UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ADRIANA AGUILAR, et al.,	:	
	:	ECF Case
Plaintiffs,	:	Civil Action No.
	:	07 CIV 8224 (KBF) (FM)
-against-	:	
	:	
IMMIGRATION AND CUSTOMS ENFORCEMENT DIVISION OF THE UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,	:	
Defendants.	:	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO FIVE *BIVENS* DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

DEWEY & LEBOEUF LLP
Aldo A. Badini
Kelly A. Librera
Lawrence S. Hirsh
1301 Avenue of the Americas
New York, New York 10019
Tel.: (212) 259-8000
Fax: (212) 259-6333

LATINOJUSTICE PRLDEF
Foster Maer
Ghita Schwarz

99 Hudson Street, 14th Floor
New York, New York 10013
Tel.: (212) 739-7504
Fax: (212) 431-4276

Attorneys for Plaintiffs

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

PRELIMINARY STATEMENT

Plaintiffs respectfully submit this memorandum of law in opposition to the Motion for Summary Judgment by the five moving defendants, ICE 19, ICE 30, ICE 32, ICE 42, and ICE 43 (hereinafter "Moving Defendants"). Plaintiffs have significant evidence that ICE and its agents and supervisors engaged in a widespread pattern and practice of aggressive, nonconsensual, warrantless raids in the New York area, unlawfully surrounding, entering and searching the homes of Latinos and seizing residents in violation of the Fourth and Fifth Amendments. The Moving Defendants, who are sued in their individual capacities pursuant to *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), were indisputably members of large teams of armed agents who conducted operations at two of the homes in the pre-dawn hours of September 24, 2007. Yet they argue that because they did not personally enter the homes during the course of the operation, they are absolved of all liability as a matter of law. This broad sweeping claim is wrong on the facts and the law.

First, with respect to one agent – ICE 32 – the Moving Defendants simply ignore sworn testimony that ICE 32 did indeed enter 22 Dogwood Lane, one of the homes at issue. Second, Plaintiffs have filed for partial summary judgment with respect to each and every agent who participated at 710 Jefferson Street, the other home at issue, where no defendant has produced any evidence that consent to enter or search was obtained. Indeed, at least one of the movants was in a position to hear and see the circumstances of the unconstitutional entry at that home, where the undisputed testimony shows that a twelve-year-old girl who answered the door in her pajamas was falsely told "someone is dying upstairs" before the armed agents brushed past her into the house. Third, sworn testimony demonstrates that all of the Moving Defendants participated in the nonconsensual entry on Plaintiffs' property, surrounded Plaintiffs' homes to prevent residents from leaving, observed their fellow agents pound forcefully on doors and

display weapons, and also failed to intervene when obvious constitutional violations occurred in their presence. Moving Defendants' claim that there are no disputed material issues of fact as to their liability is therefore meritless, and their motion for summary judgment should be denied.

FACTS

During the week of September 24, 2007, ICE executed "Operation Community Shield," a series of warrantless, purportedly consent-based arrest operations at Latino homes and businesses in Long Island. *See* Plaintiffs' Response and Counterstatement of Facts to Defendants' Local Rule 56.1 Statement of Undisputed Facts ("Pls.' 56.1 Statement") ¶ 35. That day, teams of ICE agents, including the Moving Defendants, participated in a briefing to discuss the operations for the day. *Id.* ¶ 36. The agents were told that they did not possess judicial warrants and that they needed to obtain consent in order to enter homes. *Id.* ¶ 37. Nonetheless, each of the Defendants was required to wear and/or carry "Raid jackets, Bulletproof Vest, Service Issued Firearm, Baton/O/C, Flashlight, Handcuffs." *Id.* ¶ 38. Further, although agents approached homes in large teams of at least ten, they typically sought one, and at most two, alleged civil immigration violators for whom they did not have warrants or probable cause to arrest for any crime. *Id.* ¶ 39; *see also* 4/20/10 Hr'g Tr. 48:1-2 ("We conceded very early on that these operations were not based on probable cause."). These operations—which resulted in the arrests of hundreds of Latinos on civil immigration violations, only 39 of whom were actual targets of the operations—resulted in significant notoriety, including public statements by the Nassau County Police Commissioner, who withdrew his officers from participation in the ongoing operations, stating that ICE had engaged in widespread constitutional violations. *Id.* ¶ 40. All but one of the arrests during the course of this one-week operation were of Latinos. *Id.*

A. The Warrantless Operation at 710 Jefferson Street

Sometime before dawn in the early morning hours of September 24, 2007, following the briefing, Moving Defendants ICE 19 and ICE 42, along with their team members, arrived at their first location of the day in Nassau County. *See* Pls.' 56.1 Statement ¶ 41. ICE 19 stood just outside the front door of the home at the time of entry. *Id.* ¶ 42. His responsibilities included officer safety. *Id.* He and another agent transported an arrested resident from that home. *Id.* ICE 42 also guarded the perimeter of the team's first targeted home. Without consent, she entered the home's backyard, where she stayed for most of the operation. *Id.* ¶ 43. She participated in at least two more home operations that day. *Id.* ¶ 44.

The team next proceeded to their second home of the day, 710 Jefferson Street, in Westbury, Nassau County. Ten ICE agents, including Moving Defendants ICE 19 and ICE 42, together with at least one Nassau County Police officer, descended upon the home between 5:30 and 6:00 a.m., while it was not yet light outside. *See* Pls.' 56.1 Statement ¶ 45, 47. The purported targets at this location were two Latino men under the age of 25, neither of whom had committed any violent crime. *Id.* ¶ 46. The agents and officers parked at least seven cars on the street near the front of the house. *Id.* ¶ 47. The agents passed a row of hedges and fence to enter the property and surround the home, and entered a fenced-in backyard. *Id.* ¶ 49.

While plaintiff Sonia Bonilla**,** a lawful permanent resident and owner of the home, was driving her husband to work, her daughter Dalia Velasquez, then age nine, became aware that agents and officers had surrounded their home. *See* Pls.' 56.1 Statement ¶¶ 47, 50. Dalia awoke her sister, Beatriz, then twelve years old, and, still in her pajamas, Beatriz ran to the door. *Id.* ¶ 51. The agents began knocking so loudly on the door that the residents thought the door would be forced open. *Id.* ¶ 52. Through the door's decorative window, Beatriz and Dalia could see

multiple agents, including a female agent, in the front yard. *Id*. Agents identified themselves as "police," falsely shouted that "someone was dying upstairs", and shone flashlights into the window. *Id.* ¶ 52. They shouted orders to "open the door" and "tie down that dog." *Id.* ¶¶ 6, 52.

