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 (JGK) (FM)

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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Preliminary Statement

In a litigation that already involves 21 plaintiffs, 64 defendants, and seven distinct residential locations, plaintiffs now seek certification of a class containing persons "who, because they (1) are Latino; and (2) reside within the jurisdiction of ICE New York, have been subjected to and/or are at imminent risk of home raids by ICE New York." See Plaintiffs' Memorandum of Law in Support of Their Motion for Class Certification, dated September 22, 2011 ("Mov. Mem."), at 2. According to plaintiffs, the proposed class "consists of approximately two million Latinos." Id. at 8.

Such a diffuse, varied, and indefinite class would be impossible to administer, and plaintiffs have utterly failed to meet their burden of demonstrating, by a preponderance of the evidence, that their proposed class should be certified. First, plaintiffs cannot establish commonality under Rule 23(a)(2) because they cannot show that all class members—Latinos in the New York area—have suffered the same injury, or even that all New York Latinos have been (or will be) subjected to a common discriminatory practice. In Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011), the Supreme Court recently emphasized that class certification depends not on the raising of common questions, but rather on whether conducting class-wide litigation will provide common answers. Although plaintiffs raise several allegedly common questions, see Mov. Mem. at 13, reciting such questions "is not sufficient to obtain class certification." Wal-Mart, 131 S. Ct. at 2551. Instead, plaintiffs must explain how answers to the named plaintiffs' questions—Did Defendant X enter my home without valid consent? Did Defendant X have a lawful basis to conduct brief, detentive questioning? Did Defendant X have a lawful basis for arresting me? Did Defendant X discriminate against me on account of my ethnicity?—will definitively answer such questions with respect to "millions of Latinos." Mov. Mem. at 2. Plaintiffs cannot make this showing because, as the Court recognized in Wal-Mart, where

conduct is inherently fact-specific, such as deciding to enter a residence or look for a person, there is a huge gap between proving (or even alleging) instances of misconduct and proving (or even alleging) that every member of the class has suffered the same injury.

Second, plaintiffs' statistical and anecdotal evidence does not establish commonality. Under Wal-Mart, even if such evidence is assumed true, it is insufficient to prove unitary, class-wide unconstitutional conduct. Moreover, because plaintiffs rely on disputed facts and hearsay, they cannot show, by a preponderance of the evidence, that certification is appropriate.

Third, class membership is neither typical nor ascertainable, and the proposed class is defined to include persons with no claims against ICE. For example, the class includes Latinos who have never even encountered ICE, and so lack standing to seek an injunction. Also, because a person can only be a class member if he was (or will be) subjected to discrimination on account of his ethnicity, membership is impermissibly determined based on whether a given person was pursued for a discriminatory reason. Similarly, membership depends on being "Latino" (a matter of self-identification) and an alleged fear of encountering ICE (a subjective question), both of which prevent defendants and the Court from being able to concretely identify the class.

Fourth, even if plaintiffs could satisfy the Rule 23(a) requirements, they cannot show that they are entitled to certification under Rule 23(b)(2) because any structural-type injunctive relief they receive would presumably apply to all ethnicities, not just Latinos. In fact, most of the injunctive relief plaintiffs seek—improved training, more thorough investigations, and updated databases—have nothing to do with Latinos or with remedying purported discrimination. And of the remaining, Latino-specific forms of relief, it is inconceivable that the Court would enjoin racial profiling and the "manufacturing of consent," but only with respect to Latinos.

For these reasons, class certification would not achieve the goals of fairness and efficiency. The Court should instead apply the general rule that any claims that the putative class members have against defendants should be individually litigated.

FACTUAL BACKGROUND AND RELIEF SOUGHT IN THE COMPLAINT

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.

The first two DRO encounters—in East Hampton, New York, on February 20, 2007—occurred during a four-week operation targeting 45 persons. See Ex. A.[1] The March 19 DRO encounter occurred during a four-week operation targeting 60 persons, see Ex. B, and the April 18 DRO encounter occurred during a two-week operation targeting 30 persons, see Ex. C.

With respect to OI, the three complaint locations were visited as part of a week-long operation targeting 255 persons.[2] See Ex. D. Local police departments had provided large lists of known gang members, a substantial majority of whom were associated with Latin American gangs, and ICE primarily focused on those persons who were subject to removal. See id. Approximately 160 ICE agents participated, many of whom were detailed in from ICE offices

[1] All exhibits are attached to the accompanying Declaration of Shane Cargo, dated October 28, 2011.

[2] The complaint also alleges that ICE agents visited one of the same complaint locations in 2006. See Compl. ¶¶ 380-93.

countrywide. See id. Detectives and police officers from Nassau and Suffolk counties also participated, and the team members differed at each of the three complaint locations. See id.

B. Relief Sought in the Complaint

Plaintiffs filed this action on September 20, 2007, but the operative pleading is now the fourth amended complaint, dated December 21, 2009. The complaint seeks three types of relief from the individual defendants: equitable relief arising from alleged Fourth Amendment violations, Compl. ¶¶ 454-69 (first claim); equitable relief arising from alleged Fifth Amendment violations, id. ¶¶ 470-83 (second claim); and Bivens damages for alleged violations of the Fourth and Fifth Amendments, id. ¶¶ 484-89 (third claim). The complaint also alleges eight causes of action against the United States under the FTCA. Id. ¶¶ 490-543.

