UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ADRIANA AGUILAR, *et al.*,

Plaintiffs,

- against -

IMMIGRATION AND CUSTOMS ENFORCEMENT DIVISION OF THE UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *et al.*,

Defendants.

ECF Case
07 Civ. 8224 (KBF) (FM)

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

FACTUAL BACKGROUND 3

A. Background Concerning the Enforcement Operations at Issue 3

B. 710 Jefferson Street 4

C. 15 West 18th Street 5

ARGUMENT 6

A. Summary Judgment 6

1. Legal Standards Applicable to Motions for Summary Judgment 6

2. Summary Judgment Is Generally Unavailable as to the Existence or Validity of Consent to Enter or Search, and Critical Factual Disputes Exist Here 8

B. Consent Is Governed by an Objective Standard, and in Civil Cases Plaintiffs Carry the Ultimate Burden of Persuasion 10

C. The Extent of Each Defendant's Personal Involvement Is a Factual Issue Precluding Summary Judgment 11

D. Evidence of Defendants' Habits and Routine Practices, Which Is Admissible Under Fed. R. Evid. 406, Precludes Summary Judgment 14

E. Whether Consent Was Valid Is a Factual Issue Precluding Summary Judgment 17

CONCLUSION 22

TABLE OF AUTHORITIES

Cases:

Abdella v. O'Toole, 343 F. Supp. 2d 129 (D. Conn. 2004).....17, 18

Accolla v. Ladestri, No. 87 Civ. 2272 (LMM),
1991 WL 274330 (S.D.N.Y. Dec. 6, 1991) 9

Aguilar v. ICE, No. 07-8224, 2011 WL 3273160 (S.D.N.Y. Aug. 1, 2011).....19, 20

America Casualty Co. v. Nordic Leasing, Inc., 42 F.3d 725 (2d Cir. 1994) 6

Ammirato v. Duraclean Intern., Inc., No. CV 07-5204 (ARL),
2010 WL 1186325 (E.D.N.Y. Mar. 24, 2010).....7

Anobile v. Pelligrino, 303 F.3d 107 (2d Cir. 2001).....10, 21

Beckcom v. United States, 584 F. Supp. 1471 (N.D.N.Y. 1984) 15

Berg v. United States, No. 03-4642 (MJD/JSM),
2007 WL 425448 (D. Minn. Feb. 2, 2007) 8

Carrion v. Smith, 549 F.3d 583 (2d Cir. 2008).....15

Castellar v. Caporale, No. CV-04-3402 (DGT),
2010 WL 3522814 (E.D.N.Y. Sept. 2, 2010) 12

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 6

Charles v. Odum, 664 F. Supp. 747 (S.D.N.Y. 1987) 18

Chuman v. Wright, 76 F.3d 292 (9th Cir. 1996).....12, 13

Crooker v. Van Higgins, 682 F. Supp. 1274 (D. Mass. 1988).....8

Cuoco v. Moritsugu, 222 F.3d 99 (2d Cir. 2000) 12

Djonbalic v. City of New York, No. 99 Civ. 11398 (SHS) (AJP),
2000 WL 1146631 (S.D.N.Y. Aug. 14, 2000).....9, 19

Dolphin Direct Equity Partners, LP v. Interactive Motorsports & Entertainment Corp.,
No. 08 Civ. 1558 (RMB)(THK), 2009 WL 577916 (S.D.N.Y. Mar. 2, 2009).....21

Evans v. Lopez, No. 98 C 2077, 2000 WL 631357 (N.D. Ill. May 12, 2000).....8, 10

Farrell v. Burke, 449 F.3d 470 (2d Cir. 2006) 12

Fischl v. Armitage, 128 F.3d 50 (2d Cir. 1997).....7

Florida v. Jimeno, 500 U.S. 248 (1991).....20

Fuller v. Summit Treestands, LLC, No. 07-CV-00330(A)(M),
2009 WL 1874058 (W.D.N.Y. May 11, 2009).....15

Gallo v. Prudential Residential Services Ltd. Partnership,
22 F.3d 1219 (2d Cir. 1994).....6

JSC Foreign Economic Association v. International Development & Trade Services, Inc.,
386 F. Supp. 2d 461 (S.D.N.Y. 2005).....7, 21

Jones v. Williams, 297 F.3d 930 (9th Cir. 2002).....12

Maker v. City of Tillamook, Or., No. 06-CV-731-PK, 2007 WL 2688230
(D. Or. Sept. 10, 2007).....8, 11

McCadd v. Murphy, 763 F. Supp. 2d 1018 (N.D. Ill. 2010) 8

McClellan v. Smith, 439 F.3d 137 (2d Cir. 2006) 7

McElmurry v. U.S. Bank National Association, No. CV-04-642-HU,
2007 WL 1276958 (D. Or. Mar. 23, 2007).....16

McGann v. Northeast Ill. Regional Commuter R.R. Corp.,
8 F.3d 1174 (7th Cir. 1993) 9

Mickle v. Morin, 297 F.3d 114 (2d Cir. 2002) 7

Minter v. County of Westchester, No. 08 Civ. 7726 (WHP),
2011 WL 856269 (S.D.N.Y. Jan. 20, 2011) 7

Nigro v. Phillips, No. 92-CV-399, 1997 WL 86323 (N.D.N.Y. Feb. 28, 1997) 9

Ostroski v. Town of Southold, 443 F. Supp. 2d 325 (E.D.N.Y. 2006).....7

Reed v. Schneider, 612 F. Supp. 216 (E.D.N.Y. 1985) 9

Rich v. United States, 158 F. Supp. 2d 619 (D. Md. 2001) 8

Ruggiero v. Krzeminski, 928 F.2d 558 (2d Cir. 1991) 10

Schneckloth v. Bustamante, 412 U.S. 218 (1973) 19, 20

Tavarez v. Reno, 54 F.3d 109 (2d Cir. 1995) 12

United States v. Bifulco, No. 06-CV-684A,
2007 WL 1288214 (W.D.N.Y. May 1, 2007) 15