Beatriz opened the door and stepped outside to talk to the agents. *See* Pls.' 56.1 Statement ¶ 53. The agents stepped around Beatriz, "went through" the door and spread through the home, banging on bedroom doors, ordering residents to open them, and shouting to each other to bring residents into the living room. *Id.* They ordered the girls to their room. *Id*. From their room, the girls could see agents, including a female agent, standing in their backyard. *Id.* Beatriz was not asked for, nor did she grant, consent to enter or search the home. *Id.* ¶ 54. No agent or any other witness has testified otherwise. *Id*.

Ms. Bonilla returned home while the operation was underway. *See* Pls.' 56.1 Statement ¶ 55. She drove into her driveway and saw multiple armed agents, including two women, on her lawn and on the side of her house. *Id.* At least two agents ordered her to leave her van and, despite no specific evidence of any danger, searched the van and her purse. *Id.* Ms. Bonilla repeatedly asked the agents what was happening, but they refused to answer, instead ordering her to sit on the sidewalk. *Id.* Agents at first prevented Ms. Bonilla from entering her home. *Id.*

Upon arriving at the home, Moving Defendant ICE 19 parked his car at the curb slightly to the right of the home. Pls' 56.1 Statement ¶ 56. ICE 19 got out of his car, which held a prisoner from the previous home. *Id.* ICE 19 was present when ICE agents and local police approached and surrounded 710 Jefferson Street and entered the property, including a fenced-in backyard. *Id.* ¶¶ 49, 56. ICE 19 was in front of 710 Jefferson Street and could see a "good majority" of the front door of the house and had a "clear line" unobstructed view. *Id.* ¶ 57. ICE 19 testified that he heard ICE 18 say "police" and saw the door of the home open. *Id.* ¶¶ 6, 57.

ICE 19 also observed Ms. Bonilla's van pull up to the house and saw her get out of the van, "concerned," after which agents approached and spoke to her. *Id.* ¶ 57.

ICE 42 admits to being present at 710 Jefferson Street when ICE agents and local police approached and surrounded 710 Jefferson Street and entered the property, including a fenced-in backyard. *Id.* ¶¶ 10, 49, 59. She claims to have stayed by her car, watching a prisoner. *Id.* ¶ 59. However, Ms. Bonilla saw two female agents among the approximately five agents at the front and sides of her house when she returned home; her daughters observed a female in the fenced-in backyard and a female on the front lawn near the bushes at some point during the operation. *Id.* ¶ 59. Only two female agents participated in the operation at 710 Jefferson Street. *Id.* ¶¶ 13, 14. ICE 42 did not recall anything that happened on September 24, 2007 being inconsistent or conflicting with ICE policy or practice. *Id.* ¶ 60.

ICE agents spent enough time at 710 Jefferson Street to sweep through a basement, ground floor and second floor bedrooms and to arrest seven men, all Latino. *See* Plaintiffs' 56.1 Statement ¶ 61. ICE's two purported targets—who did not reside at 710 Jefferson and in fact were unknown to the family—were not among them. *Id.* ¶ 62. At the time, three children ages twelve and under, including a baby, were present at the home. *Id.* ¶¶ 50, 51, 61, 62.

B. The Warrantless Operation at 22 Dogwood Lane

Before dawn in the early morning hours of September 24, 2007, at least nine ICE agents, including Moving Defendants ICE 30, ICE 32, and ICE 43[1] arrived at 22 Dogwood Lane, in Westbury, Nassau County after a briefing to discuss the operations for that day. *See* Plaintiffs' 56.1 Statement ¶ 63. They were joined by Nassau County Probation Officer Milagros Cabrera

[1] Officer Cabrera claimed that the team included an additional ICE agent (who ICE denies was present) as well as between four and six probation officers, bringing the total number of law enforcement officers at 22 Dogwood Lane to arrest one sixteen-year-old civil immigration violator to between thirteen and fifteen. *See* Plaintiffs' 56.1 Statement ¶ 63.

and at least two other local officers. *Id*. Their purported goal at 22 Dogwood Lane was to arrest a sixteen-year-old boy who had been complying with his probation appointments at the office of Officer Cabrera, the most recent of which occurred a mere six days before the operation. *Id.* At the time, three children under the age of five resided at the home. *Id.*

It was still dark outside when agents arrived at the home. *See* Plaintiffs' 56.1 Statement ¶ 64. Agents parked five to eight cars on the street in front of the house. *Id.* ¶ 65. They passed a fence blocking the front yard from the street, surrounded the home, and entered the front, side and back yards, all without consent. *Id*. ¶ 66. Officer Cabrera and four ICE agents approached the front door while at least five other ICE agents surrounded the house. *Id*. ¶ 67.

Officer Cabrera pounded on the front door for two minutes with her fist. One of the ICE agents then pounded on the door for one minute with a flashlight. *See* Plaintiffs' 56.1 Statement ¶ 67. All agents were armed, at least one with a 5.56 caliber semiautomatic M4 carbine. *Id.* ¶ 68. At least one agent drew his gun prior to entry, and testified that it was typical practice for ICE agents to draw guns in this type of enforcement operation. *Id.*

Residents were awakened at approximately 5 a.m. by loud banging, shouting and screaming. *See* Plaintiffs' 56.1 Statement ¶ 69. The agents yelled "open the door!" Plaintiff Elder Bonilla, who lived on the second floor with Diana Rodriguez and their two infant children, went downstairs to the front door. *Id.* ¶ 69. Through the door's small window, he saw at least one gun pointed at him, and, frightened, he began to open the door. *Id*. Agents immediately kicked it in, handcuffed him, pointed a gun at his chest, and threw him to the floor. *Id.* At least five male agents entered the house. *Id.* ¶ 70. They roused residents from sleep, forced them to open bedroom doors, and pointed guns. *Id.* Agents ordered Plaintiff Diana Rodriguez, in bed in her underwear, to dress as they blocked her bedroom door, then handcuffed her without saying a

word and brought her to the living room, where several residents were on the floor, handcuffed. *Id.* Weapons were displaced until the home was "secured," and residents were aware of the ICE agents surrounding their home. *Id.* ¶ 71.

