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.	:	

REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

The Moving Plaintiffs (the "Plaintiffs") have shown that it is undisputed that the 710 Jefferson and 15 W. 18th Street Defendants (the "Defendants") entered and searched Plaintiffs' homes and curtilage without judicial warrants, exigent circumstances, or consent, and that even if consent had been obtained, it would have been invalid as a matter of law. In response, Defendants have failed to point to *any* evidence that consent was obtained at these two homes. Even if they had produced such evidence, Defendants have failed to come forward with any facts rebutting Plaintiffs' evidence that the circumstances of the encounters were so coercive as to vitiate the validity of any purported consent. Defendants have thus failed to satisfy their burden of "producing specific facts showing that there is a genuine issue of material fact for trial." *Nextec Applications v. Brookwood Cos., Inc.*, 703 F. Supp. 2d 390, 400 (S.D.N.Y. 2010); Fed. R. Civ. P. 56(c). The Court should therefore find that consent was not obtained and that Defendants are liable for violating Plaintiffs' Fourth Amendment rights.

ARGUMENT

I. Defendants Have No Facts Showing Consent To Enter Or Search Plaintiffs' Homes

A. Defendants Have The Burden To Come Forward With Evidence

Defendants argue that because, in a civil case, Plaintiffs ultimately have the burden of persuasion to prove their case at trial, Defendants do not have the burden to set forth evidence that they obtained consent. Defendants are wrong. First, they ignore the Second Circuit's holding in *Anobile v. Pelligrino*, 303 F.3d 107, 124 (2d Cir. 2002), a civil case brought under 42 U.S.C. § 1983, that "[t]he official claiming that a search was consensual has the burden of demonstrating that the consent was given freely and voluntarily." Second, even the authority Defendants cite recognizes that the defendant must "produc[e] evidence of consent or search

incident to an arrest or other exceptions to the warrant requirement," even if the "ultimate risk of non-persuasion must remain squarely on the plaintiff …." *Ruggiero v. Krzeminski*, 928 F.2d 558, 563 (2d Cir. 1991). Defendants clearly have the burden to come forward *now* with evidence that valid consent was obtained. *See*, *e.g.*, *Nextec*, 703 F. Supp. 2d at 400 (defendant has to come forward with "affirmative and specific evidence" to avoid entry of summary judgment).

B. Defendants Have Failed To Come Forward With Any Evidence

In place of admissible evidence demonstrating actual consent, Defendants rely on speculative, conclusory declarations made in some cases more than two years after agents were deposed. But no declarant claims to have been the person who obtained consent at either home, and no declarant claims to remember witnessing another agent or police officer doing so. Defendants thus have no evidence based on personal knowledge that consent was obtained.

1. Defendants' Alleged Habit Evidence Does Not Raise A Disputed Issue Of Fact

Defendants attempt to conjure a genuine issue of material fact by claiming that ICE agents possessed a "custom and practice of always obtaining consent when conducting a warrantless operation." Opp'n at 14. This argument fails both as a matter of law and fact.

As a matter of law, "always obtaining consent when conducting a warrantless operation" does not qualify as habit evidence because it is not the type of "semi-automatic," "regular response to a repeated, specific situation" required by Rule 406.[1] *Cf. Loussier v. Universal Music Grp., Inc.*, No. 02 CV 2447 (KMW), 2005 WL 5644420, at *2-3 (S.D.N.Y. Aug. 30, 2005). Whether consent was obtained to enter and search a home is simply not equivalent to fact evidence concerning "the habit of going down a particular stairway two stairs at a time or of giving the hand-signal for a left turn," *United States v. Merritt-Meridian Constr. Corp.*, No. 90

[1] Fed. R. Evid. 406, advisory com. notes (citation omitted); *United States v. Al Kassar*, 660 F.3d

Civ. 5106 (DC), 1994 WL 577637, at *2 (S.D.N.Y. Oct. 19, 1994) (citation omitted), or even of conducting a breast exam during a doctor's appointment or advising clients of the rules of attorney-client privilege during a legal consultation, Opp'n at 15. Defendants previously conceded as much during discovery, when they claimed that whether agents abided by the Fourth Amendment when entering individuals' homes does not constitute "the type of 'semi-automatic' behavior contemplated by Rule 406."[2] Agents, in fact, insisted during their depositions that the manner in which they conduct consent entries and searches depends "on the circumstances of the case" and that "every case is different."[3] Yet the ICE agents provide no factual description in their declarations about how they conduct "consent" entries or searches and thus fail to provide any factual foundation for their legal conclusion that they always obtain consent.