United States v. Garcia, 56 F.3d 418 (2d Cir. 1995) 20, 21

United States v. Matlock, 415 U.S. 164 (1974) 18

United States v. Peterson, 100 F.3d 7 (2d Cir. 1996) 21

Wallace v. Conroy, 945 F. Supp. 628 (S.D.N.Y. 1996) 12

Federal Statutes and Rules:

42 U.S.C. § 1983 12

Fed. R. Evid. 406 .....14, 15, 17

Fed. R. Civ. P. 56(a) 6

Preliminary Statement

Despite numerous issues of fact, and plaintiffs' own inability to identify which agents allegedly did what, plaintiffs seek summary judgment against nearly two dozen ICE agents who were in the vicinity of two of the seven complaint locations at issue in this case. The motion is based on plaintiffs' own self-serving allegations that the ICE agents entered their homes without consent, and on plaintiffs' contention that the ICE agents cannot controvert these allegations because they do not specifically recall the details of what occurred at these two sites. But plaintiffs' argument must fail: defendants do dispute plaintiffs' allegations through specific recollections, recollections of the operations in general, and evidence of their normal practices in conducting consent-based investigations, all of which must be accepted as true for the purpose of this motion. Accordingly, summary judgment cannot be granted.

First, plaintiffs seek to improperly shift the burden to defendants to prove that they obtained lawful consent to enter the two homes at issue. But this confuses the government's burden in criminal cases—where the government must show that a warrantless search was reasonable—with a plaintiff's burden in a civil case, where the plaintiffs bear the burden of proof, especially where a defendant has come forward with a justification, such as consent.

Second, plaintiffs are seeking summary judgment against all 21 Bivens defendants who were in the vicinity of the complaint locations regardless of their role in the operations—even though plaintiffs concede that not all of the defendants entered their homes, and that some defendants remained with their cars. But the law does not permit plaintiffs to simply lump all of the defendants together and have judgment entered vicariously against some agents based on the actions of others; rather, plaintiffs must prove that each of the defendants was personally involved in the alleged constitutional violations. Thus, even if plaintiffs' factual allegations were

assumed to be uncontroverted, their motion would still fail because group pleading is impermissible in the Bivens context.

Third, defendants, whose testimony must be accepted as true for purposes of this motion, have given testimony that contradicts plaintiffs' versions of events. At the very least, this creates credibility issues that cannot be decided on summary judgment. Although plaintiffs claim that defendants cannot remember what happened at 710 Jefferson Street and 15 West 18th Street, many agents have in fact testified to facts that contradict plaintiff's allegations, and the credibility of their testimony must be weighed by a jury. For example, ICE 18 recalls that a local officer, not an ICE agent, was the person who made contact with the residents of 710 Jefferson Street. At 15 West 18th Street, the plaintiffs allege that ICE agents entered through the back door, but ICE 52 testified that ICE agents only entered homes through the front door during the operations at issue. And still other defendants are certain that consent was obtained at plaintiffs' homes because it was their custom and practice to always obtain consent when conducting warrantless operations, and they would have remembered if they had been unable to obtain consent at plaintiffs' homes; indeed, many agents have clear recollections of visiting other homes during the same week where the residents declined to give consent, and the agents therefore left. Factual discrepancies like these—and many others—create genuine disputes of material fact that preclude summary judgment.

Finally, genuine issues of material fact are created by defendants' evidence of practice, routine, and habit, which is admissible under Rule 406 of the Federal Rules of Evidence. The 21 defendants are experienced federal agents who have had extensive Fourth Amendment training, and many of them have conducted dozens or hundreds of consent-based operations and investigations following well-established and proper protocols. Even if they do not have clear

recollections of 710 Jefferson Street and 15 West 18th Street, they are entitled to testify about their customary practice of obtaining consent and their belief that they followed that practice at the two locations at issue. Further, defendants are entitled to have a jury weigh the credibility of that testimony in determining whether plaintiffs have met their burden of proving Fourth Amendment violations.

FACTUAL BACKGROUND

A. Background Concerning the Enforcement Operations at Issue

Plaintiffs live or lived in Suffolk, Nassau, and Westchester counties, and include persons of unspecified status, lawful permanent residents, and United States citizens. The complaint alleges that in seven separate incidents—four that were conducted by ICE's Office of Detention and Removal Operations ("DRO") in February, March, and April of 2007, and three that were conducted by ICE's Office of Investigations ("OI") during the week of September 24, 2007—ICE officers and agents entered plaintiffs' residences without consent.

Plaintiffs' motion for partial summary judgment concerns two of the complaint locations—710 Jefferson Street, Westbury, New York, and 15 West 18th Street, Huntington Station, New York—that were visited as part of a week-long operation in September 2007 targeting 255 persons who were suspected of having gang affiliations. See Declaration ("Decl") of Shane Cargo, dated December 23, 2011 ("Cargo Decl."), Exhibit ("Ex.") A. Local police departments had provided ICE with lists of known gang members, and ICE focused on those people on the lists who were subject to removal. See id. Approximately 160 ICE agents participated, and due to the size of the operation, ICE had agents travel to New York from around the country to participate. See id. Detectives and police officers from Nassau and Suffolk counties also participated, and the team members differed from location to location. See id.