Upon arriving at 22 Dogwood Lane, ICE 30 entered the front yard past the enclosed fence, without consent of the residents, and to secure the perimeter, took a position on the front yard toward the left side of the house with a view of the rear, where he observed an agent was stationed. *See* Pls.' 56.1 Statement ¶¶ 18, 66, 73. Numerous agents who participated in OCS the week of September 24, 2007, including agents at 22 Dogwood Lane, testified that the purpose of securing the perimeter was in part to prevent an occupant from leaving the home. Id. ¶ 76. ICE 30 believes that all actions he took at 22 Dogwood conformed with ICE policy. *Id.* ¶ 77.

ICE 32 claims that he stayed by his car and did not enter 22 Dogwood Lane. *See* Pls.' 56.1 Statement ¶¶ 28, 74. However, ICE 31 testified that at the beginning of the operation, ICE 32 approached the front door and either entered or went to the side of the home. *Id*. Further, ICE 31, who admitted to entering the home himself, testified that ICE 32 assisted him in taking arrested occupants from the home to waiting ICE vehicles. *Id.*

Upon arriving at 22 Dogwood Lane, ICE 43 approached the home, taking a position inside the property's fence in the front yard toward the right side of the house, facing the front door. *See* Pls.' 56.1 Statement ¶¶ 32, 75. She had a view of the right corner of the house and the side yard, and she glanced at the front door, where she saw multiple law enforcement officers. *Id*. ¶ 75. She paced back and forth, entering the side yard along the right side of the house without consent while other agents entered the home. *Id.* Her purpose in securing the perimeter was in part to stop and identify occupants exiting the home. *Id.* ICE 43 believes that all actions she took at 22 Dogwood were consistent with ICE policy. *Id.* ¶ 78.

ICE targeted only one sixteen-year-old civil immigration violator, and agents were accompanied by a probation officer who knew where his room was located on the first floor. *See* Pls.' 56.1 Statement ¶ 79. But ICE agents spent enough time inside 22 Dogwood Lane to take into custody four Latino men on two floors and to knock down the door of a storage space on the second floor. *Id*. Three children under the age of five were present at the time. *Id*.

ARGUMENT

"[A] motion [for summary judgment] may properly be granted . . . only where there is no genuine issue of material fact to be tried, and the facts as to which there is no such issue warrant the entry of judgment for the moving party as a matter of law. . . [T]he court may not make credibility determinations or weigh the evidence and must draw all reasonable inferences in favor of the nonmoving party. The function of the district court in considering the motion for summary judgment is not to resolve disputed questions of fact but only to determine whether, as to any material issue, a genuine factual dispute exists." *Ideal Steel Supply Corp. v. Anza*, 652 F.3d 310, 326 (2d Cir. 2011) (internal citations and quotation marks omitted).

THE COURT SHOULD DENY MOVING DEFENDANTS' MOTION BECAUSE THEY ACTIVELY PARTICIPATED IN CONSTITUTIONAL VIOLATIONS

It is "the basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." *Groh v. Ramirez*, 540 U.S. 551, 559 (2004) (internal citations omitted). This principle extends equally to the curtilage of a home. *See United States v. Dunn*, 480 U.S. 294, 301 (1987). "[C]ourts historically have found helpful the common law concept of curtilage, meaning yard, courtyard or other piece of ground included within the fence surrounding a dwelling house." *Fixel v. Wainwright*, 492 F.2d 480, 483 (5th Cir. 1974). The Second Circuit and other courts allow curtilage to extend farther than the area immediately outside a home. *See United States v. Reilly*, 76 F.3d 1271, 1277 (2d Cir. 1996),

aff'd on reh'g, 91 F.3d 331 (2d Cir. 1996) (finding a cottage 375 feet from the main residence to be within the curtilage); *see also Roybal v. City of Albuquerque*, No. CIV 08-0181 JB/LFG, 2009 U.S. Dist. LEXIS 45670 (D.N.M. Apr. 28, 2009) (finding a warrantless entry past a fence into the backyard a constitutional violation).

Defendants did not possess judicial warrants, nor did they have probable cause and exigent circumstances to justify seizures, entries, or searches at Plaintiffs' homes. Thus, whether Defendants obtained voluntary, duress-free consent and whether they targeted and seized Plaintiffs on the basis of their race, national origin or ethnicity are at the heart of this case.

At 710 Jefferson Street, Defendants have no evidence whatsoever that any member of the team of ten visibly armed ICE agents or any other law enforcement officer obtained consent to enter or search the home. Nor do they deny that Defendants entered into the property and surrounded the home prior to attempting to enter. Indeed, according to the unrebutted testimony of then twelve-year-old Beatriz Velazquez, in her pajamas at the time of the pre-dawn raid, one or more agents at the front door falsely claimed that "someone is dying upstairs" and brushed past her into the house when she opened the front door. *See* Pls.' 56.1 Statement ¶¶ 6, 51, 52, 53. It is similarly undisputed that in the pre-dawn hours of the same day, another team of at least twelve armed agents and local officers—at least one with his weapon drawn—surrounded 22 Dogwood Lane prior to seeking entry. And, according to Plaintiffs' version of the operation—which must be accepted for purposes of summary judgment—the agents yelled "open the door," pointed at least one weapon at the door, kicked the door in, handcuffed the unarmed resident, pointed a gun at his chest, and threw him to the floor. *Id.* ¶ 69. Defendants claim that, despite the admitted participation of ICE 19 and 42 at the 710 Jefferson Street operation and ICE 30, ICE 32 and ICE 43 at the 22 Dogwood Lane operation, these Defendants were not "personally

involved" in constitutional violations because they did not physically enter the homes. Defendants' Motion for Summary Judgment ("Def. Mot.") at 7.

Defendants' argument fails as a matter of both fact and law. With respect to the facts, Defendants' Motion ignores significant evidence showing that the Moving Defendants did in fact enter the property, and in at least one case, the actual home of the plaintiffs. As a matter of law, Moving Defendants did participate in these seizures and other constitutional violations.[2] First, the Moving Defendants need not have physically entered the homes to have participated in the seizure. Second, Moving Defendants were well aware of their fellow agents' unconstitutional actions and unlawfully failed to intervene to stop these violations. Accordingly, Moving Defendants' motion for summary judgment must be denied in all respects.