In addition to monetary relief and punitive damages, id. at 138 (¶¶ 4-8), the complaint seeks a declaration that the defendants violated the Fourth and Fifth Amendments, id. at 135 (¶ 1). Plaintiffs seek an injunction preventing defendants from "deploying groups of armed agents to descent upon the homes of Latinos in the pre-dawn hours with the intent to enter such homes, without judicial warrants or permission from the residents to do so, through the use of force or by manufacturing 'consent' from residents who are unable—under law or due to the oppressive conditions of the raids—to give legitimate consent." Id. at 135-36 (¶ 2(a)). The same language is used with respect to searching homes of Latinos, seizing Latinos, and searching Latinos. Id. at 136-37 (¶¶ 2(a)-(d)). Plaintiffs also seek an order preventing defendants from "[u]nlawfully identifying and targeting locations based on the belief that Latino individuals are known to live in or frequent such locations," and "[d]esigning raids with the intent to detain, interrogate and seize Latinos based on their race, national origin or ethnicity." Id. at 137 (¶¶ 2(e) & (f)).

Finally, plaintiffs seek several forms of injunctive relief that do not reference Latinos, including requiring defendants to conduct "adequate pre-raid investigation" and to provide "effective and/or adequate training," id. at 137 (¶¶ 2(g) & (h)); requiring defendants to implement policies ensuring that agents "accurately record" consent and do not "raid locations unnecessarily," id. at 137-38 (¶¶ 3(a) & (b)); and requiring defendants to implement corrective measures preventing policies that "encourage law enforcement officers to act in [a] constitutionally deficient manner," id. 138 (¶ 3(d)).

ARGUMENT

Under Rule 23, plaintiffs must establish both the prerequisites under Rule 23(a)—numerosity, commonality, typicality, and adequacy of representation—and also that the action falls within a category listed in Rule 23(b). Here, plaintiffs' motion fails for lack of commonality, inadequacy of representation, inability to ascertain class membership (a court-created requirement), typicality, and noncompliance with Rule 23(b)(2).

A. Plaintiffs Cannot Establish Commonality Under Rule 23(a)(2)

Rule 23(a)(2) requires plaintiffs to show that "there are questions of law or fact common to the class." In Wal-Mart, the Supreme Court observed that commonality was the "crux of [the] case." Wal-Mart, 131 S. Ct. at 2550.

The three named plaintiffs claimed that Wal-Mart discriminated against them based on their gender. They did not allege that Wal-Mart "has any express corporate policy against the advancement of women," but instead claimed that the local managers' broad discretion over employment decisions "is exercised disproportionately in favor of men, leading to an unlawful disparate impact on female employees." Id. at 2548. In support of their theory that every woman was "the victim of one common discriminatory practice," plaintiffs used a statistician, who analyzed Wal-Mart's promotional decisions and determined that gender disparities could

only be explained by discrimination, and a labor economist, who concluded that Wal-Mart promoted fewer women than its competitors. Id. at 2555. Plaintiffs also submitted 120 employee affidavits reporting experiences of discrimination. Id. at 2556.

Interpreting Rule 23(a)(2), the Court stated that its commonality language is "easy to misread, since '[a]ny competently crafted class complaint literally raises common questions.'" Id. at 2551 (quoting Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U.L. Rev. 97, 131-132 (2009)).

> For example: Do all of us plaintiffs indeed work for Wal–Mart? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedies should we get? Reciting these questions is not sufficient to obtain class certification. Commonality requires the plaintiff to demonstrate that the class members "have suffered the same injury," [Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157 (1982)]. This does not mean merely that they have all suffered a violation of the same provision of law. . . . Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

Id. at 2551.

According to the Court, what matters to class certification "is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." Id. (citation omitted). In Falcon, 457 U.S. at 157-58, the Court stated that there is a "wide gap" between an individual's claim of discrimination and "the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claim will share common questions of law or fact and that the individual's claim will be typical of the class claim."

Applying Falcon, the Court held that the plaintiffs' anecdotal and statistical evidence did not provide "significant proof" that Wal-Mart "operated under a general policy of

discrimination." Wal-Mart, 131 S. Ct. at 2553 (quoting Falcon, 457 U.S. at 159 n.15). The Court concluded that statistical gender disparities would not establish discrimination on a class-wide basis because the disparities could be explained by regional differences, whereas the plaintiffs would have to show a "uniform, store-by-store disparity upon which [their] theory of commonality depends." Id. at 2555. In addition, where instances of discrimination depended on managerial decisions in 3,400 different stores, plaintiffs could not identify a specific employment practice uniting the claims of all 1.5 million class members. Id. at 2555-56.

As to the plaintiffs' anecdotal evidence, the Court observed that plaintiffs' 120 affidavits amounted to only one affidavit for every 12,500 class members. Id. at 2556. "Even if every single one of these accounts is true, that would not demonstrate that the entire company 'operate[s] under a general policy of discrimination,' which is what [plaintiffs] must show to certify a companywide class." Id. (quoting Falcon, 457 U.S. at 159 n.15).

1. Plaintiffs Cannot Show That Class-Wide Litigation Would Generate Answers Common to the Named Plaintiffs and the Proposed Class

Under Wal-Mart, commonality can be established only if a trial with respect to plaintiffs' homes would generate common answers with respect to the class members' alleged Fourth and Fifth Amendment claims. See Wal-Mart, 131 S. Ct. at 2551. That cannot be the case here because, as this Court has recognized, the "fundamental question" posed in this case is "whether [plaintiffs'] constitutional rights were violated because the ICE agents did not seek their consent before entering their homes." Aguilar v. Immigration & Customs Enforcement, 255 F.R.D. 350, 361 (S.D.N.Y. 2008). To decide the issue, the fact-finder will have to make house-by-house findings, based on the testimony of those present at each location, as to whether the entries were consensual. Just as a finding of liability at one location will not preordain liability for the rest, such findings, whatever they may be, will not establish that ICE entered (or will enter) the homes

of "millions of Latinos," Mov. Mem. at 2, without consent, or that these millions have been (or will be) unconstitutionally targeted.