B. 710 Jefferson Street

The 10 Bivens defendants who were present at 710 Jefferson Street dispute most, if not all, of plaintiffs' allegations concerning what occurred there. For example, before the operation, the team leader (ICE 18) discussed with his team the difference between administrative and judicial warrants and stressed the importance of obtaining consent. See ICE 18 Decl. ¶ 10. Once at the location, ICE 18 reminded his team that, because the building appeared to have been subdivided, separate consent to enter certain interior rooms might be required. Id. ¶ 12. An assisting local police officer, not an ICE agent, approached the door to conduct the knock and talk. Id. at ¶ 13. Although ICE 18 could not recall the specific conversation at the door, the local police officer and other agents entered the home, which they would not have done unless consent had been granted. Neither the police officer nor the agents pounded on the door, and no one forced his way in once the door was opened. See ICE 21 Decl. ¶ 10. At no point did anyone say that someone was dying upstairs, or use any other prohibited ruse technique to obtain consent to enter. Id. ¶ 11; see also ICE 18 Decl. ¶ 13; ICE 19 Decl. ¶ 11; ICE 20 Decl. ¶ 9; ICE 22 Decl. ¶ 11; ICE 23 Decl. ¶ 7; ICE 24 Decl. ¶ 8; ICE 25 Decl. ¶ 12; ICE 26 Decl. ¶ 12.

After the ICE agents had entered the residence, a woman arrived in a white van, and after being asked to remain outside for a brief time, she was allowed to enter. The woman was calm, and at no point did she express an opinion that her rights were being violated or that the agents should not have entered her home. See ICE 21 Decl. ¶ 12; see also ICE 19 Decl. ¶ 11; ICE 20 Decl. ¶ 7. At no point during the operation did any agent draw a weapon. See ICE 19 Decl. ¶ 13; see also ICE 21 Decl. ¶ 13; ICE 22 Decl. ¶ 12; ICE 23 Decl. ¶ 8; ICE 26 Decl. ¶ 12.

Later in the day, two agents went back to the home to retrieve medication for one of the several residents who had been arrested there. The woman who answered the door gave them

permission to enter. The woman was calm and did not make any complaint about the earlier encounter. See ICE 18 Decl. ¶ 16.

C. 15 West 18th Street

Similarly, the ICE agents who were present at 15 West 18th Street dispute plaintiffs' allegations concerning what occurred there. Before the operation, the team leader discussed the operation plan and showed pictures and addresses of the targets for that day. See ICE 45 Decl. ¶¶ 16-17. She also discussed with her team the difference between administrative and judicial warrants, instructing her team members that if consent to enter was refused, the agents were not permitted to enter. Id.

A local police officer approached the door to conduct the knock and talk, which was standard practice because the intent of the operation was to have local uniformed police present at the front door of the target locations. Id. at ¶¶ 18-19. During the operation, no ICE agent or uniformed police officer pushed through an open door without obtaining consent, see id. at ¶ 20; ICE 41 Decl. ¶ 15; ICE 51 ¶ 16, and no one barged into the front door of 15 West 18th Street without obtaining consent to enter or search, see ICE 41 Decl. ¶ 17; ICE 45 Decl. ¶ 23; ICE 51 ¶ 13.

Indeed, the defendants specifically recall other homes they visited during the same operation, where they did not enter because they were unable to obtain consent to enter. See, e.g., ICE 41 Decl. ¶ 17 ("On one occasion, I spoke to two women in Spanish, and the older of the two women refused to give me consent. I specifically recall asking her through a window if we could come in, and she said 'no.' As a result, we left the premises without attempting to enter."); ICE 51 Decl. ¶ 14 ("a woman spoke through a window to the officers and agents on our team, and she denied us consent to enter. Therefore, we did not enter the target home."); ICE 45 Decl. ¶¶ 24-25 ("I recall being turned away by a woman who claimed that the target was not home.

She spoke to us through a window, but she would not open the door. We did not enter"); ICE 40 Decl. ¶ 10 (describing an incident where the team attempted to gain consent by speaking to residents through an intercom, but consent was denied and they left). Several defendants have testified that if team members had entered 15 West 18th Street without obtaining consent, they would remember, because it would have been inconsistent with ICE practice and policy. See ICE 40 Decl. ¶¶ 9-10; ICE 41 Decl. ¶ 19; ICE 45 Decl. ¶ 23; ICE 50 Decl. ¶¶ 8-9; ICE 51 ¶ 13; ICE 52 Decl. ¶ 8.

ARGUMENT

Because of numerous issues of material fact, plaintiffs' motion for summary judgment should be denied.

A. Summary Judgment

1. Legal Standards Applicable to Motions for Summary Judgment

To obtain summary judgment, the moving party must "show[ ] that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Celotex Corp. v. Catrett, 477 U.S. 317, 323–25 (1986). "[T]he trial court's task at the summary[-]judgment motion stage of the litigation is carefully limited to discerning whether there are genuine issues of material fact to be tried, not to deciding them. Its duty, in short, is confined at this point to issue-finding; it does not extend to issue-resolution." Gallo v. Prudential Residential Servs. Ltd. P'ship, 22 F.3d 1219, 1224 (2d Cir. 1994).

In its issue-finding role, the district court must assess the evidence in "the light most favorable to the non-moving party," and resolve all ambiguities and "draw all reasonable inferences" in the non-moving party's favor. Am. Cas. Co. v. Nordic Leasing, Inc., 42 F.3d 725, 728 (2d Cir. 1994) (citations omitted). Thus, once the non-moving party points to conflicting, non-conclusory evidence concerning "any material fact," Fed. R. Civ. P. 56(a), summary

judgment cannot be granted. See, e.g., JSC Foreign Econ. Ass'n v. Int'l Dev. & Trade Servs., Inc., 386 F. Supp. 2d 461, 463 (S.D.N.Y. 2005) ("Summary judgment is improper if there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party.") (emphasis added).