I. Defendants' Motion Must Be Denied Because They Unlawfully Seized Plaintiffs by Participating in a "Show of Authority" that Vitiated Plaintiffs' Ability to Consent

A plaintiff alleging unlawful seizure must prove that (1) he or she was "seized" and (2) that the seizure was unreasonable. *See generally*, *Sampson v. City of Schenectady*, 160 F. Supp. 2d 336, 342-345 (N.D.N.Y. 2001). Warrantless home entries and searches are presumptively unreasonable, subject to a few specific exceptions; one of those exceptions is an entry or search conducted pursuant to a home occupant's consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *Payton v. New York*, 445 U.S. 573, 586 (1980). For decades, courts have held that "[c]onsent must be a product of that individual's free and unconstrained choice, rather than a mere acquiescence in a show of authority." *United States v. Wilson*, 11 F.3d 346, 351 (2d Cir.

[2] Two of the agents who are the subject of Defendants' motion, ICE 19 and ICE 42, participated in the operation at 710 Jefferson Street. Simultaneous with the filing of this instant motion, Plaintiffs moved for summary judgment of liability with respect to all of the agents who participated in the 710 Jefferson Street operation, including ICE 19 and ICE 42, on the ground that the undisputed facts demonstrate that the seizure of Plaintiffs and the entry into their home was without consent or other constitutional justification. *See* Plaintiffs' Memorandum of Law in Support of Motion for Partial Summary Judgment (Oct. 28, 2011) at 3-9. As set forth below, summary judgment in *favor* of ICE 19 and ICE 42 would be inappropriate. Indeed, for the reasons fully set forth in Plaintiffs' Motion for Summary Judgment, this Court should grant summary judgment of liability *against* ICE 19 and ICE 42.

1993); *see also Bumper v. North Carolina*, 391 U.S. 543, 549 (1968); *United States v. Mapp*, 476 F.2d 67, 77 (2d Cir. 1973) ("[W]here there is coercion there cannot be consent.").

Defendants are unable to deny that both undisputed and disputed facts demonstrate an overwhelming "show of authority": the large number of armed agents surrounding homes in the dark, early morning hours, the pounding on doors, the use of a ruse falsely claiming a medical emergency, and the physical use of force to gain entry. Instead, Defendants argue that agents who participated in this show of authority should bear no responsibility for the resulting constitutional violations, because these agents did not enter the homes. To the contrary, the law imposes liability on Moving Defendants for actively participating in the coercion and show of authority that denied Plaintiffs their constitutional rights.

A. ICE Teams Conducted Warrantless, Unlawful Seizures at Plaintiffs' Homes

Defendants argue they should not be held liable because they "never set foot in 710 Jefferson Street or 22 Dogwood Lane . . . [and] were in no position to observe any searches or detentions occurring inside." Def. Mot. at 10. This argument is meritless, not least because testimony shows these agents entered Plaintiffs' property, observed fellow agents' actions, and, at least in the case of ICE 32, entered the home. *See infra* at I.B, I.C. But even accepting, for the sake of argument, Moving Defendants' claims, their position fails as a matter of law.

Physical entry into a protected space such as a home is not required to find a Fourth Amendment violation. The Supreme Court has "refused to lock the Fourth Amendment into instances of actual physical trespass," *United States v. U.S. District Court*, 407 U.S. 297 (1972), and has found that a seizure occurs when a law enforcement officer restrains liberty "by means of physical force or show of authority." *Florida v. Bostick*, 501 U.S. 429, 434, (1991); *see also United States v. Maez*, 872 F.2d 1444, 1451 (10th Cir. 1989) (finding Fourth Amendment

violation where officers did not physically enter home but used "extreme coercion," including surrounding defendant's home); *United States v. Morgan*, 743 F.2d 1158, 1164-66 (6th Cir. 1984) (finding resident was placed under warrantless arrest "at the moment the police encircled the Morgan residence" and holding "the location of the arrested person, and not the arresting agent. . . determines whether an arrest occurs within a home") (internal citations and quotations omitted).[3]

Defendants also wrongly state that Plaintiffs must prove the elements for false imprisonment or arrest in order to sustain a seizure claim. Def. Mot. at 11. This is not the standard for evaluating Fourth Amendment violations. Claims for false arrest or imprisonment are a subset of unreasonable seizure claims. *Saenz v. Lucas*, No. 07 Civ. 10534 (WCC), 2008 U.S. Dist. LEXIS 52400, at *11-12 (S.D.N.Y. Jul. 9, 2008).[4] In any case, it is clear that Moving Defendants intended to confine Plaintiffs by preventing exit from their homes and that Plaintiffs were well aware their homes were surrounded. *See* Pls.' 56.1 Statement ¶¶ 49, 50, 53, 56, 71.

ICE teams participated in a show of authority that compelled Plaintiffs to open the doors of their home and vitiated any ability to consent voluntarily. ICE teams parked multiple cars in front of Plaintiffs' homes in the early morning hours, deployed visibly armed agents at the side windows, backyards, and front doors of the homes, shone flashlights, pounded on doors and shouted orders to open doors, and in some cases drew weapons prior to seeking entry. Pls.' 56.1 Statement ¶¶ 6, 11, 20, 21, 41, 47, 49, 52, 63, 65-70. "[C]ircumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of

---

[3] Defendants cite no case examining officers' "show of authority," much less any case granting a defendant summary judgment where such a claim was alleged. Indeed, some of the authority cited by defendants involves officers who had warrants to enter the home, rendering consent irrelevant. *See, e.g., Castellar v. Caporale.*, No. CV-04-3402, 2010 WL 3522814, at *1 (E.D.N.Y. Sept. 2, 2010).

[4] Plaintiffs have brought separate claims of false imprisonment against Defendant United States pursuant to the Federal Tort Claims Act. *See* Fourth Amended Complaint (Dec. 21, 2009) ¶¶ 490-495. .

several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). At both homes, Plaintiffs have testified to each of these factors; indeed, at 22 Dogwood Lane, agents pointed a gun at Plaintiff Elder Bonilla's chest, threw him to the floor and handcuffed him. *See* Pls.' 56.1 Statement ¶ 69. Courts have found a pattern of unlawful seizures where ICE agents conducted warrantless searches "during early morning or late evening hours, surrounded the residences in emergency vehicles with flashing lights . . . and stationed officers at all doors and windows." *LaDuke v. Nelson*, 762 F.2d 1318, 1321 (9th Cir. 1985). These factors were present here. *See* Pls.' 56.1 Statement ¶¶ 18, 32, 47, 48-50, 52, 53, 64, 65, 72, 75.

