s way and could have, and should have, been avoided with effective planning.

ANSWER: Defendants admit that the persons conducting the Search were properly armed and wore appropriate protective clothing, they lack knowledge or information sufficient to form a belief as to whether their arms were visible to any plaintiff, and deny the remaining allegations of paragraph 36.

37. Upon information and belief, during the Search, Porter made comments to the Decedent that were improper by implying violations of law not specified or addressed in the Affidavit or Warrant causing unnecessary emotional stress and harm to Decedent. Porter’s comments were condoned by Muschell.

ANSWER: Defendants deny the allegations of paragraph 37.

38. The Defendants improperly and unlawfully executed the wrongfully obtained Warrant in violation of the Plaintiffs’ Fourth and Fifth Amendment rights under the United States Constitution.

ANSWER: Defendants deny the allegations of paragraph 38.

39. The Defendants unauthorized search resulted in a violation of Decedent’s Fourth and Fifth Amendment due process rights.

ANSWER: Defendants deny the allegations of paragraph 39.

40. On November 9, 2007, just three days after the Search, Decedent committed suicide.

ANSWER: Defendants lack knowledge or information sufficient to form a belief as to

the truth of the allegations of paragraph 40.

41. Several hours prior to Decedent's death, Decedent wrote a letter expressing her deep concern over armed IRS agents illegally and improperly coming to her home; her inability to keep her children safe in light of such actions by the IRS; and, as a result, her overall fear and distrust of the federal government.

ANSWER: Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 41.

42. Upon information and belief, the IRS has institutional practices, customs and policies of procuring search warrants in criminal tax cases by omitting relevant information, and making false and/or misleading statements in warrant application affidavits in violation of the constitutional rights of taxpayers.

ANSWER: Defendants are without knowledge or information sufficient to form a belief as to plaintiffs' information and belief concerning the alleged "institutional practices" of the IRS, and defendants deny the remaining allegations of paragraph 42.

43. Upon information and belief, Muschell, Patton, Porter, and Unknown Agents within the IRS have knowledge of or acquiescence in such practices, customs and policies and such constitutional rights violations because they have adopted and maintained practices, customs and/or policies that contribute to the violations.

ANSWER: Defendants are without knowledge or information sufficient to form a belief as to plaintiffs' information and belief concerning the alleged "practices customs and policies," and defendants deny the remaining allegations of paragraph 43.

44. Upon information and belief, Patton was the Special Agent in Charge of Muschell during the Investigation, at the time the Affidavit was prepared, and at the time the Search was executed.

ANSWER: Defendants admit that Patton is a Special Agent in Charge with the CID, and that at the times relevant to this action, he supervised Muschell as part of his official duties.

45. Upon information and belief, Patton acted willfully and/or recklessly in the following ways:

45.1 Failing to properly supervise Muschell during the Investigation, preparing the Affidavit, obtaining the Affidavit, and during the Search;

45.2 Approving the Affidavit;

45.3 Failing to adequately train Muschell; and,

45.4 Failing to replace Muschell as the lead investigative agent after Decedent's death.

ANSWER: Defendants deny the allegations of paragraph 45, including subparagraphs 45.1-45.4.

BIVENS ACTION

COUNT I - FOURTH AMENDMENT VIOLATION IN OBTAINING SEARCH WARRANT

46. Plaintiffs incorporate by reference rhetorical paragraphs 1-45 as if fully set forth in this paragraph.

ANSWER: Defendants incorporate by reference their answers to paragraphs 1-45.

47. Muschell unlawfully and improperly executed the Affidavit and violated the Plaintiffs' clearly established constitutional rights.

ANSWER: Defendants deny the allegations of paragraph 47.

48. The Affidavit contains false and misleading information regarding the IRS's investigation of Simon.

ANSWER: Defendants deny the allegations of paragraph 48.

49. The false and misleading information was intended to and resulted in the Court granting the Warrant.

ANSWER: Defendants deny the allegations of paragraph 49.

50. There was no good faith basis for the Defendants reviewing and approving the Affidavit to determine that probable cause existed to issue the Warrant.

ANSWER: Defendants deny the allegations of paragraph 50.

51. Unknown Agents and Patton acting in a supervisory capacity had actual knowledge of and acquiesced in Muschell's conduct by adopting and maintaining a practice, custom and/or policy that contributed to the violation of Plaintiffs' constitutional rights.

ANSWER: Defendants deny the allegations of paragraph 51.

52. As a direct and proximate result of Defendants' actions, Plaintiffs have suffered mental anguish, emotional harm, fright, shock, humiliation, embarrassment, deprivation of their liberty, violation of their constitutional rights, loss of life, and other damages and injuries for which they seek compensatory damages.

ANSWER: Defendants deny the allegations of paragraph 52.

53. Additionally, Defendants acted in reckless disregard to plaintiffs' constitutional rights.

ANSWER: Defendants deny the allegations of paragraph 53.

54. Pursuant to *Bivens*, Plaintiffs are entitled to money damages for the violation of their clearly established constitutional rights.

ANSWER: Defendants deny the allegations of paragraph 54.