Indeed, the facts here militate against the introduction of such "habit" or "routine practice" evidence. *See Corona v. Adriatic Italian Rest. & Pizzeria*, No. 09 Civ. 5399(KNF), 2010 WL 675700, at *1 (S.D.N.Y. Feb. 23, 2010) (habit evidence must show "the degree of specificity and frequency of uniform response that ensure more than a mere 'tendency' to act in a given manner"). It is Defendants' burden to show that any alleged "habit" is both uniform and frequent. *Weil v. Seltzer*, 873 F.2d 1453, 1461 (D.C. Cir. 1989). Yet with respect to 710 Jefferson, ICE 18, ICE 20, ICE 21 and ICE 22 testified during depositions to witnessing or participating in clearly nonconsensual conduct during the same week of warrantless home

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108, 123 (2d Cir. 2011).

[2] Supp. Decl. of Lawrence S. Hirsh in Support of Pls' Reply Mem. of Law in Support of the Motion for Partial Sum. J., dated January 20, 2012 ("Supp. LH Decl.") Ex. A at 3.

[3] Decl. of Lawrence S. Hirsh in Support of Pls' Motion for Partial Sum. J., dated October 28, 2011 ("LH Decl.") Ex. 7 at 198:5-16; *see also id.* at 130:16-19, 244:3-14, 256:2-16, 265:10-16, 284:21-285:8; Supp. LH Decl. Ex. L at 170:3-175:20.

operations.[4] And with respect to 15 West 18th Street, ICE 41 testified both that Operation Community Shield was her first operation involving an administrative warrant and that during that same week she entered two bedrooms where occupants were sleeping.[5] Further, several agents do not aver at all that they conducted consensual entries or searches prior to the time of the relevant raids in September 2007.[6] Defendants have, therefore, failed to establish the factual predicate that any purported practice of obtaining valid consent was either routine or consistent at the relevant time. *See Loussier*, 2005 WL 5644220 at *3 (court must examine "the adequacy of sampling and the uniformity of response") (citations omitted).

Likewise, Plaintiffs have undisputedly demonstrated that once inside the homes, Defendants conducted protective sweeps[7] but were unable to identify any "reasonable suspicion of danger" to justify them.[8] Defendants are not permitted to contradict their prior deposition testimony by declaring now that it was their habit to conduct protective sweeps only with "reasonable suspicion that dangerous persons may be concealing themselves."[9] *Margo v. Weiss*,

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[4] *See* LH Decl. Ex. 5 at 234:5-236:11 (describing, as team leader, observing a forcible entry by team member ICE 20 during the week of September 24, 2007); LH Decl. Ex. 7 at 237:10-242:21 (describing forcing open a door after a home occupant shut it during the week of September 24, 2007); LH Decl. Ex. 9 at 167:12-168:9 (witnessing same); LH Decl. Ex. 8 at 331:19-23 (describing ICE 20 "breach[ing] the door" and entering with him).

[5] *Compare* ICE 41 Decl. ¶ 10 *with* LH Decl. Ex. 24 at 37:6-25 and ICE 41 Decl. ¶ 15 *with* LH Decl. Ex. 24 at 176:23-183:15.

[6] *See*, *e.g.*, Decls. of ICE 23, 42, 48, 52.

[7] Plaintiffs' 56.1 Statement (hereinafter "56.1 Stmnt") ¶¶ 57-64, 112.

[8] *See* 56.1 Stmnt ¶¶ 23, 88. Defendants, in violation of the Local Rules for this Court, cite no record evidence in support of the conclusory statement that "defendants were on heightened alert during the operations," or offer any legal support for the proposition that such "heightened alert" is sufficient to satisfy the *Buie* standard. *See infra* at 5. Rule 56.1 Stmnt ¶¶ 23 and 88 should thus be deemed admitted. *See* L.R. 56.1(c); *Mediterranean Shipping Co. (USA) v. Cargo Agents, Inc.*, No. 10 Civ. 5070 (THK), 2011 WL 6288422, at *2-3 (S.D.N.Y. Dec. 15, 2011).