The warrantless seizures of Plaintiffs thus began when agents proceeded to surround Plaintiffs' homes, long before any agent set foot inside. Further, Defendants targeted and seized Plaintiffs without suspecting any Plaintiff of any crime; indeed, even the young Latino men they purportedly sought—none of whom is a Plaintiff here—were not suspects in any crime and were being targeted for arrest on the basis of civil immigration violations. *See* Pls.' 56.1 Statement ¶¶ 39, 79; *see also* 4/20/10 Hr'g Tr. 48:1-2 ("We conceded very early on that these operations were not based on probable cause."). Such lack of reasonable suspicion of criminal activity strongly suggests racial profiling. *See Bennett v. City of Eastpointe*, 410 F.3d 810, 822 n.1 (6th Cir. 2005) (in racial profiling claim alleging discriminatory stop, "the lack of suspicion admitted by [law enforcement officer] may properly be considered"); *Choi v. Gaston*, 220 F.3d 1010, 1012 (9th Cir. 2000) (lack of reasonableness in detention or arrest may support allegation of selective enforcement). Thus, because Moving Defendants directly participated in their teams' nonconsensual and discriminatory actions, their Motion must fail as a matter of law.

B. ICE 19 and ICE 42 Participated in Unlawful Seizures at 710 Jefferson Street

By failing to move for summary judgment on behalf of all agents present at 710 Jefferson Street, Defendants implicitly acknowledge, at minimum, a factual dispute over whether the operation constituted an unlawful seizure. In fact, as Plaintiffs have argued in their own motion for partial summary judgment, Defendants have adduced *no evidence whatsoever* that they obtained consent to enter or search 710 Jefferson Street. Warrantless entry into the home is presumptively unreasonable, *Payton v. New York*, 445 U.S. 573, 586-87 (1980), and it is Defendants' burden to demonstrate that they obtained consent in the absence of a warrant. *Anobile v. Pellegrino*, 303 F.3d 107 (2d Cir. 2002). Given that Defendants cannot show that any ICE agent or other law enforcement official obtained consent to enter or search 710 Jefferson Street, their claims that ICE 19 and ICE 42 bear no responsibility as a matter of law for the unlawful seizures of Plaintiffs at that home must fail.

In contrast, Plaintiffs and witnesses have provided the following undisputed testimony about the events at 710 Jefferson Street: (1) In the pre-dawn hours of September 24, 2007, visibly armed ICE agents and local police approached and surrounded the home and entered a fenced-in backyard; (2) agents parked five to eight cars on the street near the front of the house; (3) agents and officers approached the front door, shone flashlights into the windows, and banged on the door, shouting "open the door!" and falsely asserting "someone is dying upstairs"; (4) agents pushed their way into the house after a twelve-year-old girl opened the door while her parents were out; (5) agents stopped and searched the homeowner upon her arrival home, preventing her from immediately entering to check on her children; and (6) agents swept through the home, arresting several residents despite purportedly targeting only two civil immigration violators, neither of whom was found at the home or known to Plaintiffs. *See* 3-5, *supra*.

In this context, even if the Court were to accept the testimony of ICE 19 and ICE 42 that they did not enter the physical structure of the home, their presence on a team of at least eleven law enforcement officers actively and directly contributed to a "show of authority" that vitiated any ability to render voluntary consent. The "threatening presence of several officers" is an important factor in evaluating whether a seizure has occurred, and is alone sufficient to defeat ICE 19 and 42's Motion. *Mendenhall*, 446 U.S. at 554; *see also Kaupp v. Texas*, 538 U.S. 626, 630 (2003) (same). But ICE 19 and 42's participation in the warrantless operation at 710 Jefferson Street is not limited to their mere presence.

ICE 19 parked his car near the front of the house, contributing to the impression of force and authority that alarmed Sonia Bonilla when she arrived home during the operation. *See* Pls.' 56.1 Statement ¶¶ 56, 55. Then, with a view of the front door, he established himself on the perimeter for the purpose of watching for "people trying to run from the residence." *Id.* ¶ 56. ICE 19 was close enough to the front door to see agents "around the side and the back" of the home, hear ICE 18 shout "police" to the residents inside (*Id.* ¶¶ 6, 57), and have a clear view of agents detaining Ms. Bonilla and searching her car. *Id.* ¶¶ 4, 6, 57. But 710 Jefferson Street is surrounded by tall hedges and a fence. *Id.* It is reasonable to infer that ICE 19 could not have witnessed agents at the door or detaining Ms. Bonilla had he remained by his car, and that he was instead on the front lawn, and therefore took an even more direct and active role in the team's show of authority and resulting unlawful seizures at 710 Jefferson Street.

ICE 42 claims that she remained near her car. *See* Pls.' 56.1 Statement ¶ 11. Even if ICE 42's testimony were unrebutted, her presence at her car contributed to the show of authority, which included multiple parked cars that vitiated consent at the home. But her testimony has in fact been called into question; Plaintiff Beatriz Velasquez testified that she saw a female agent

on the front lawn as well as a female agent in the backyard. *Id.* ¶ 11. Plaintiff Dalia Velasquez similarly testified that she looked through her bedroom window after agents ordered her to remain there, and that she saw a female agent in the backyard. Sonia Bonilla testified that she saw two female agents among the team of agents at the front and sides of the home. *Id.* ¶ 55. Because only two female agents participated in the raid at 710 Jefferson (*Id.* ¶ 13) and ICE 22, the second female agent, claims not to recall where she was stationed (*Id* ¶¶ 11-14), a jury could reasonably infer that ICE 42 was part of the team on the front lawn and/or in the backyard. More significantly, if ICE 42 never left her car, then ICE 22 would have had to have been in two places at once—on the front lawn and in the side of the house or in the backyard. Thus, it is also reasonable to infer that ICE 42 not only participated in the "show of authority," but also personally invaded the curtilage of 710 Jefferson Street.[5] Given their direct participation in the unlawful seizures at 710 Jefferson Street, ICE 19 and ICE 42's Motion for Summary Judgment should be denied.