Thus, "[i]t is a settled rule that '[c]redibility assessments, choices between conflicting versions of the events, and the weighing of evidence are matters for the jury, not for the court on a motion for summary judgment.'" McClellan v. Smith, 439 F.3d 137, 144 (2d Cir. 2006) (citing Fischl v. Armitage, 128 F.3d 50, 55 (2d Cir. 1997) (credibility assessments are not "within the province of the court on a motion for summary judgment")). For this reason, conflicting testimony precludes summary judgment. See, e.g., Minter v. County of Westchester, No. 08 Civ. 7726 (WHP), 2011 WL 856269, at *7 (S.D.N.Y. Jan. 20, 2011) ("Given this conflicting testimony and the inherently fact-intensive inquiry of determining when a person is placed under 'arrest,' the precise moment of [plaintiff's] arrest and the identity of the arresting officer(s) are disputed issues of material fact that preclude summary judgment . . . ."); Ammirato v. Duraclean Intern., Inc., No. CV 07-5204 (ARL), 2010 WL 1186325, at *1 (E.D.N.Y. Mar. 24, 2010) ("the issue of apparent authority requires a credibility determination that is not for the court to make on summary judgment"); see also Ostroski v. Town of Southold, 443 F. Supp. 2d 325, 342 (E.D.N.Y. 2006) (denying motion for summary judgment given conflicting testimony about proportionality of force used during arrest); see also Mickle v. Morin, 297 F.3d 114, 122-23 (2d Cir. 2002) (reversing judgment as matter of law in favor of defendant officers given conflicting testimony about force used on plaintiff's wrists and shoulder).

2. Summary Judgment Is Generally Unavailable as to the Existence or Validity of Consent to Enter or Search, and Critical Factual Disputes Exist Here

Plaintiffs cite no case—and we are aware of none—where a plaintiff has been granted summary judgment on the issue of consent to enter or search. Conversely, dozens of cases hold that the fact-intensive nature of consent precludes summary judgment. See, e.g., Crooker v. Van Higgins, 682 F. Supp. 1274, 1284 (D. Mass. 1988) (denying plaintiff's summary judgment motion because "[b]ased on the testimony during the suppression hearing, as well as statements made in affidavits, there is ample evidence creating a jury question regarding whether [plaintiff] consented to the search at issue and, if so, whether such consent was voluntary."); Evans v. Lopez, No. 98 C 2077, 2000 WL 631357, at *10 (N.D. Ill. May 12, 2000) (denying defendant's motion for summary judgment because "taking [plaintiff's roommate's] affidavit as true, as the court must in ruling on defendant's summary[-]judgment motion, there is a question of material fact as to whether the consent was voluntary and valid."); Rich v. United States, 158 F. Supp. 2d 619, 642, 628 (D. Md. 2001) (where agents barged into home without a warrant, pointed guns at plaintiffs while searching home, "Plaintiffs' Fourth Amendment claim presents genuine issues of material fact which preclude entry of summary judgment"); Berg v. United States, No. 03-4642 (MJD/JSM), 2007 WL 425448, at *6 (D. Minn. Feb. 2, 2007) ("A fact question remains as to whether [plaintiff] voluntarily consented to [defendant's] search of her luggage, and therefore summary judgment is denied on this basis."); Maker v. City of Tillamook, Or., No. 06-CV-731-PK, 2007 WL 2688230, at *4 (D. Or. Sept. 10, 2007) (denying cross motions for summary judgment because "[t]he scope of any consent, like the existence of consent to search in the first instance, raises questions of fact that preclude summary judgment."); McCadd v. Murphy, 763 F. Supp. 2d 1018, 1024 (N.D. Ill. 2010) (defendants' summary-judgment motion denied because plaintiffs "have identified evidence that would support a factfinder's determination that [elderly

mother's] consent was the product of coercion or duress"); McGann v. Ne. Ill. Reg'l Commuter R.R. Corp., 8 F.3d 1174, 1176 (7th Cir. 1993) (reversing district court's grant of defendant's summary-judgment motion because circumstances of search and seizure create "genuine issues of fact precluding summary judgment"); Accolla v. Ladestri, No. 87 Civ. 2272 (LMM), 1991 WL 274330, at *5 (S.D.N.Y. Dec. 6, 1991) ("factual issue raised by Plaintiff's and Defendants' conflicting accounts of the circumstances of that search renders summary judgment on this claim inappropriate as a matter of law"); Reed v. Schneider, 612 F. Supp. 216, 221 (E.D.N.Y. 1985) ("The question of the voluntary nature of [plaintiff's] consent [to search his home] constitutes a material fact in issue that can only be decided by the finder of fact."); id. at 223 (co-defendant's role also "must be resolved by the finder of fact"); Nigro v. Phillips, No. 92-CV-399, 1997 WL 86323 (N.D.N.Y. Feb. 28, 1997) (in home-entry case, denying defendants' summary-judgment motion because of conflicting testimony; "the court is unable to find valid consent as a matter of law"); Djonbalic v. City of New York, No. 99 Civ. 11398 (SHS) (AJP), 2000 WL 1146631 (S.D.N.Y. Aug. 14, 2000) (in case involving entry and search of apartments, "because the facts are in dispute, summary judgment is not warranted and the jury should be allowed to determine whether valid consent was given for each search").