Plaintiffs raise allegedly common questions, Mov. Mem. at 13, but "[r]eciting these questions is not sufficient to obtain class certification." Wal-Mart, 131 S. Ct. at 2551. Instead, plaintiffs must demonstrate that a "determination of [the] truth or falsity [of the named plaintiffs' claims] will resolve an issue that is central to the validity of each one of the claims in one stroke." Id. (citation omitted). And the fate of the named plaintiffs' claims will be determined by answers to questions far more specific than the three general questions raised in plaintiffs' brief. See Mov. Mem. at 13.

Using plaintiff Nelly Amaya as an example, the jury will have to decide, by officer, whether ICE 1, ICE 2, ICE 3, ICE 4, ICE 5, ICE 6, or ICE 7 entered her home without consent; which of the officers questioned her, see Compl. ¶ 254; whether they had a valid basis for doing so; which officers "searched the Amaya family home without permission or consent from the Amaya family," id. ¶ 264; whether the officers were entitled to conduct a protective sweep; if so, whether they exceed the legal scope; whether any officer actually injured Amaya's wrist, id. ¶¶ 267-69; if so, whether any use of force was justified under the circumstances; whether any one of the seven defendants engaged in "discriminatory application of the law," id. ¶ 485(d); and a myriad of other questions relating to Amaya's eight FTCA claims against the United States. Because each complaint location is different—including different plaintiffs and defendants, different targets, and different reasons for going there—the jury will have to answer such questions with respect to the remaining six complaint locations. But the jury's answers will not establish anything definite with respect to each of the hundreds of other operations defendants have conducted since 2007, much less operations that defendants may conduct in the future.

Thus, just as the Wal-Mart plaintiffs sought to sue about "millions of employment decisions at once," Wal-Mart, 131 S. Ct. at 2552, the plaintiffs here wish to sue about millions of purported past or possible future decisions to discriminate against Latinos or enter their homes without consent. But plaintiffs cannot tie all of these decisions together as required under Rule 23(a)(2).

2. Plaintiffs' Anecdotal and Statistical Evidence Cannot Establish Commonality

Plaintiffs try to establish commonality through the use of anecdotal and statistical evidence, but these attempts must fail for many of the same reasons that they did in Wal-Mart. First, even if certain ICE officers and agents entered individual homes without consent, or discriminated against Latinos, it does not establish that all ICE employees will act similarly with respect to millions of Latinos, especially where ICE's policies specifically address consent-based entries[3] and explicitly prohibit discrimination.[4] In fact, whereas the Wal-Mart plaintiffs provided 120 affidavits for a class of 1.5 million, plaintiffs here provide less than a dozen anecdotes (including the allegations of the complaint) for a proposed class of "approximately two million Latinos." Mov. Mem. at 8; see also Wal-Mart, 131 S. Ct. at 2556 ("Even if every single one of these accounts is true, that would not demonstrate that the entire company operates under a general policy of discrimination . . . .") (citation and alteration omitted). This is especially true

[3] ICE's policies concerning consent are discussed at length in the government's memorandum of law in support of its motion to dismiss plaintiffs' claim for injunctive relief, dated May 19, 2010 (docket no. 241), at 8-11.

[4] ICE has an explicit, DOJ-endorsed policy prohibiting discrimination. See Ex. E at 563. That policy expressly repudiates the assumption "that any particular individual of one race or ethnicity is more likely to engage in misconduct than any particular individual of another race or ethnicity." Id. And it "imposes more restrictions on the consideration of race and ethnicity in Federal law enforcement than the Constitution requires." Id. at 564. DHS requires that all law enforcement activities comply with that DOJ policy. See Ex. F at 1.

given that the operations at issue in the complaint targeted 380 persons, but plaintiffs' complaints arise from only seven locations.

(a) Anecdotal Evidence

Even if anecdotal evidence could ever establish commonality, much of plaintiffs' anecdotal evidence is unreliable or has been flatly contradicted during discovery. For example, plaintiffs rely heavily on the statements of Mulvey and Suozzi, but they both admitted in their depositions that they did not participate in the operations, and that their knowledge was based solely on information that had been conveyed to them. Compare Suozzi Tr. (Ex. G), at 21:13-18 ("In all these instances I have no personal knowledge of what was conducted during the particular raids. This has all been relayed to me from my Police Commissioner, who had information relayed to him from police officers who were present for all of these actions."); 38:21-25 – 39:1-6 ("Q. And if I understand your testimony correctly, in your October 2, 2000 [*sic*] letter, which is Exhibit 1155, you are passing along complaints and information provided to you by your Commissioner Mulvey. Is that correct? A. That's correct. Q. And you didn't do anything to verify whether those allegations were correct other than talking to the Commissioner; is that correct? A. That's correct."); and Mulvey Tr. (Ex. H), at 101:20-25 – 102:1-4 ("Q. So just to be clear, other than expressing your displeasure to Palmese you don't have any first-hand knowledge of what's in this letter? A. No. Q. You are conveying what was conveyed to you? A. Correct."), 126:16-18 ("Q. Do you have any first-hand knowledge of agents entering homes without consent? A. No."); with Fed. R. Evid. 602 ("A witness may not testify to a matter unless . . . the witness has personal knowledge of the matter.").