C. ICE 30, ICE 32 and ICE 43 Participated in Unlawful Seizures at 22 Dogwood Lane

By moving for summary judgment for only a fraction of the Defendants present at 22 Dogwood Lane on September 24, 2007, Defendants likewise concede that there are genuine issues of material fact as to whether or not unlawful seizures occurred there. Thus, this Court must deny Defendants' motion with respect to Moving Defendants ICE 30, ICE 32, and ICE 43, who were members of the at least twelve-person team that conducted the warrantless operation at 22 Dogwood Lane. *See Lagrange v. Ryan*, 142 F. Supp. 2d 287, 291 (N.D.N.Y. 2001) (holding that the disputed facts regarding what happened at the front door prevent entry of summary

[5] Indeed, even putting aside the issue that ICE 22 could not have been in two places at once, granting summary judgment for ICE 42 would seem to place responsibility for both presence on the lawn and invasion of the backyard on ICE 22, despite the fact that she claims not to remember where she was located.

judgment dismissing false arrest/unlawful imprisonment claims); *Burke v. Cicero Police Dep't*, No. 5:07-CV-624 (FJS/DEP), 2011 U.S. Dist. LEXIS 34266, at *8-14 (N.D.N.Y. Mar. 30, 2011) (entering judgment of unlawful seizure/false arrest and imprisonment against officer who kicked in front door to home to enter and make arrest).

A jury could easily conclude that a seizure occurred at 22 Dogwood Lane based on any combination of the following undisputed facts: (1) ICE agents and local police approached and surrounded the home and entered the property, including a backyard; (2) agents parked five to eight cars on the street near the front of the house; (3) agents and officers approached the front door and proceeded to bang loudly with their fists and flashlights for three minutes; (4) agents drew weapons prior to seeking consent. *See* 5-8, *supra*. Additionally, one Plaintiff, a lawful permanent resident, testified that he looked through the window in the front door to see a gun pointed at him as agents shouted "open the door!" *See* Pls.' 56.1 Statement ¶ 69. As soon as he did so, an agent kicked in the door, pointed a gun at his chest, and grabbed and handcuffed him, no questions asked. *Id*. More than one agent pointed a gun at another resident when she opened her bedroom door. *Id.* ¶ 70. Upstairs, agents ordered a young woman in her underwear to dress as they stood blocking a bedroom door, then handcuffed her without saying a word. *Id.* Weapons were displayed until the home was "secured." *Id.* ¶ 71.

Given these striking hallmarks of nonconsensual behavior—it is hard to imagine a more intimidating "show of authority" than that displayed by the ICE team here—this Court cannot exculpate ICE 30, ICE 32 and ICE 43 as a matter of law because they participated in their team's actions and, thus, in the vitiation of consent and unreasonable seizure. But ICE 30, ICE 32 and ICE 43 did far more than merely arrive at the home. ICE 30, ICE 32 and ICE 43 contend that they did not enter the homes. As shown below, in the case of ICE 30 and ICE 32, these claims

are subject to dispute. But even if they never entered 22 Dogwood Lane, they directly and actively surrounded the home, entered the curtilage, contributed to a show of force and authority, and made clear that residents were in no way "free to leave." *Mendenhall*, 446 U.S. at 544.

ICE 30 testified that he took his perimeter position inside the fence surrounding 22 Dogwood Lane, on the side of the house with a view of the rear. *See* Pls.' 56.1 Statement ¶ 73. He did not obtain consent before entering the side yard, *id*., which falls within the curtilage. *See Fixel*, 492 F.2d at 483 (noting the common law concept of curtilage encompasses yard and "ground included within the fence surrounding a dwelling house."). From his position, ICE 30 could see an agent in the rear of the home and hear men at the door announce themselves as "police." *See* Pls.' 56.1 Statement ¶ 73. Numerous agents who participated in Operation Community Shield, including agents at 22 Dogwood Lane, testified that the purpose of securing the perimeter was in part to prevent any occupant of 22 Dogwood Lane from leaving the house. Id. ¶ 76. It is reasonable to infer that ICE 30 had the same understanding and would have complied with common practice and policy. "If undisputed evidentiary facts disclose competing material inferences as to which reasonable minds might disagree, the motion [for summary judgment] must be denied." *Cali v. E. Airlines, Inc.*, 442 F.2d 65, 71 (2d Cir. 1971); *see also Stonehill v. Security Nat'l Bank*, 68 F.R.D. 24, 36 (S.D.N.Y. 1975) (stating that "even if the evidentiary facts are undisputed, summary judgment must be denied if the inferences drawn from the facts are disputed" (citing *Am. Mfrs. Mut. Ins. Co. v. Am. Broad.-Paramount Theatres, Inc.*, 388 F.2d 272 (2d Cir. 1967))).

Although ICE 43 observed ICE 30 on the perimeter, she does not corroborate that he was there for the duration of the operation. *Id*. ¶ 20. Given that Plaintiffs have never had a

meaningful opportunity to identify the agents who entered the homes,[6] this lack of corroboration is significant, particularly because at least five male agents entered the home. *Id*. ¶¶ 22, 70.

Defendants wrongly state that there is no dispute that ICE 32 did not enter 22 Dogwood Lane. While ICE 32 makes the uncorroborated claim that he stood by his car throughout the operation (*See* Defs' 56.1 Statement ¶ 26),[7] his testimony is contradicted by ICE 31, who testified that ICE 32 not only approached the front door, but also assisted in removing two prisoners from inside. *See* Pls.' 56.1 Statement ¶¶ 28, 74. Thus ICE 32's claims not to have entered are contradicted, and his motion for summary judgment should be dismissed on this basis alone. *United States v. Rem*, 38 F.3d 634, 644 (2d Cir. 1994) ("Choices between conflicting versions of the facts are matters for the jury**,** not for the court on summary judgment.").

ICE 43 approached the home, taking a position inside the property's fence in the front yard, facing the front door to guard the perimeter. *See* Pls.' 56.1 Statement ¶¶ 18, 32, 75. She had a view of the right corner of the house, the side yard, and the front door, where she saw multiple law enforcement officers. *Id.* ¶ 75. She did not obtain consent to enter the side yard, *id*., which falls within the curtilage. *See Fixel*, 492 F.2d at 483. ICE 43 stated that based on her training, the purpose of securing the perimeter was in part to stop and identify individuals exiting the home, and that she understood she was to do so at 22 Dogwood Lane. *See* Pls.' 56.1 Statement ¶ 75. Thus, along with ICE 30 and ICE 32, she clearly participated in the seizure.