[9] *Compare, e.g.*, ICE 18 Decl. ¶ 5 ("I also understand that I am permitted to conduct a protective sweep if I have a reasonable suspicion that dangerous persons may be concealing themselves") *with* LH Decl. Ex. 5 at 174:2-175:20 (could not articulate any specific danger during operation).

213 F.3d 55, 60-61 (2d Cir. 2000). Defendants' reliance on familiarity with the Special Agent Handbook as evidence that they conduct protective sweeps correctly is misplaced. The Supreme Court held that protective sweeps require a reasonable suspicion of danger over a decade after the manual was last revised in 1979; that doctrine is reflected nowhere in the manual.[10]

2. Defendants Have No Evidence That Local Police Obtained Consent

Defendants also attempt to manufacture an issue of fact by suggesting that local police officers who accompanied ICE agents might have obtained consent, but offer *no evidence* that local law enforcement actually did.[11] Despite every opportunity and an obligation[12] to do so, Defendants do not identify a single law enforcement officer who claims to have obtained consent or indicate how such purported consent was obtained. Many Defendants testified that they did not recall what local officers actually did during the raids or did not recall local police being involved at all, thus impermissibly contradicting their declaration averments.[13] *See Margo*, 213 F.3d at 60-61. Further, no local law enforcement officer deposed in this action claims to have obtained consent at either home; each testified it was not his role to obtain consent.[14] This is not

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[10] *Compare* Supp. LH Decl. Ex. B *with Maryland v. Buie*, 494 U.S. 325, 327 (1990).

[11] ICE 39 assumed that "one of the uniformed police officers" obtained consent at 15 W. 18th Street but testified that she never determined who obtained consent or whether it was obtained. ICE 39 Decl. ¶ 12; LH Decl. Ex. 22 at 264:9-12; 268:20-23. ICE 45 averred that the local police officer "very likely would have knocked on the door," saying nothing about consent. ICE 45 Decl. ¶ 18. ICE 18 claimed that a NCPD officer "approached the front door" of 710 Jefferson, but did not "recall the interaction." ICE 18 Decl. ¶ 13. Thus, Defendants' rote declarations that local police were to "assist" in obtaining consent cannot create an issue of material fact.

[12] *See, e.g.,* LH Supp. Decl. Ex. C at No. 1; LH Supp. Decl. Ex. D at No. 1. Further, at their depositions, Defendants could not identify the police officers who purportedly obtained consent, and often could not recall the identities of any police officers at all. *See, e.g,* LH Decl. Ex. 22 at 203:7-205:4; LH Decl. Ex. 28 at 139:3-7; LH Decl. Ex. 5 at 199:3-8.

[13] *Compare, e.g.,* ICE 20 Decl. ¶ 2 *with* LH Decl. Ex. 7 at 210:20-25 (could not recall role of local officers at 710 Jefferson); ICE 22 Decl. ¶ 5 *with* LH Decl. Ex. 9 at 80:7-17 (same); ICE 25 Decl. ¶ 4 *with* LH Decl. Ex. 12 at 100:7-15 (could not recall local police being involved).

[14] S*ee* LH Decl. Ex. 36 at 127:7-13, 154:5-7 (testifying that he did not obtain consent at 15 W.

surprising given that several ICE agents, and ICE itself at its Rule 30(b)(6) deposition, testified that it was the *ICE agents'* role to obtain consent during ICE-led operations.[15]

3. Defendants' Averments That Consent Must Have Been Obtained Are Speculative

As Defendants cannot point to any evidence that consent was obtained; they instead rely on speculative declaration averments which state that they assume or believe that consent was granted, or that they "would have remembered" if consent had not been obtained.[16] These speculative statements cannot defeat summary judgment. Fed. R. Civ. P. 56(c)(4); *Palomo v. Trs. of Columbia Univ. in the City of N.Y.*, 170 F. App'x 194, 197 (2d Cir. 2006).