Plaintiffs claim that "ICE agents on numerous occasions used derogatory and racist terms such as 'wetback' to refer to the Latinos whose homes were being raided," Mov. Mem. at 16, but that too is a misleading statement based on unreliable testimony, further undermining plaintiffs'

assertion of commonality. Lieutenant Mulrain did not participate in any of the operations, and he admitted that his hearsay testimony was based on alleged information he had learned "almost third hand." Mulrain Tr. (Ex. I), at 96. Commissioner Mulvey testified that he heard the allegation from Mulrain, adding yet another level of hearsay. Mulvey Tr. (Ex. H), at 72:6-12. ICE 4 merely testified that he had heard agents use the word "wetback" in the past, not during these operations. ICE 4 Tr. (Ex. J), at 331:13-18. And Agent Warren Smith, the only other person plaintiffs cite, testified similarly. See W. Smith Tr. (Ex. K), at 355:13-19. Moreover, even if the Court chooses to consider the Mulrain and Mulvey hearsay testimony, it is substantially undermined by the Nassau and Suffolk detectives who actually participated. See, e.g., Ryan Tr. (Ex. L), at 139:21-25 – 140:1-4 ("Q: Did you hear the term 'wetback' being used on either September 24, 2007 or September 26, 2007? A. No, absolutely not. Q. Did you hear any derogatory terms towards Latinos being used on September 24, 2007 or September 26, 2007? A. No."); see also Ierardi Tr. (Ex. M), 261:15-21 – 262:1-4 ("Q. On September 24, 2007, do you remember any of the ICE agents using derogatory language? A. No. Q. Do you remember any ICE agent referring to Latinos as wetbacks? A. No. Q. Is that something you think you'd remember? A. Yes. My partner's Latino.").

Similarly, even if plaintiffs otherwise could show commonality by claiming that the operations were "characterized by . . . nonconsensual entries and searches," Mov. Mem. at 16, such claims are refuted by the Nassau and Suffolk detectives, who consistently testified that they did not witness or hear about any nonconsensual entries. See, e.g., Egan Tr. (Ex. N), 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. (Ex. O), at 355:21-23 ("Q. Are you aware of anyone entering a home without consent? A. No."); Coffman Tr. (Ex. P),

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 (witnessed no constitutional violations); Ierardi Tr. (Ex. M), 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. (Ex. H), at 126:16-18 ("Q. Do you have any first-hand knowledge of agents entering homes without consent? A. No.").

Plaintiffs' contentions concerning visits to homes not inhabited by Latinos are similarly deficient, both because even if true they would not show commonality, and because, at any rate, the evidence undermines plaintiffs' characterization of the incidents. First, while plaintiffs claim that the example of James Berry "graphically illustrate[s]" defendants' discriminatory conduct because agents departed after Mr. Berry, a white male, opened the door," Mov. Mem. at 18, in fact participating local police officers accompanied OI to that residence, and Mr. Berry, a veteran EMT and volunteer fire rescue worker, testified that he knew nearly every local officer on the force. See Berry Tr. (Ex. Q), at 11:16-25 – 12:1-8 – 29:24-25 – 30:1-2. The local police officers immediately recognized him as someone other than the target, so there was no reason for the officers not to "walk[] away without entering or making any further inquiries." Mov. Mem. at 18. Similarly insufficient is plaintiffs' argument concerning an instance when a team encountered an African-American man at the door and declined to seek entry to his home. Mov.

Mem. at 18. Wal-Mart instructs that the "plaintiff must begin by identifying the specific . . . practice that is challenged." 131 S. Ct. at 2555. The implication of this anecdote, if it is to be believed, is that defendants purposefully engage in a practice of targeting Latinos to the exclusion of all other races and ethnicities. Just as in Wal-Mart, however, plaintiffs must not only identify a discriminatory practice but also prove its widespread existence. That defendants allegedly declined to enter a black person's home or a white person's home can be explained by scores of more rational (and less sinister) reasons, most obviously that the person who opened the door did not fit the target's physical description. Establishing agency-wide discriminatory conduct requires far more than identifying ambiguous situations where discrimination is only one possible, but implausible, explanation. See Wal-Mart, 131 S. Ct. at 2553-54.

Moreover, many of plaintiffs' allegations of unconstitutional conduct have nothing to do with the alleged targeting of Latinos. For example, the fact that agents went to a different address "in the same town, looking for the same target," Mov. Mem. at 10, or searched for a target who had been deported once before, id. at 11, suggest no constitutional violation at all, let alone targeting on the basis of ethnicity. Obviously, the fact that ICE does not have a policy prohibiting its agents from visiting a location more than once—especially given that targets are often not home, or ICE may later learn that a different target resides at the same location—does nothing to establish that ICE has a practice of discriminating against Latinos. Similarly, the fact that DRO officers looked for a target at his ex-wife's home does not suggest discriminatory

conduct, especially considering that he was still receiving his mail there. See A. Aguilar Tr. (Ex. X), at 73:13-25 – 74:1-15.[5]

Thus, plaintiffs have not met and cannot meet their burden of demonstrating, by a preponderance of the evidence, that their proposed class should be certified. The Supreme Court has said that "Rule 23 does not set forth a mere pleading standard," and that the "party seeking class certification must affirmatively demonstrate his compliance with the Rule." Wal-Mart, 131 S. Ct. at 2551. Courts are to undertake a "rigorous analysis," see id., and may certify a class "only after making determinations that each of the Rule 23 requirements has been met." In re Initial Public Offering Sec. Litig., 471 F.3d 24, 44 (2d Cir. 2006).[6] In performing this analysis, the Court has "an 'obligation' to resolve factual disputes relevant to the Rule 23 requirements." Flag Telecom Holdings, 574 F.3d at 38. And failure to establish any Rule 23 element by a preponderance of the evidence precludes class certification. Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc., 546 F.3d 196, 202 (2d Cir. 2008).