**COUNT II - FOURTH AMENDMENT VIOLATION IN EXECUTING
IMPROPER SEARCH WARRANT**

55. Plaintiffs incorporate by reference rhetorical paragraphs 1-54 as if fully set forth in this paragraph.

ANSWER: Defendants incorporate by reference their answers to paragraphs 1-54.

56. Defendants Muschell, Patton, Porter, and Unknown Agents failed to take reasonable efforts to determine if the Affidavit was accurate and supported by probable cause.

ANSWER: Defendants deny the allegations as to Muschell, and are without legally disclosable knowledge or information sufficient to form or to state a belief as to the truth of the remaining allegations of paragraph 56.

57. Defendants Muschell, Porter, and Unknown Agents used excessive force in executing the Warrant and thereby violated Plaintiffs' constitutional rights.

ANSWER: Defendants deny the allegations of paragraph 57.

58. Defendants Muschell, Patton, Porter, and Unknown Agents, unlawfully and improperly executed, or caused to be executed, the improper Warrant and thereby violated Plaintiffs' constitutional rights.

ANSWER: Defendants deny the allegations of paragraph 58.

59. Defendants Muschell, Patton, Porter, and Unknown Agents, knew or should have known there was no good faith basis to execute the Warrant and thereby violated Plaintiffs' clearly established constitutional rights.

ANSWER: Defendants deny the allegations of paragraph 59.

60. The Defendants knew or should have known that there was no good faith basis for the issuance of the Warrant, and thereby violated the Plaintiffs' clearly established constitutional rights.

ANSWER: Defendants deny the allegations of paragraph 60.

61. Unknown Agents and Patton acting in a supervisory capacity had actual knowledge of and acquiescence in Muschell's, Porter's, and Unknown Agents' conduct by adopting and maintaining a practice, custom or policy that contributed to the violation of Plaintiffs' constitutional rights.

ANSWER: Defendants deny the allegations of paragraph 61.

62. As a direct and proximate result of Defendants' actions, Plaintiffs have suffered mental anguish, emotional harm, fright, shock, humiliation, embarrassment, deprivation of their liberty, violation of their constitutional rights, loss of life, and other damages and injuries for which they seek compensatory damages.

ANSWER: Defendants deny the allegations of paragraph 62.

63. Additionally, Defendants acted in reckless disregard to Plaintiffs' clearly established constitutional rights.

ANSWER: Defendants deny the allegations of paragraph 63.

64. Pursuant to *Bivens*, Plaintiffs are entitled to money damages for the violation of their constitutional rights.

ANSWER: Defendants deny the allegations of paragraph 64.

COUNT III - FOURTH AND FIFTH AMENDMENT DUE PROCESS VIOLATION

65. Plaintiffs incorporate by reference rhetorical paragraphs 1-64 as if fully set forth in this paragraph.

ANSWER: Defendants incorporate by reference their answers to paragraphs 1-64.

66. Defendants violated Decedent's Fourth and Fifth Amendment due process rights by obtaining and executing an improper search warrant.

ANSWER: Defendants deny the allegations of paragraph 66.

67. As a result of the search, Decedent took her life out of fear for her family's well-being because of the armed officers that were in her home and falsely accused her of criminal acts.

ANSWER: Defendants deny that Decedent was falsely accused of "criminal acts," and are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 67.

68. Decedent was deprived of her life as a result of the search in violation of her Fourth and Fifth Amendment constitutional rights.

ANSWER: Defendants deny the allegations of paragraph 68.

69. Unknown Agents and Patton acting in a supervisory capacity had actual knowledge of and acquiescence in Muschell's, Porter's, and/or Unknown Agents' conduct by adopting and maintaining a practice, custom or policy that contributed to the violation of Decedent's constitutional rights.

ANSWER: Defendants deny the allegations of paragraph 69.

70. As a direct and proximate result of Defendants' actions, Decedent was deprived of her life, a violation of her constitutional rights, and other damages and injuries for which the Estate seeks compensatory damages.

ANSWER: Defendants deny the allegations of paragraph 70.

71. Additionally, Defendants acted in reckless disregard to Decedent's clearly established constitutional rights.

ANSWER: Defendants deny the allegations of paragraph 71.

72. Pursuant to *Bivens*, Decedent is entitled to money damages for the violation of their constitutional rights.

ANSWER: Defendants deny the allegations of paragraph 72.

WHEREFORE, the defendants Special Agent Paul Muschell, Special Agent in Charge Alvin Patton, and Special Agent Linda Porter demand judgment dismissing the plaintiffs' action, and such other and further relief as this Court deems just and proper.

Date: February 26, 2010

D. PATRICK MULLARKEY
Acting Deputy Assistant Attorney General

/s/ Nathan L. Strup
NATHAN L. STRUP
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 55, Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 514-6058
Facsimile: (202) 514-5238
Email: Nathan.L.Strup@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2010, I electronically filed the foregoing MOTION TO STAY with the Clerk of the court using the CM/ECF system which sent notification of such filing to the following:

Ashley Law
alaw@beckmanlawson.com

Craig Patterson
cpatterson@beckmanlawson.com

and I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants: None.

/s/ Nathan L. Strup
NATHAN L. STRUP
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 55, Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 514-6058
Email: Nathan.L.Strup@usdoj.gov