Moreover, the declarations often contradict Defendants' previous testimony and therefore must be disregarded. *See Margo*, 213 F.3d at 60-61. For example, ICE 20 now claims he would not enter a location if he did not obtain consent or believe consent was obtained, but he admitted to forcing open a door during a warrantless home operation in September of 2007.[17] Similarly, ICE 41, who now avers she has never seen agents open doors without consent, admitted that she entered two bedrooms where occupants were sleeping[18] and thus unable to grant consent.

II. No Purported Consent Was Valid

Even if one were to assume counter-factually that Defendants had come up with some

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18th Street); Supp. LH Decl. Ex. E at 92:16-25 ("it was our understanding that it was going to be ICE [who was responsible for obtaining consent]"); Supp. LH Decl. Ex. F at 81:19-22 ("I believe it was ICE" who was responsible for obtaining consent), 203:2-15; *see also* Supp. LH Decl. Ex. G at 97:11-16; Supp. LH Decl. Ex. H at 60:10-15; Supp. LH Decl. Ex. I at 142:16-19; Supp. LH Decl. Ex. J at 249:5-13; Supp. LH Decl. Ex. K at 93:4-13.

[15] *See* Supp. LH Decl. Ex. L at 177:5-178:3 ("Q: So ICE policy is that when ICE couples with local law enforcement, but ICE is the lead agency on an operation, ICE agents would get consent to enter a home?" A: Yes."); LH Decl. Ex. 8 at 234:7-23; LH Decl. Ex. 22 at 25:3-8.

[16] *See, e.g.,* ICE 18 Decl. ¶ 13; ICE 46 Decl. ¶ 12.

[17] *Compare* ICE 20 Decl. ¶ 8 *with* LH Decl. Ex. 7 at 237:10-242:21; *Compare* ICE 18 Decl. ¶ 13 *with* LH Decl. Ex. 5 at 233:14-236:11 (approving ICE 20's conduct).

[18] *Compare* ICE 41 Decl. ¶ 15 *with* LH Decl. Ex. 24 at 176:23-183:15.

evidence of words or gestures signifying consent to enter and/or search, such consent would have been invalid as a matter of law given the coercive nature of the raids. *See* Opening Br. at 20-25.

Defendants are wrong to say that "the fact-intensive nature of consent precludes summary judgment." Opp'n at 8. First, as set forth above, there is *no* admissible evidence that consent was granted. Second, courts have on many occasions determined as a matter of law that valid consent was not granted. *See Richardson v. City of Antioch*, 722 F. Supp. 2d 1133, 1140-43 (N.D. Cal. 2010) (finding that police officers had not obtained valid consent on summary judgment); *United States v. 90-23 201st St.*, 775 F. Supp. 2d 545, 556-57 (E.D.N.Y. 2011) (concluding as a matter of law that purported consent was invalid). And courts have rendered conclusions of law in favor of plaintiffs after considering the "totality of the circumstances." *Jennifer D. v. N.Y.C. Dep't of Educ.*, 550 F. Supp. 2d 420, 434-36 (S.D.N.Y. 2008); *Gayle v. Harry's Nurses Registry, Inc.*, No., 2009 WL 605790, at *5-9 (E.D.N.Y. Mar. 9, 2009).

Here, the undisputed facts show that large teams of armed Defendants and police officers parked multiple cars in front of the homes in the early morning hours. Opening Br. at 3-4, 9-10. They surrounded the homes and knocked hard at the front doors, where their only contact was with minors. *Id.* at 4-5, 10-11. At 710 Jefferson, Defendants falsely stated that "someone was dying upstairs" and entered after a 12-year-old girl in pajamas opened the door. *Id.* at 5. At 15 W. 18th Street, Defendants pushed a 17-year-old aside to enter the home. *Id.* at 10-11. Inside, agents swept through the homes, pulled residents from beds, corralled them in common spaces, searched rooms where Plaintiffs could not have granted authority to search, and restrained residents' ability to move freely. *Id.* at 6, 11-12.