[5] Similarly, plaintiffs cannot establish commonality by cherry-picking unfavorable immigration judge decisions, see Mov. Mem. at 14 n. 39 & 17, especially where defendants are aware of several IJ decisions rejecting similar claims, which can be provided in redacted form upon request.

[6] In the last five years, the Second Circuit has dramatically altered the evidentiary standard for certifying a class. Overruling its prior case law, the Circuit first held that district courts must resolve factual disputes and make actual findings bearing on class-certification motions. In re Initial Pub. Offering Sec. Litig., 471 F.3d 24, 40-41 (2d Cir. 2006). It later held that the proponent of class certification bears the burden of proof by a preponderance of the evidence. Teamsters, 546 F.3d at 202. The Circuit also made clear that district courts' obligation to resolve factual disputes is "not lessened by overlap between a Rule 23 requirement and a merits issue, even a merits issue that is identical with a Rule 23 requirement." Flag Telecom, 574 F.3d at 38 (quoting IPO, 471 F.3d at 41).

(b) Statistical Evidence

Plaintiffs' statistical evidence also fails to establish commonality. Even if taken at face value, and without waiving any evidentiary challenges to plaintiffs' expert reports,[7] the fact that the ethnic composition of ICE's targets does not mirror the ethnic composition of the non-citizen populations of Nassau and Suffolk counties, see Mov. Mem. at 18-19, does not establish class-wide discrimination against Latinos. See Wal-Mart, 131 S. Ct. at 2556 ("Merely showing that Wal-Mart's policy of discretion has produced an overall sex-based disparity does not suffice."). Plaintiffs do not even try to account for all of the non-discriminatory reasons that a person could become a target of ICE operations, even where only a subset of "non-citizens" (the metric plaintiffs use) are subject to removal from the United States. The Wal-Mart Court highlighted a similarly flawed statistical analysis, faulting plaintiffs' expert for being unable to calculate with any certainly what percentage of Wal-Mart's decisions "might be determined by stereotyped thinking." Wal-Mart, 131 S. Ct. at 2553. As in Wal-Mart, even if plaintiffs' aggregated analysis is taken as true, they have given the Court no basis to conclude that any one of the 135 DRO or 255 OI targets was selected because of ethnicity, which is especially significant given that defendants have produced more than 15,000 pages of work papers associated with generating the final target lists.

[7] The Wal-Mart Court stated that statistical reports must be examined for scientific rigor and strongly suggested that such expert evidence is subject to a Daubert inquiry. See 131 S. Ct. at 2553-54 ("The District Court concluded that Daubert did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so, but even if properly considered, [plaintiffs' expert] testimony does nothing to advance [their] case."); see also In re NYSE Specialists Secs. Litig., 260 F.R.D. 55, 65-66 (S.D.N.Y. 2009) (applying Daubert in connection with Rule 23 analysis); Weiner v. Snapple Bev. Corp., No. 07 Civ. 8742 (DLC), 2010 WL 3119452, at *7-8 (Aug. 5, 2010) (expert testimony excluded and class certification denied).

Moreover, plaintiffs' "statistical evidence" is unreliable because of numerous analytical errors. For example, using plaintiffs' own data concerning the targets and arrests of the September 2007 operations, defendants' statistician found no statistically significant over-representation of persons from Spanish-speaking countries. See Ex. R at 3-7. In addition, even though the point of the OI operation was to find undocumented gang members living in Nassau and Suffolk counties, plaintiffs' analysis is based on the unsupported assumption that people from Spanish-speaking countries are equally likely to be in Nassau and Suffolk gangs as are people from other countries. See id. at 7-9. Plaintiffs also ignore the issue of statistical dependence because their analysis assumes that all arrests occur independently. In plaintiffs' view, arresting one person from a Spanish-speaking country has no statistical bearing on whether another person arrested in the same home is likely to be from the same country. See id. at 13-16.

Finally, the plaintiffs' cited cases are not to the contrary. Jermyn v. Best Buy Stores, 256 F.R.D. 418, 429-30 (S.D.N.Y. 2009), for example, itself distinguishes the point plaintiffs wish to make by holding that differences in damages, but not liability, do not defeat commonality. A similar point was made in Ventura v. New York City Health & Hosp. Corp., 125 F.R.D. 595, 600 (S.D.N.Y. 1989), where a drug-testing policy affected all class-member employees, and the court found merely that differences in the degree of harm did not destroy commonality. And although plaintiffs cite Nicholson and Baby Neal for the proposition that "there is an assumption of commonality" in a (b)(2) class, see Mov. Mem. at 9, that presumption has limits. In Baby Neal ex rel. Kanter v. Casey, 43 F.3d 48, 56, 59 (3d Cir. 1994), the Third Circuit noted that for commonality to apply, all class members must be subject to the same harm, and warned that when the interests of (b)(2) class members are not alike, the class runs the risk of binding absentee class members through res judicata. Likewise, in Nicholson v. Williams, 205 F.R.D.