Here, as in all the cases cited above, summary judgment on the issue of consent is inappropriate because there is conflicting testimony as to the facts and circumstances surrounding the ICE agents' entry into plaintiffs' homes. To take one example, the 710 Jefferson plaintiffs contend that ICE agents employed a ruse and gained entry into the house by stating that someone in the house was dying. See Mov. Mem. at 5. But the defendants at that location have uniformly testified that no such ruse was used. See ICE 18 Decl. ¶ 13; ICE 19 Decl. ¶ 11; ICE 20 Decl. ¶ 9; ICE 21 Decl. ¶ 11; ICE 22 Decl. ¶ 11; ICE 23 Decl. ¶ 7; ICE 24 Decl. ¶ 8; ICE

25 Decl. ¶ 12; ICE 26 Decl. ¶ 12. Likewise, at 15 West 18th Street, the plaintiffs allege that officers "barged into the home" without obtaining consent. See Mov. Mem. at 11. But the defendants at that house have declared under oath that entry did not occur as plaintiffs allege it occurred, that it was their custom and practice to always obtain consent before entering, and that they would remember if anyone had deviated from that custom and practice at that location. See ICE 40 Decl. ¶¶ 9-10; ICE 41 Decl. ¶ 19; ICE 45 Decl. ¶ 23; ICE 50 Decl. ¶¶ 8-9; ICE 51 ¶ 13; ICE 52 Decl. ¶ 8. It is for the jury to weigh this conflicting testimony and assess the credibility of the witnesses. Summary judgment is inappropriate.

B. Consent Is Governed by an Objective Standard, and in Civil Cases Plaintiffs Carry the Ultimate Burden of Persuasion

Plaintiffs argue that "[i]t is the agents' burden to demonstrate that 'consent was given freely and voluntarily.'" Mov. Mem. at 17 (quoting Anobile v. Pelligrino, 303 F.3d 107, 124 (2d Cir. 2001)). This argument confuses the government's burden in criminal cases with a plaintiff's burden in a civil case. As the Second Circuit has explained in the context of a civil action seeking damages for an allegedly nonconsensual and warrantless search, while "searches and seizures conducted without warrants are presumptively unreasonable . . . . [t]he operation of this presumption . . . cannot serve to place on the defendant the burden of proving that the official action was reasonable." Ruggiero v. Krzeminski, 928 F.2d 558, 562-63 (2d Cir. 1991). Thus, while the presumption may require the defendant to "produc[e] evidence of consent or search incident to an arrest or other exceptions to the warrant requirement," the "ultimate risk of nonpersuasion must remain squarely on the plaintiff in accordance with established principles governing civil trials." Id.; see also Evans, 2000 WL 631357 at *14 ("While in the criminal context a warrantless search is presumed unreasonable, requiring the government to show that it was reasonable under the circumstances, in a civil action, the defendant only has the burden of

coming forward with a justification (such as consent), while the burden of proof remains with the plaintiff.") (citation omitted); Maker, 2007 WL 2688230, at *3 ("In a criminal case, the prosecutor bears the burden of proving that consent was freely and voluntarily given. In a civil § 1983 action, however, although the burden of producing evidence of consent may be on the defendant, the risk of nonpersuasion remains with the plaintiff.") (citations omitted). Thus, to the extent plaintiffs' motion rests on an asserted failure of defendants to meet the criminal-case burden articulated in Anobile—i.e. they defendants cannot prove that they obtained consent—their motion should be denied based on an incorrect statement of applicable law.

C. The Extent of Each Defendant's Personal Involvement Is a Factual Issue Precluding Summary Judgment

Even though plaintiffs acknowledge that each of the ICE agents they have sued had different roles during the operations, plaintiffs have moved for summary judgment against all ten defendants who were present at 710 Jefferson Street and all eleven defendants who were present at 15 West 18th Street, in effect lumping them together as if their varied roles and conduct were immaterial to the question of individual liability. But plaintiffs' inability to identify the specific alleged personal involvement of each individual defendant fails to satisfy the elements of their cause of action and creates numerous issues of fact for trial.

Plaintiffs note that ICE 42 (who, along with ICE 19, has moved for summary judgment with respect to 710 Jefferson Street) was "stationed outside of the home, near her car," Rule 56.1 Statement at ¶ 43," and that "[a]t a minimum, ICE 18, 21, 23, 25 and 26 entered the home," id. at ¶ 59. Plaintiffs further state that "[a]t least one agent searched the girls' bedroom," id. 66, but the agent is not identified. As for 15 West 18th Street, plaintiffs state that "at least six" of the 11 defendants "approached and/or surrounded the home," id. ¶ 96, and that "[a]t a minimum, ICE 39, 40, 41, 47, 49, and 50 entered the home," id. ¶ 105. Plaintiffs provide no further

explanation as to who did what, including which agent allegedly insisted that Christopher Jimenez "[o]pen the door." Id. ¶ 101.

Plaintiffs nonetheless ask the Court to enter summary judgment against all 21 defendants, including the ones who stayed near their cars and played no role in the entries or searches. But to establish Bivens liability, plaintiffs must show that each defendant was personally involved in the alleged violations. See Cuoco v. Moritsugu, 222 F.3d 99, 109 (2d Cir. 2000); Castellar v. Caporale, No. CV-04-3402 (DGT), 2010 WL 3522814, at *4 (E.D.N.Y. Sept. 2, 2010); see also Farrell v. Burke, 449 F.3d 470, 484 (2d Cir. 2006).[1] Thus, a plaintiff must satisfy this requirement by proving that each defendant directly participated in the alleged violations. See, e.g., Wallace v. Conroy, 945 F. Supp. 628, 637 (S.D.N.Y. 1996).