---

[6] Plaintiffs repeatedly requested that Defendants produce photographs of all agents who participated in the operations at issue in this litigation. However, Defendants did not comply with these requests until they were expressly ordered to do so by the Court, *see* Order of Hon. Frank Maas, dated June 18, 2010, and after almost all discovery in the case was completed. Nor did Defendants make available photographs or other identifying documents during their sworn depositions. Moreover, the photographs finally produced did not contain the agents' names, which Plaintiffs are barred from seeing under the terms of a confidentiality order. Finally, the photographs appear to be woefully out of date; indeed, even attorneys who attended the depositions and sat for several hours with various agents had difficulty later identifying those agents from the photographs

[7] Even under his version of the events, ICE 32 was forced to acknowledge that "standing on a perimeter is being involved in an arrest." *See* Pls.' 56.1 Statement ¶ 76.

II. Moving Defendants Failed to Intervene In the Constitutional Violations

As set forth above, each Moving Defendant participated in the constitutional violations at the homes. Even if this were not the case, however, the Moving Defendants' failure to intervene to stop constitutional violations which took place in their presence provides an independent path to their liability. Despite a reasonable opportunity to intervene to prevent or remedy obvious constitutional violations being perpetrated by other agents, the Moving Defendants did nothing.

"It is widely recognized that all law enforcement officials have an affirmative duty to intervene to protect the constitutional rights of citizens from infringement by other law enforcement officers in their presence." *Anderson v. Branen*, 17 F.3d 552, 557 (2d Cir. 1994). To establish *Bivens* liability based on failure to intervene, Plaintiffs must show: (i) the alleged violation took place in the officer's presence; (ii) the officer had a realistic opportunity to intercede and prevent the harm; (iii) a reasonable person in the officer's position would know that plaintiffs' rights were being violated; and (iv) the officer did not take reasonable steps to intervene. *Id.* at 557. Whether an officer can be held liable for failure to intervene is generally a question of fact for the jury to decide. *See Douglas v. City of New York*, 595 F. Supp. 2d 333 (S.D.N.Y. 2009) (in § 1983 claim, "personal involvement is a question of fact") (citing *Williams v. Smith*, 781 F.2d 319, 323 (2d Cir.1986); *Anderson*, 17 F.3d at 557 ("Whether an officer had sufficient time to intercede or was capable of preventing the harm being caused by another officer is an issue of fact for the jury unless, considering all the evidence, a reasonable jury could not possibly conclude otherwise."). Here, material facts exist which preclude this Court from granting summary judgment to Defendants on these questions.

Defendants claim that "plaintiffs cannot establish that a reasonable person in the Moving Defendants' position would have known that plaintiffs' rights were being violated" because

Moving Defendants "never set foot in" the homes where the constitutional violations took place. Def. Mot. at 10. Even if Moving Defendants had not entered Plaintiffs' property and houses—and there is genuine dispute that this is true—Defendants' position ignores facts demonstrating that constitutional violations visibly occurred before any agent "set foot" inside, when large armed teams surrounded homes, entered the curtilage of the homes and then stood guard to prevent exit during roundups inside. And, even if that were not the case, the Defendants had ample opportunity to intervene to stop the other agents from engaging in unconstitutional conduct and failed to do so, as shown below.

A. ICE 19, ICE 42, ICE 30, ICE 32, and ICE 43 Witnessed Unlawful Conduct and Had An Opportunity to Intervene

As a preliminary matter, Defendants do not claim that any of the Moving Defendants ever attempted to intervene to stop any of the unconstitutional conduct during the operations. Because this is undisputed, we discuss only the remaining three factors.

All Moving Defendants witnessed the unlawful conduct that took place at the homes at issue here and had a realistic opportunity to intervene to prevent or remedy these constitutional violations. As discussed above, ICE 19 and ICE 42 were present when a significant number of ICE agents and local police approached and surrounded 710 Jefferson Street in the early morning hours, wearing and carrying raid gear, parking at least seven cars in front of the house, and entered the property, including a fenced-in backyard. *See* Section II.B, *infra*; *see also* Pls.' 56.1 Statement ¶¶ 41, 45-52. None of these actions form the hallmark of a true consensual encounter; as such, ICE 19 and ICE 42 could have intervened before the agents entered the home, knowing that the approach to the home and unlawful entry into the property would invalidate consent, particularly as this was the second operation of the day and they had already witnessed and participated in a previous unconstitutional operation (*see* 3, *supra*).

Moreover, ICE 19 was positioned in front of 710 Jefferson Street with a clear view of the front door. *See* Pls.' 56.1 Statement ¶ 57. He also testified that he heard "police!" shouted at the front door (*id.* ¶ 6), which raises the inference he heard what else was said at the front door, including the false statement used by the officers ("someone is dying upstairs") to gain entry into the home. But ICE 19 did not intervene. ICE 19 also observed Sonia Bonilla's van pull up to the house and watched her interaction with agents, admitting she looked "concerned." *Id.* ¶¶ 7, 57. It would therefore be reasonable to conclude that he saw agents search her car and restrain her movements. *See* Section II.B, *infra*. Once again, he could have intervened, but did not.

Upon arriving at 710 Jefferson Street, ICE 42 testified she stayed near her car and watched a prisoner. *See* Pls.' 56.1 Statement ¶ 11. However, as discussed in Section I.B, *supra*, given Plaintiffs' observations of two women on and around the property, a trier of fact would be entitled to conclude that ICE 42 in fact approached the home and went onto the curtilage, and could have intervened at any point during the operation. Finally, both ICE 19 and ICE 42 could have intervened when agents exited the home, taking arrested residents with them, by preventing the agents from transporting the prisoners away from their home.