92, 95-98 (E.D.N.Y. 2001), Judge Weinstein stated that the class should be "as narrow and precise as possible" and carefully crafted it to ensure a nexus between class members' domestic-violence injuries and the injuries of the named plaintiffs. And in Daniels v. City of New York, 198 F.R.D. 409 (S.D.N.Y. 2001), the court was following the now-rejected proposition that for Rule 23 analysis, a "court assumes that the allegations raised in the plaintiff's complaint are true," id. at 413, when it found commonality based on plaintiffs' "alleg[ations] that defendants engaged in an unconstitutional pattern, practice or policy," id. at 417. Wal-Mart squarely rejected that notion: "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule." 131 S. Ct. at 2551.

B. The Proposed Class Is Neither Typical Nor Ascertainable, and It Is Defined to Include Persons With No Claims Against ICE

1. Putative Class Members Who Have Never Encountered ICE Lack Standing to Seek Injunctive Relief

Because plaintiffs' proposed class contains persons who "have been subjected to and/or are at imminent risk of home raids by ICE New York," Mov. Mem. at 2, it includes persons who have never encountered ICE. But class members who share only a generalized fear of encountering ICE lack standing to enjoin ICE's conduct.

Standing is "an essential and unchanging part of the case-or-controversy requirement of Article III," and plaintiffs must establish, rather than merely plead, its three "irreducible" constitutional elements: injury in fact, traceability, and redressability. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). In this case, the Court has found that the named plaintiffs have standing to pursue injunctive relief because "plaintiffs' alleged fear that ICE agents will return to their homes and conduct searches and seizures in an unconstitutional manner is not unreasonable or unrealistic." See Opinion and Order, Aug. 1, 2011 (docket no. 286), at 54.

By its reasoning, however, the Court's decision implies (as Lujan requires) that persons who have never encountered ICE do not have standing to seek injunctive relief because they do not have a concrete, non-speculative fear of being harmed, or even visited, by ICE. This reality precludes certifying the proposed class here, because a class must be "defined in such a way that anyone within it would have standing," and "no class may be certified that contains members lacking standing." Denney v. Deutsche Bank AG, 443 F.3d 253, 264 (2d Cir. 2006) (standing based on reliance on negligent or fraudulent tax advice). Relatedly, a claim "is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." Texas v. United States, 523 U.S. 296, 300 (1998).

Thus, in Reno v. Catholic Servs., Inc., 509 U.S. 43, 66 (1993), the Supreme Court stated that "only those class members (if any) who were front-desked [i.e., their applications were summarily rejected] have ripe claims over which the District Courts should exercise jurisdiction." Similarly, in Burdick v. Union Sec. Ins. Co., No. CV 07-4028 ABC (JCx), 2009 WL 4798873, at *4 (C.D. Cal. Dec. 9, 2009), the district court—relying on Reno and Denney—held that "class members lacking justiciable claims under Article III should be excised from the case." Under these decisions, putative class members who have never encountered ICE, safely the majority of the two million members, lack standing to enjoin defendants' conduct. And the point is not merely academic, given that many of the named plaintiffs themselves testified that they did not have a fear of ICE before the encounters detailed in the complaint. See, e.g., Lazaro-Perez Tr. (Ex. S), at 123:15-18 ("Q. Before March 19, 2007, were you afraid of ICE or the police or the government? A. Not at all."), Revolorio Tr. (Ex. T), at 163:9-13 ("Q. Before April 18, 2007 were you afraid of ICE? A. No. Q. Have you ever been afraid of ICE? A. No.), Lazaro-Melchor Tr. (Ex. U), at 128:9-11 ("Q. Before March 19, 2007, were you afraid of the

police? A. No.), Patzan de Leon Tr. (Ex. V), at 204:15-17 (same); B. Velasquez Tr. (Ex. W), at 181:17-19 (same).

2. Class Membership Is Neither Typical Nor Ascertainable

Although class membership must be able to be concretely defined, that is not possible here because class membership (i) depends on whether a person has been discriminated against; (ii) is based on subjective fears of ICE; and (iii) depends on being "Latino," which has not been defined.

A class must be identifiable before it may be properly certified. Friedman–Katz v. Lindt & Sprungli (USA), Inc., 270 F.R.D. 150, 154 (S.D.N.Y. 2010). This requirement is referred to as "ascertainability." Id.; see also Bakalar v. Vavra, 237 F.R.D. 59, 64 (S.D.N.Y. 2006) ("Whether a proposed class is ascertainable is fundamental to certification."). "An identifiable class exists if its members can be ascertained by reference to objective criteria. Where any criterion is subjective, e.g., state of mind, the class is not ascertainable." In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 209 F.R.D. 323, 337 (S.D.N.Y. 2002). A court must be able to determine who is in the class and is bound by its ruling "without engaging in numerous fact-intensive inquiries." Bakalar, 237 F.R.D. at 64. Class members need not be ascertained prior to certification, but each individual's class membership must be ascertainable at some stage in the proceedings. In re Fosamax Prods. Liab. Litig., 248 F.R.D. 389, 395–96 (S.D.N.Y. 2008); Bakalar, 237 F.R.D. at 64.