For this reason, at least one Circuit has found reversible error when a trial court instructed the jury that individual liability could be based on "team effort." See Jones v. Williams, 297 F.3d 930, 936 (9th Cir. 2002) ("We decline to require an instruction that would invite a jury to find all of the officers liable for an alleged constitutional violation merely for being present at the scene of an alleged unlawful act."); Chuman v. Wright, 76 F.3d 292, 295 (9th Cir. 1996) ("team effort" standard impermissible).

Chuman arose from a SWAT-style search of a plaintiff's home. See Chuman, 76 F.3d at 293. The jury found against only two of the defendants, id., and on appeal, one of them challenged the district court's jury instruction, which provided:

[1] Although the constitutional claims asserted in Farrell and other cases cited in this brief were brought under 42 U.S.C. § 1983, "federal courts have typically incorporated § 1983 law into Bivens actions." Tavarez v. Reno, 54 F.3d 109, 110 (2d Cir. 1995).

> Concerning the search of the residence, if you find the searches were conducted in an unreasonable manner, then no matter whose actions ultimately inflicted the plaintiff's injury, when the deprivation of the rights is the result of a "team effort," all members of the "team" may be held liable.

Id. at 294.

The defendant argued that the instruction suggested liability even if he was not an individual tortfeasor, and the Ninth Circuit agreed. Id. at 294-95. The instruction erroneously "removes individual liability as the issue and allows a jury to find a defendant liable on the ground that even if the defendant had no role in the unlawful conduct, he would nonetheless be guilty if the conduct was the result of a 'team effort.'" Id. at 295. According to the court, the "team effort" standard impermissibly allows the jury to "lump all the defendants together." Id.

Here, in seeking judgment against all 21 defendants, irrespective of their differing roles and varying responsibilities, plaintiffs' motion is predicated on an impermissible "team effort" theory that seeks to avoid complicated factual questions by lumping all of the defendants together. But Chuman and the Second Circuit's personal-involvement cases preclude this approach. Indeed, plaintiffs themselves have acknowledged this law in this case, seeking discovery of photographs to assist them in making individualized showings by defendant. See Cargo Decl. Ex. B, Apr. 20, 2010, Hrg. Tr., at 58-59 (stating that counsel wished to show the photographs to local law enforcement and the plaintiffs); see also id. at 62 (government counsel stating that "[p]art of the purpose of seeing the photographs as they have articulated it is being able to identify [whether] a particular agent was at their home on a particular day. We are not going to do that for them; that's an issue in the case."), 63 (identification is "going to be an issue for trial, your Honor, does this plaintiff remember this specific agent who is our client entering their home without consent").

Plaintiffs were attempting 18 months ago to develop evidence of each defendant's personal involvement, as they must. But despite being provided with photographs of every individual defendant who participated in the home operations (in addition to more than 140 depositions), plaintiffs are unable to come forward with specific evidence as to who allegedly did what. Now, rather than ask a jury to sort out the complicated factual issues, plaintiffs ask the Court to bypass the function of the jury entirely and enter judgment against all 21 defendants, regardless of their differing roles and varying involvement in two operations. The Court should not do so, but should instead find that whether plaintiffs can meet their burden of proof with respect to each defendant is an issue of fact for trial.

D. Evidence of Defendants' Habits and Routine Practices, Which Is Admissible Under Fed. R. Evid. 406, Precludes Summary Judgment

Plaintiffs argue that defendants "have produced zero evidence of consent—voluntary or not—to enter or search the Moving Plaintiffs' homes and curtilage." Mov. Mem. at 18 (emphasis in original). But that assertion ignores that evidence of defendants' customs and practices—including the custom and practice of always obtaining consent when conducting a warrantless operation, see, e.g., ICE 50 Decl. ¶ 8; ICE 52 Decl. ¶ 8—is admissible and creates a genuine dispute to be resolved by the jury.

Federal Rule of Evidence 406, titled "Habit; Routine Practice" and revised effective December 1, 2011, provides:

> Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

The advisory committee's note explains that character evidence, which is generally inadmissible, is "a generalized description of one's disposition, or of one's disposition in respect

of a general trait, such as honesty, temperance or peacefulness." Habit or practice, on the other hand, is "more specific" in that "it describes one's regular response to a repeated specific situation . . . the person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or of giving the hand-signal for a left turn, or of alighting from railway cars as they are moving. The doing of habitual acts may become semi-automatic." See Fed. R. Evid. 406, Advisory Committee Note (quoting McCormick on Evidence, § 162, at 340).

Thus, habit evidence is often used where a witness has no specific recollection about the event at issue, but can describe his regular practice in similar situations. See, e.g., Carrion v. Smith, 549 F.3d 583, 590 (2d Cir. 2008) (where attorney had no specific recollection of representing client 12 years prior to his testimony, evidence regarding his usual practice was admissible to establish he provided effective assistance in habeas petition); Fuller v. Summit Treestands, LLC, No. 07-CV-00330(A)(M), 2009 WL 1874058, at *4 (W.D.N.Y. May 11, 2009) ("Although [plaintiff's] inability to recall the events of the day in question might otherwise preclude his testimony that he did not open the hatch cover or detach the cable on that day, Fed. R. Evid. 406 allows 'evidence of the habit of a person . . . whether corroborated or not . . . to prove that the conduct of the person . . . on a particular occasion was in conformity with the habit.'"); United States v. Bifulco, No. 06-CV-684A, 2007 WL 1288214, at *1 (W.D.N.Y. May 1, 2007) (attorney's declaration concerning "his routine habit and practice" in advising clients, although he did not recall the specific discussion, was sufficient to defeat habeas claim of ineffective assistance); Beckcom v. United States, 584 F. Supp. 1471 (N.D.N.Y. 1984) (doctor permitted to testify about his usual practice in conducting a breast exam where he had no independent recollection of the exam at issue). And where habit evidence is offered in response

to a summary-judgment motion, it creates an issue of fact (typically involving a credibility determination) and defeats the motion. See, e.g., McElmurry v. U.S. Bank Nat'l Ass'n, No. CV-04-642-HU, 2007 WL 1276958, at *11 (D. Or. Mar. 23, 2007) ("evidence regarding [plaintiff's timekeeping] practice[s] . . . creates a genuine issue of material fact precluding an award of summary judgment").