Similarly, at 22 Dogwood Lane, Moving Defendants ICE 30, ICE 32, and ICE 43 were present when agents approached and parked five to eight cars near the front of the home, and personally entering the property, which had a fenced-in yard, taking positions along the sides of the house without obtaining consent to do so. *See* 5-8, *supra*; *see also* Pls' 56.1 Statement ¶¶ 32-34, 63-68, 72-75. Each of these Defendants had an opportunity to intervene while agents surrounded the home. Additionally, ICE 30 saw officers approach the front door and heard the knocking at the door. *Id.* ¶¶ 20-21; Def. Mot. at 5. Plaintiffs have described loud banging and shouting, and which a probation officer has described three minutes of knocking with fist and

flashlight. described as banging for two minutes with fists and one minute with a flashlight. *Id.* ¶¶ 67, 69. Further, despite ICE 32's claims to have remained by his car, sworn testimony indicates that he not only approached the front door but also entered the home. *Id.* ¶¶ 26, 74.

It is reasonable to infer that ICE 30, ICE 32 and ICE 43 would have seen and heard everything that occurred at the front door of the home, including: (1) the agents pointing a weapon at the door; (2) the agents demanding that the door be opened; (3) the agents pounding on the door for three minutes; (4) the agents kicking in the door when it was finally opened by a resident; (5) an agent handcuffing a resident, shoving him and putting a gun into his chest. *See* Pls.' 56.1 Statement ¶ 69. Further, ICE 32 may have seen the brutal conduct of agents within the home. *Id.* ¶ 74. These Defendants thus all had a reasonable opportunity to intervene at any of these points during the operation. *See, e.g.*, *Burke*, 2011 U.S. Dist. LEXIS 34266, at *18-21 (entering judgment against law enforcement officer who failed to intervene while other officer kicked in front door to home). Finally, they could have intervened when agents left the home with prisoners in tow, by preventing the agents from taking and transporting the prisoners in their cars. However, far from doing that, according to ICE 31, ICE 32 actually approached the front door and assisted him in taking arrested residents out of the home. *See* Pls.' 56.1 Statement ¶ 28.

Defendants argue that "when an officer is standing at a distance from an alleged violation, or the violation occurs quickly, the officer does not have a realistic opportunity to intervene and is therefore insulated from liability." Def. Mot. at 9-10. However, the Second Circuit has found that "[e]ven if [a defendant] had no opportunity to intervene at the start of [an] incident . . . evidence . . . that he had such opportunities with respect to subsequent constitutional violations" provided a factual question for the jury's determination. *Anderson*, 17 F.3d at 558. Here, Moving Defendants failed to intervene at any point in time—whether during the approach,

entry and search at 710 Jefferson Street and 22 Dogwood Lane, afterwards when prisoners were taken from their homes, or at any other point over the course of the operations that week. In fact, Moving Defendants actually guarded prisoners and assisted in their transportation throughout the course of the operation. *See* Pls.' 56.1 Statement ¶¶ 28, 42, 59, 77. The law is clear that where an agent or officer "not only declined to intercede on [an arrestee's] behalf but also assisted [another] officer in detaining her" the first officer's participation in the unlawful arrest is sufficient to render him liable to the arrestee. *See Gagnon v. Ball*, 696 F.2d 17, 21 (2d Cir. 1982).

B. ICE 19, ICE 42, ICE 30, ICE 32, and ICE 43 Should Have Reasonably Known Plaintiffs' Rights were being Violated

At 710 Jefferson Street, agents began knocking so loudly on the door that the residents thought agents were trying to force it open. *See* Pls.' 56.1 Statement ¶ 52. Agents shone flashlights into windows. *Id*. Entry was obtained not by knowing consent, but by the agents' false suggestion of a medical emergency. *Id*. Sonia Bonilla, the owner of the home, returned home during the operation to find multiple agents on her lawn, some carrying weapons, as well as agents on the side of her house. *Id.* ¶ 55. At least two agents ordered her to leave her van and, despite no specific evidence of any danger, searched inside. *Id*. Agents, who by then knew she was the owner of the home and not a target of the operation (as she was not a male under the age of 25), prevented her from entering her own home. *Id.* ¶¶ 46, 55. All of this occurred in the presence of ICE 19 and ICE 42, and could not reasonably have been viewed as falling within the scope of a consent-based operation.

Moreover, 710 Jefferson Street was the second home the team visited that day. *See* Pls.' 56.1 Statement ¶ 45. At the first home, both ICE 19 and ICE 42 participated in the unconstitutional entry onto the property of the home, including, in the case of ICE 42, the

nonconsensual entry into the backyard, which typically falls within the curtilage. *Id.* ¶¶ 41-43. Given that ICE 19 may have already witnessed, and ICE 24 may have already participated in, constitutional violations at the first home, ICE 19 and ICE 42 had reason to believe that violations would continue to occur throughout the operation. Yet both at the first home and then again 710 Jefferson Street, they failed to intervene.

At 22 Dogwood Lane, Plaintiffs and agents alike described weapons, including an M4 semiautomatic carbine, drawn and pointed at unarmed residents in the home. *See* Pls.' 56.1 Statement ¶¶ 68-70. At the front door, a Plaintiff saw a gun pointed at him through the door's window and heard agents order him to open it. *Id.* ¶ 69. As soon as he did so, an agent kicked the door in, grabbed him, put handcuffs on him and pointed a gun at his chest. *Id*. All of these acts took place in the presence of ICE 30, ICE 32, and ICE 43. Here, too, none of these occurrences could reasonably be viewed as falling within the scope of a consent-based operation.

CONCLUSION

As this is the Defendants' motion for summary judgment, they "bear[] the burden of establishing the absence of any genuine issue of material fact." *Zalaski v. City of Bridgeport Police Dep't*, 613 F.3d 336, 340 (2d Cir. 2010). Defendants' argument that Moving Defendants who did not enter homes are absolved of all liability fails as a matter of law, both because they participated in the seizures of Plaintiffs and because they had realistic opportunities to intervene in the constitutional violations that occurred but failed to do so. Accordingly, and for all of the foregoing reasons, Plaintiffs respectfully request that the Five *Bivens* Defendants' Motion for Summary Judgment be denied.

///

Dated: December 23, 2011
New York, New York

DEWEY & LEBOEUF LLP

By: */s/ Aldo A. Badini*
Aldo A. Badini
Kelly A. Librera
Lawrence S. Hirsh
1301 Avenue of the Americas
New York, New York 10019
Tel.: (212) 259-8000
Fax: (212) 259-6333

LATINOJUSTICE PRLDEF

By: */s/ Ghita Schwarz*
Ghita Schwarz
Foster Maer
99 Hudson Street, 14th Floor
New York, New York 10013
Tel.: (212) 739-7504
Fax: (212) 431-4276