The foregoing facts are undisputed.[19] L.R. 56.1(c); *Mediterranean Shipping*, 2011 WL

[19] *See* 56.1 Stmnt ¶¶ 32, 95 (Defendants were heavily armed with weapons, bulletproof vests and

6288422, at *2-3. In many cases, where Defendants purportedly dispute the fact, Defendants merely baldly assert that a fact in Plaintiffs' 56.1 Statement is "immaterial" to the motion, fail to respond to the averments in the 56.1 Statement, or "dispute" them without providing any conflicting evidence.[20] This must result in this Court finding those facts undisputed.[21] Moreover, these facts, including the presence of multiple heavily armed agents, the ages of the minors who opened the door, the presence of lights shining into the home, and whether agents physically grabbed residents once inside, are of course plainly relevant to the question of consent. *LaDuke v. Nelson*, 762 F.2d 1318, 1328-29 (9th Cir. 1985).

Defendants claim that there is "conflicting testimony" about whether a ruse was used at

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raid jackets); Defendant's 56.1 Response (hereinafter "56.1 Resp.") ¶¶ 32, 95 (disputing only that agents carried all of the listed weapons "at all times"); Opp'n at 4 (claiming only that agents did not draw weapons, not that they were not armed); 56.1 Stmnt and 56.1 Resp. ¶¶ 33-43, 96 (Defendants patrolled perimeter); 56.1 Stmnt ¶¶ 45, 100 (Defendants knocked hard on the doors); 56.1 Resp. ¶¶ 45, 100 (with one exception, Defendants' citations do not refer to loud knocking at all, and all testified that could not remember the interaction at the front door); ICE 18 Decl. ¶ 5, 13; ICE 39 Decl. ¶¶ 12-14; ICE 52 Decl. ¶ 8. For a purported dispute as to loud knocking, Defendants point only to the declaration of ICE 21 at ¶ 10, who contends that "[t]he agents did not pound on the door," but admits that that *he was not present at the front door*.

[20] *See*, *e.g.*, 56.1 Resp. ¶¶ 1, 14 (age of Velasquez girls), 29 (time Sonia Bonilla was absent from home), 31 (number of ICE cars at 710 Jefferson), 32 (equipment Defendants bore), 34 (Defendants established perimeter), 35 (same), 37 (evidence that plaintiffs witnessed show of force), 43-44 (same), 48 (same), 49 (same), 51 (same), 55 (Defendants admit minor cannot grant consent), 56 (describing encounter with Beatriz and Dalia Velasquez), 64 (describing search and detention of residents), 65-66 (same), 79-81 (age of Christopher, Anthony, and Bryan Jimenez), 93 (time of operation at 15 W. 18th Street), 95 (equipment Defendants bore), 96 (Defendants established perimeter), 98 (same), 99 (Defendants shone flashlights into windows), 101 (agents insisted that someone "open the door"), 102 (describing encounter at front door with minor), 104 (describing entry via back door), 111 (agents grabbed and pulled residents), 112-113 (describing sweep and search of home), 114 (describing search of sleeping Plaintiff's room).

[21] *See Schultz v. Stoner*, No. 00 Civ. 0439(LTS), 2009 WL 455163, at *2 nn. 3-4 (S.D.N.Y. Feb. 24, 2009) (facts in plaintiffs' 56.1 statement were "undisputed" where defendants' "response to the statement purports to deny these facts and argues that they are irrelevant" but offers "no evidence to the contrary"); *Larsen v. JBC Legal Grp., P.C.*, 533 F. Supp. 2d 290, 295 (E.D.N.Y. 2008) (disregarding defendant's response to 56.1 statement where the response had no evidentiary citations and simply labeled plaintiff's statements "irrelevant" to his liability).

710 Jefferson, citing declarations stating that agents did not hear a ruse used to gain entry. Opp'n at 9-10. However, the fact that someone did not hear a statement does not create a dispute that such statement was made unless the affiant was in a position to hear it. By and large, Defendants stated that they were not at the front door, did not hear the conversation there, or do not remember what happened,[22] and their testimony thus has no evidentiary value. *See Palomo*, 170 F. App'x at 197. Further, ICE 21 testified in his deposition that he had used ruses in the past, that the use of ruses is a common practice, that it is probable that a ruse was used at 710 Jefferson, and that he had been present on another occasion when agents falsely stated that they were responding to a 911 call.[23] His declaration that he had not "ever heard of that tactic being used before"[24] should therefore be disregarded. *See Margo*, 213 F.3d at 60-61.