Here, plaintiffs' definition requires the Court to answer a number of fact-intensive questions to determine membership. For example, was the person "subjected to" a "home raid," that is, a nonconsensual entry? Was the person targeted "because [he or she is] Latino"? Is a person at "imminent risk" of a nonconsensual entry? These questions would have to be answered on a case-by-case basis, and the Court would have to know, at the minimum, the

essential facts of a given encounter, including why the person or residence was targeted and whether ICE entered without consent. In addition to raising ascertainability problems, these inquiries defeat the typicality requirement because persons' claims are "highly individualized and differ[] from case to case." Lewis Tree Serv., Inc. v. Lucent Tech. Inc., 211 F.R.D. 228, 234 (S.D.N.Y. 2002). Even the assertion of "a common legal theory does not establish typicality when proof of a violation requires individualized inquiry." Elizabeth M. v. Montenez, 458 F.3d 779, 787 (8th Cir. 2006); see generally Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C., 504 F.3d 229, 245 (2d Cir. 2007) (typicality requires that "each class member's claim arises from the same course of events") (internal quotation marks omitted).

Second, for those persons who have not encountered ICE, the Court would have to determine whether they fear an "imminent encounter." Even though plaintiffs' definition does not explicitly state that non-injured class members must fear encounters with ICE, it would make no sense to extend class membership to the multitudinous persons who fall within the proposed class yet who have no reason to believe that ICE will ever violate their constitutional rights. Aside from the lack-of-standing problem discussed above, this would require the Court to assess, person by person, whether a putative class member fears ICE, making the class definition far "too amorphous." See, e.g., 7A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 1760 (3d ed. 2005) ("class defined with reference to the state of mind of its members will not be allowed to proceed under Rule 23"); see also Simer v. Rios, 661 F.2d 655 (7th Cir. 1981) (impossible to determine who was "discouraged" from applying for public assistance); Rappaport v. Katz, 62 F.R.D. 512 (S.D.N.Y. 1974) (impossible to determine who is "imminently seeking to be married"); Zapka v. Coca-Cola Co., No. 99-cv-8238 (JWD),

2000 WL 1644539, at *3 (N.D. Ill. Oct. 27, 2000) (impossible to determine who was "deceived by" Coca-Cola's marketing practices).

Moreover, plaintiffs have never defined Latino, and because Latino ethnicity is generally regarded as a matter of self-identification,[8] the Court would be unable to ascertain class membership, and ICE would not know which persons fall within the scope of any eventual injunction. Many persons with non-Spanish surnames—for example, Bill Richardson, the former governor of New Mexico—identify themselves as Latino, and still other persons with Spanish surnames—such as persons from the Philippines, Palau, and the Northern Mariana Islands—do not identify themselves as Latino.

For these reasons, although plaintiffs wish to "ensure that an Order of this Court is enforceable by class members," Mov. Mem. 22, there will be no way for defendants (or the Court) to determine who is in the class.

C. Plaintiffs Have Not Shown That the Named Plaintiffs Will Adequately Protect the Interests of the Class

Under Rule 23(a)(4), plaintiffs must show that the named plaintiffs "will fairly and adequately protect the interests of the class." As plaintiffs correctly note, they must show both that class counsel is capable of conducting the litigation and that the named plaintiffs' interests coincide with the interests of the class. See Mov. Mem. at 22 (citations omitted). Although defendants do not dispute the competence of class counsel, the interests of the named plaintiffs and the proposed class members are not, as plaintiffs argue, "identical." Id.

[8] "Persons who report themselves as Hispanic can be of any race." See https://ask.census.gov/app/answers/detail/a_id/216/kw/hispanic/session/L3RpbWUvMTMxOTY2NTkwNi9zaWQvU05FWjF6SGs%3D.

To provide the clearest example, two persons from one of the actual complaint locations (165 Main Street) did not join this litigation, but instead filed two separate actions in the Southern District of New York. See Gonzales v. United States, No. 08 Civ. 6845 (LMS) (S.D.N.Y) (filed July 31, 2008); Soto v. United States, No. 08 Civ. 8884 (LMS) (S.D.N.Y.) (filed Oct. 16, 2008 (S.D.N.Y)). Their FTCA actions, which were filed approximately one year after this case, did not name Bivens defendants and did not seek injunctive relief. The parties settled the Gonzales case in November 2010 (Mr. Soto died while his case was pending), but if this Court had certified a class before that time, Gonzales (and every other New York Latino who may have a claim against defendants) arguably would have been precluded by res judicata from seeking monetary relief. See MTBE, 209 F.R.D. at 338 ("Absent class members may bring suit later—for personal injury or property damage—only to be 'told . . . that they had impermissibly split a single cause of action.'") (quoting Feinstein v. Firestone Tire & Rubber Co., 535 F. Supp. 595, 606 (S.D.N.Y. 1982)); Baby Neal, 43 F.3d at 59 (court must prevent absentee class members from "being bound by . . . the subsequent application of principles of res judicata").

While those plaintiffs may have shared the Aguilar plaintiffs' desire "to end the defendants' unconstitutional conduct," Mov. Mem. at 22, they did not seek injunctive relief and, in effect, opted out of the class that plaintiffs wish to certify, which is not permitted by Rule 23(b)(2). Cf. Rule 23(c)(2)(B)(v) (permitting only (b)(3) class members to opt out).

Finally, plaintiffs cite Dajour B. ex rel. L.S. v. City of New York, No. 00 Civ. 2044 (JGK), 2001 WL 1173504 (S.D.N.Y. Oct. 3, 2001), for the proposition that individualized differences do not overcome the adequate-protection requirement. See Mov. Mem. at 22. But there the class was narrowly defined to include children receiving emergency shelter who were eligible for Medicaid benefits. Dajour B., 2001 WL 1173504, at *2. And a specific question—

have the plaintiffs (and the homeless, class-member children) been unlawfully deprived of benefits?—was uniquely tailored to provide a class-wide answer, id. at *6, which is consistent with the Supreme Court's teachings on commonality in Wal-Mart, 131 S. Ct. at 2550-52.