Here, even assuming that defendants have no specific recollections of 710 Jefferson Street and 15 West 18th Street (which is not the case), they have testified that consent-based operations are entirely routine, that they have conducted them hundreds of times, and that they follow (and have been trained to follow) a specific, systematic process when seeking consent to enter. See, e.g., ICE 41 Decl. ¶¶ 10, 15; ICE 45 Decl. ¶¶ 11, 14; ICE 50 Decl. ¶ 8; ICE 51 Decl. ¶¶ 7, 8, 13; ICE 52 Decl. ¶ 8. And their testimony has been corroborated by the assisting Nassau and Suffolk detectives—neutral third-party witnesses who consistently testified that they did not witness or hear about any nonconsensual entries. See, e.g., Egan Tr. (Cargo Decl. Ex. C), at 251:21-25 ("A. [A]s a group we obtained permission to come in to a house. Q. So you observed consent being obtained during the course of the operation? A. Yes."); Hoeler Tr. (Cargo Decl. Ex. D), at 355:21-23 ("Q. Are you aware of anyone entering a home without consent? A. No."); Coffman Tr. (Cargo Decl. Ex. E), at 239:1-7 ("Q. Did you see anyone, or did you witness any situations in which ICE agents entered homes without – in which you knew they were doing so without consent? A. I did not."), 232:5-8 ("Q. Did you witness anything that you would have considered a constitutional violation? A. No, not from what I witnessed."); Ierardi Tr. (Cargo Decl. Ex. F), at 198:21-25 – 199:1-10 ("Q. Did you encounter any uncomfortable situations during the course of your day? A. Not my team, no. Q. And in every house that you entered, it was a cordial atmosphere? A. Yes . . . . Q. And you didn't observe any situation

where access to enter the house was denied by the individual who opened the door? A. No."), 262:22-25 – 263:1-4 ("Q. Did you see – on September 24, 2007, did you see anyone force their way into a residence – A. No. Q. – like if a resident opened the door, an ICE agent pushed through the door? A. No."); accord Mulvey Tr. (Cargo Decl. Ex. G), at 126:16-18 ("Q. Do you have any first-hand knowledge of agents entering homes without consent? A. No.").

But even if defendants' habit evidence could not be corroborated, it is still admissible under the plain language of Rule 406 to prove that at 710 Jefferson Street and 15 West 18th Street, the ICE agents "acted in accordance with [their] habit or routine practice." Fed. R. Evid. 406. Because the credibility of this testimony—and how persuasive it is relative to plaintiffs' own testimony—is an issue for the jury, defendants' custom and habit evidence precludes summary judgment.

E. Whether Consent Was Valid Is a Factual Issue Precluding Summary Judgment

Plaintiffs further assert that "even if Defendants could offer admissible evidence tending to show that consent was obtained . . . any such consent would not have been valid as a matter of law." Mov. Mem. at 19. Plaintiffs argue that because of the age of some of the persons at the locations—a 12-year-old at 710 Jefferson Street and a 17-year-old at 15 West 18th Street—defendants "did not even confront any individual . . . who had the authority or capacity to grant consent to enter or search." Id.

But whether a minor's consent is legally valid is a factual issue based on the totality of the circumstances, a principle recognized by plaintiffs' primary authority, Abdella v. O'Toole, 343 F. Supp. 2d 129, 135 (D. Conn. 2004). In that case, the court stated that "[i]t is clear that there is no *per se* rule that all minors lack the authority to consent to a search." Id. Instead, "the minority of the consenting party will be merely one of many factors considered when a fact-finder decides the voluntariness of consent." Id.

Further, the Abdella court stated that whether the 11-year-old in question there gave valid consent depended not on whether a child of that age was legally able to consent to a search at all, but on whether she had apparent authority to permit the police to enter her parents' home and search the bedrooms. Id. at 137. And according to the Supreme Court, that issue turns on whether the homeowners "have assumed the risk that one of their number might permit the common area to be searched." United States v. Matlock, 415 U.S. 164, 171 (1974); see also Charles v. Odum, 664 F. Supp. 747, 752 (S.D.N.Y. 1987) (Leisure, J.) ("Matlock's third[-]party consent analysis looks not to the presence or absence of a party but to whether the party assumed the risk that another might consent to the search.") (citations omitted). Thus, neither Abdella nor other law supports plaintiffs' contention that consent obtained from a minor is invalid as a matter of law.

For these reasons, as in Abdella, there are at least two distinct sets of factual issues regarding the minors at 710 Jefferson Street and 15 West 18th Street: first, whether, based on the totality of the circumstances, the minors gave consent to enter, see Abdella, 343 F. Supp. 2d at 138 ("There are genuine issues of material fact regarding [the 11-year-old girl's] consent for defendants to enter the Abdella home and so summary judgment is denied."); and second, whether the minors had actual or apparent authority to consent, see id. ("Summary judgment for the second floor is denied as there are genuine issues of fact regarding [the eleven-year-old girl's] actual authority to consent."). As noted, the defendants' consistent testimony is that they obtained consent to enter, see supra at 4-5, and the age of the residents is at most an issue of fact for the jury to consider, thereby precluding summary judgment.