III. Each Defendant Participated In The Constitutional Violations

Defendants also argue that "plaintiffs' motion is predicated on an impermissible 'team effort' theory." Opp'n at 11-14. Defendants' argument fails for four reasons. *First*, this argument ignores voluminous evidence as to the involvement of each Defendant. At 710 Jefferson, the undisputed facts show: ICE 18, 21, 23, 25, and 26 entered the home;[25] ICE 42 was present at the operation;[26] and ICE 19, 20, 22 and 24 guarded the perimeter of the home.[27] At 15 W. 18th Street, the undisputed facts show: ICE 39, 40, 41, 47, 49, and 50 entered the home;[28]

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[22] LH Decl. Ex. 5 at 159:5-25; LH Decl. Ex. 6 at 122:4-8, LH Decl. Ex. 7 at 119:3-11, 116:17-20; LH Decl. Ex. 9 at 66:2-19, 92:10-15; LH Decl. Ex. 10 at 177:7-9; LH Decl. Ex. 11 at 103:8-11; LH Decl. Ex. 12 at 108:16-20; LH Decl. Ex. 46 at 105:6-10.

[23] *See* LH Decl. Ex. 8 at 229:19-230:20, 250:14-18.

[24] *See* ICE 21 Decl. ¶ 11.

[25] *See* 56.1 Stmnt ¶¶ 59-64; 56.1 Resp. ¶¶ 59-64.

[26] *See* 56.1 Stmnt ¶ 43; 56.1 Resp. ¶ 43.

[27] *See* 56.1 Stmnt ¶¶ 34-35, 37, 39; 56.1 Resp. ¶¶ 34-35, 37, 39.

[28] *See* 56.1 Stmnt ¶ 105; 56.1 Resp. ¶ 105.

ICE 45 was stationed in front of his car at the front of the home;[29] and ICE 46, 48, 51, and 52 did not dispute their presence at the operation.[30] *Second*, each Defendant participated in a "show of authority" that negated any consent that could have been obtained. *See, e.g., LaDuke*, 762 F.2d at 1329 (stating factors relevant to coercion).[31] Each Defendant can and should therefore be held liable for the constitutional violations.[32] *Third*, each of the Defendants had multiple opportunities to intervene, but failed to do so. Defendants do not dispute that such failure is a basis for imposition of liability. *Finally*, even if one assumes, *arguendo,* that there is some particular basis to deny summary judgment as to one or more of the Defendants, there certainly is no basis either to deny summary judgment as to those Defendants who undisputedly entered and/or searched Plaintiffs' homes or not to make a finding that the entries and searches at issue were unconstitutional. *See* Fed. R. Civ. P. 56(a) (permitting motions for summary judgment on parts of a claim or defense). Regardless of which agents entered and searched Plaintiffs' homes, the Court should find that ICE did not obtain consent at 710 Jefferson or 15 West 18th Street.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court grant their Motion for Partial Summary Judgment on the Third Claim of their Fourth Amended Complaint and rule that (1) consent to enter or search was not obtained at 710 Jefferson and 15 West 18th Street; and (2) that the agents present at each home were liable.

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[29] *See* 56.1 Stmnt ¶ 97; 56.1 Resp. ¶ 97.

[30] *See id.*

[31] *See also* Plfs' Mem. of Law in Opp'n to Five *Bivens* Dfts' Motion for Sum. J. at 10-13.

[32] Defendants do not dispute that each of the Defendants were present at Plaintiffs' homes, nor do they dispute the location of each of the ICE agents. *See* 56.1 Resp. ¶¶ 16; 33-43; 59-64; 82; 96-98. *See Johnson v. Harron*, No. 91-CV-1460, 1995 WL 319943, at *16 (N.D.N.Y. May 23, 1995) (holding all defendants that "actively participated" as an "integral part" of the team of defendants that violated plaintiff's constitutional right liable and granting plaintiff's motion for partial summary judgment); *see also Boyd v. Benton Cnty.*, 374 F.3d 773, 780 (9th Cir. 2004).

Dated: January 20, 2012
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