D. Plaintiffs' Proposed Class Should Not be Certified Under Rule 23(b)(2)

Rule 23(b) lists three different types of class actions, and plaintiffs seek certification under subsection (b)(2), which applies where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." In Wal-Mart, the Court stated that "[t]he key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." 131 S. Ct. at 2557 (citation omitted).

There are at least two problems with certifying a (b)(2) class here. First, plaintiffs cannot show that defendants have acted "on grounds that apply generally to the class," or that injunctive relief "is appropriate respecting the class as a whole." Here, plaintiffs seek several forms of injunctive relief, some mentioning Latinos and others that do not. See Compl. at 135-38. The latter category includes injunctions that purportedly would ensure more thorough investigations, improve training, update databases, and implement corrective measures to discourage "law enforcement officers to act in [a] constitutionally deficient manner." Id. at 137-38. Assuming that the Court orders any of those alleged improvements, the relief would be applied generally—not just to Latinos—and therefore would not be "appropriate respecting the class as a whole." See Rule 23(b)(2).

As to the Latino-specific forms of relief, plaintiffs seek an injunction preventing defendants from "[d]eploying groups of armed agents to descend upon the homes of Latinos in the pre-dawn hours with the intent" to enter or search the home, or to search or seize Latinos,

"through the use of force or by manufacturing 'consent' from residents who are unable—under law or due to the oppressive conditions of the raids—to give legitimate consent." Compl. 135-37 (¶¶ 2(a)-(d)). Plaintiffs also seek injunctions preventing unlawful racial profiling in identifying targets and executing operations. Id. at 137 (¶¶ 3(e) & (f)). Notwithstanding the way that plaintiffs frame these forms of relief, it is inconceivable that the Court would enjoin racial profiling and the manufacturing of consent, but only with respect to Latinos and not other racial or other ethnic groups.

Second, plaintiffs have not shown that class-wide litigation will promote the interests of efficiency, the very goal of class-action litigation. See Falcon, 457 U.S. at 159 ("[M]aintenance of respondent's action as a class action did not advance 'the efficiency and economy of litigation which is a principal purpose of the procedure.'") (citing Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553 (1974)). In deciding whether to certify a (b)(2) class, courts should consider whether the litigation, as reconfigured as a class action, will be manageable and efficient. See, e.g., Lightfoot v. District of Columbia, 273 F.R.D. 314, 337 (D.D.C. 2011). In Lightfoot, the court decertified a proposed (b)(2) class after "look[ing] ahead to determine how certain issues might be addressed at trial," and finding "that the continued certification of the class will not advance the principal purpose of the class action device—i.e., advancing 'the efficiency and economy of the litigation.'" Id., 273 F.R.D. at 337 (citing Falcon, 457 U.S. at 159); see also Shook v. El Paso Cnty., 386 F.3d 963, 973 (10th Cir.2004) ("[T]he vehicle of class action litigation must ultimately satisfy practical as well as purely legal considerations."), cert. denied, 544 U.S. 978 (2005); Walsh v. Ford Motor Co., 807 F.2d 1000, 1019 n. 111 (D.C.Cir.1986) ("manageability problems that might block a class action under Rule 23(b)(3) may be entailed as well in the Rule 23(b)(2) format"), cert. denied, 482 U.S. 915 (1987); see also Agostino, 256

F.R.D. at 469 (denying certification under Rule 23(b)(2) where proposed class was insufficiently cohesive to "preserve the efficiencies gained through class litigation").

Here, in an already complex and unwieldy case, plaintiffs have not explained how adding two million more class plaintiffs can possibly advance the "efficiency and economy" of the litigation. Nor have plaintiffs anticipated the practical effects this expansion will have upon introduction of evidence, upon cross examination, upon matters of proof, on the overall length of the trial, and on the proposed jury verdict forms. See In re Rezulin Prods. Liab. Litig., 210 F.R.D. 61, 71 (S.D.N.Y. 2002) (in case involving complex variations of state law, plaintiffs bore burden of proving that management of the class was possible, by providing an "extensive analysis," including sample model jury instructions and proposed verdict forms).

Finally, plaintiffs' Rule 23(b)(2) cases are not to the contrary. In Biediger v. Quinnipiac Univ., No. 3:09cv621 (SRU), 2010 WL 2017773, **4-5 (D. Conn. May 20, 2010), the class was much more concrete—female college students harmed by the university's non-diverse athletic programs—and the court actually denied (as too amorphous) class certification as to women who had decided against enrolling on account of those programs. And plaintiffs cite Ingles v. City of New York, No. 01 Civ. 8279 (DC), 2003 WL 402565, *6 (S.D.N.Y. Feb. 20, 2003), for the proposition that the named plaintiffs' damages claims do not impact the Rule 23(b)(2) analysis, Mov. Mem. at 25, but the defendants in Ingles actually made a different argument: that the named plaintiffs would have an incentive to settle their damages claims instead of vigorously seeking an injunction. But aside from Ingles involving a tightly defined class (prison inmates), defendants here have made the opposite argument, i.e., that the class members' pursuit of only injunctive relief will possibly preclude individuals from seeking damages against defendants.

CONCLUSION

For the foregoing reasons, the Court should deny plaintiffs' motion for class certification.

Dated: New York, New York
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