Plaintiffs next argue that "any purported consent . . . cannot, as a matter of law, have been free and voluntary, as required by the Fourth Amendment." Mov. Mem. at 21. But there are a

number of problems with that position, the first of which is that it requires the Court to assume both the truth of all of plaintiffs' allegations and the falsity of defendants' denials. For example, defendants dispute, among other things, the time of the operations at 710 Jefferson Street, that they "brandished" their weapons, and that they yelled that "someone is dying upstairs." See, e.g., ICE 18 Decl. ¶ 13; ICE 19 Decl. ¶ 13; ICE 23 Decl. ¶¶ 7-8; ICE 24 Decl. ¶ 8. For the purposes of plaintiffs' motion, the Court is required to accept defendants' statements as true, which precludes finding that consent was involuntary "as a matter of law." Mov. Mem. at 21.

Second, given that the jury is required to examine the "totality of all the surrounding circumstances," see Schneckloth v. Bustamante, 412 U.S. 218, 226 (1973), merely listing a number of factors that could suggest a lack of voluntary consent does not establish the absence of a genuine issue of material fact, a principle recognized by plaintiffs' own cases. In Djonbalic v. City of New York, No. 99 Civ. 11398 (SHS) (AJP), 2000 WL 1146631, at *10 (S.D.N.Y. Aug. 14, 2000), for example, the plaintiffs alleged that the police, in riot gear and carrying weapons, knocked on their door late at night, threatened them, and then began breaking down the doors. The Court nonetheless found that "because the facts are in dispute, summary judgment is not warranted and the jury should be allowed to determine whether valid consent was given for each search." Id. And the fact that certain factors "are of great import," Mov. Mem. at 22, does not require a legal finding that consent was per se invalid, which is consistent with this Court's statement (in the very different context of assessing the legal sufficiency of the complaint) that plaintiffs' allegations "tend[ ] to undermine voluntary, duress-free consent." See Aguilar v. ICE, No. 07-8224, 2011 WL 3273160, at *13 (S.D.N.Y. Aug. 1, 2011). That decision concerned four high-level officials' motion to dismiss under Rule 12(b)(6), where the Court acknowledged that "the allegations in the complaint are accepted as true, and all reasonable inferences must be

drawn in the plaintiffs' favor." Id. at *1. In contrast, here is it defendants' statements that must be accepted as true, so plaintiffs get no mileage from the Court's statement that certain factors sufficiently allege a lack of valid consent. For similar reasons, plaintiffs are not assisted by their purported sleep expert, who argues that being awoken suddenly would "'call into question the extent to which a grant of permission was made voluntarily.'" Mov. Mem. at 23 (quoting report, citation omitted). Whatever evidence plaintiffs advance to argue that there was no voluntary consent, other evidence supports the opposite conclusion, see Egan Tr. (Ex. C), at 251:21-25; Hoeler Tr. (Ex. D), at 355:21-23; Coffman Tr. (Ex. E), at 239:1-7, and precludes summary judgment.

This is especially true given that consent is not required to be knowing and intelligent, and the issue of consent is governed by an objective standard. See United States v. Garcia, 56 F.3d 418, 422-23 (2d Cir. 1995). Thus, the jury must determine whether each agent acted reasonably—that is, "whether the officer had a reasonable basis for believing that there had been consent to the search." Id. at 423 (quotation omitted); see also Florida v. Jimeno, 500 U.S. 248, 251 (1991) ("The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?"). Thus, "[t]he Fourth Amendment is satisfied when, under the circumstances, it is objectively reasonable for the officer to believe that the scope of the suspect's consent permitted him to [conduct the search that was undertaken]." Garcia, 56 F.3d at 423 (quoting Jimeno, 500 U.S. at 249) (brackets in original). Therefore, whether it was objectively reasonable for ICE 18, for example, to believe that a local officer had obtained consent to enter 710 Jefferson Street is a question of fact that must be determined based on the totality of the circumstances. See Schneckloth, 412 U.S. at

227; Anobile, 303 F.3d at 124; United States v. Peterson, 100 F.3d 7, 11 (2d Cir. 1996); Garcia, 56 F.3d at 423.

Finally, although plaintiffs observe that "[c]ourts in this district have not hesitated to grant summary judgment where defendants counter sworn testimony with unsubstantiated denials, conjecture, or otherwise fail to rebut plaintiff's sworn testimony," Mov. Mem. at 15, defendants here have presented more than enough facts to controvert plaintiffs' claims, and the two cases plaintiffs cite are readily distinguishable. In Dolphin Direct Equity Partners, LP v. Interactive Motorsports & Entertainment Corp., No. 08 Civ. 1558 (RMB)(THK), 2009 WL 577916, at *6 (S.D.N.Y. Mar. 2, 2009), the defendant stated that he did not know one way or the other whether the plaintiff had received the disputed payment, which the court deemed insufficient to defeat plaintiff's summary-judgment motion. Similarly, in JSC Foreign Economic Association v. International Development & Trade Services, Inc., 386 F. Supp. 2d 461, 475 (S.D.N.Y. 2005), the non-moving party provided no contradictory evidence and instead merely disputed whether plaintiff's evidence actually supported the allegations in the accompanying Rule 56.1 statement—which it did. Neither case supports plaintiffs' motion here, given their failure to make even a prima facie case as to any individual defendant, the fact issues created by some defendants' specific recollections of the relevant events, and the overwhelming evidence based on habit and custom, all of which will need to be resolved through trial.

CONCLUSION

For the foregoing reasons, the Court should deny plaintiffs' motion for partial summary judgment.

Dated: New York, New York
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