UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION; ROSA ARELLANO; DELFINA ARIAS; SONIA MENDOZA; ROSALVA RODRIGUEZ; CANDACE MICHELLE SVENNINGSEN; MICHAEL RAY GRAVES; ALICIA RODRIGUEZ; SERGIO B. RODRIGUEZ, Plaintiffs, v. UNITED STATES DEPARTMENT OF HOMELAND SECURITY, MICHAEL CHERTOFF, SECRETARY; UNITED STATES DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION AND CUSTOMS ENFORCEMENT; JULIE L. MYERS, ASSISTANT SECRETARY, UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN AND JANE DOES 1-100, Defendants.	Civil Action No.: 2-07CV-188-J **DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS**

Submitted by:

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

RICHARD B. ROPER
United States Attorney

D. GORDON BRYANT
Assistant United States Attorney

DAVID J. KLINE
Principal Deputy Director

VICTOR M. LAWRENCE
Senior Litigation Counsel

CHRISTOPHER W. HOLLIS
Trial Attorney
Office of Immigration Litigation
U.S. Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
(202) 305-0899
(202) 233-0397 (fax)
Christopher.Hollis@usdoj.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL STATUTES

Immigration and Nationality Act of 1952, as amended:

U.S. Code

FEDERAL RULES OF CIVIL PROCEDURE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION; ROSA ARELLANO; DELFINA ARIAS; SONIA MENDOZA; ROSALVA RODRIGUEZ; CANDACE MICHELLE SVENNINGSEN; MICHAEL RAY GRAVES; ALICIA RODRIGUEZ; SERGIO B. RODRIGUEZ, Plaintiffs, v. UNITED STATES DEPARTMENT OF HOMELAND SECURITY, MICHAEL CHERTOFF, SECRETARY; UNITED STATES DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION AND CUSTOMS ENFORCEMENT; JULIE L. MYERS, ASSISTANT SECRETARY, UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN AND JANE DOES 1-100, Defendants.	Civil Action No.: 2-07-CV-188-J

DEFENDANTS' REPLY TO
PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiffs seek to counter Defendants' Motion to Dismiss by arguing, *inter alia*, that, "there is a substantial likelihood that the individual plaintiffs, the UFCW, and other UFCW members will . . . be subject to mass ICE detentions" in the future, that the interests Plaintiff UFCW "seeks to protect are germane to the organization's purpose," and that "Plaintiff UFCW has suffered direct injuries to its own interests." Opposition at 1-16. Moreover, Plaintiffs seek to persuade this Court that Defendants' adherence to civil warrants issued by Federal Magistrate Judges, and adherence to procedures approved by the United States Supreme Court in *INS v. Delgado*, 466 U.S. 210 (1984), provide no insulation to Defendants' activities in conducting a workplace enforcement action premised on probable cause that illegal aliens employed by Swift & Company were engaging in identity theft. Opposition at 17-24.

Plaintiffs' arguments fail, and Plaintiffs can neither establish standing nor state a claim upon which relief may be granted. Neither the allegations in the Complaint nor the improper extraneous material Plaintiffs seek to add in their Opposition demonstrates a reasonable expectation that any of the Plaintiff individuals will ever be the subject of another Immigration and Customs Enforcement (ICE) workplace enforcement action. In addition, Plaintiffs fail to show that Plaintiff UFCW has either individual or associational standing because the enforcement of immigration law is not an interest germane to UFCW's purpose.

Defendants obtained lawful warrants to search the premises and question all individuals about their citizenship and work status. Plaintiffs' assertion that individuals were unlawfully detained because they were questioned in areas away from their work space lacks credibility given the real and immediate concern for the safety of Federal agents and civilians during the immigration interviewing of individuals in meatpacking/slaughtering facilities.

Because Plaintiffs lack standing and fail to state a claim upon which relief may be granted, this lawsuit should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

I. Plaintiffs Lack Subject Matter Jurisdiction

A. Plaintiff UFCW Lacks Standing

As a primary matter, Plaintiff UFCW cannot show that, as an organization, it has been injured by Defendants' workplace enforcement actions. As Plaintiffs concede, to obtain individual Article III standing, an organization must make the same showing as an individual: demonstration (I) of injury in fact; (ii) that the injury is fairly traceable to the defendant's actions; and (iii) that the injury will likely be redressed by a favorable decision. *See Association of Community Organizations for Reform Now (ACORN) v. Fowler*, 178 F.3d 350, 356 (5th Cir. 1999); Opposition at 15. The Fifth Circuit Court of Appeals requires that, to obtain individual standing, an organization clearly demonstrate "a direct conflict between the defendant's conduct and the organization's mission," in addition to a clear showing that "an organization's stated goals were 'at loggerheads' with a defendant's conduct." *ACORN*, 178 F.3d at 361.

Plaintiffs fail to directly address this *ACORN* standard regarding Plaintiff UFCW's mission and its stated goals.[1] Indeed, Plaintiffs' omission in this regard is no surprise since, as a labor organization, Plaintiff UFCW simply cannot show that its organizational purpose is to guard against immigration enforcement actions, rather than to protect the interests of its members

---

[1] In *ACORN*, the organization's purpose was "to make equal opportunity in housing a reality in the Richmond Metropolitan Area." *Id.* at 368. Thus, there was a direct conflict between the organizational purpose in question and the allegedly unlawful actions in *ACORN* where the organization suffered injury due to alleged racial steering by an apartment complex owner. *Id.*

in employment-related aspects of the workplace such as wages, benefits, and work schedules. *See* Opposition, Ex. 1, Attachment A–UFCW Constitution, Article 2.

No direct conflict exists between UFCW's organizational purpose and Defendants' actions. UFCW's organizational purpose is the betterment of employee conditions within the context of contract bargaining with the respective employer. Plaintiff UFCW's own literature reflects this purpose.[2] It therefore is disingenuous for Plaintiff UFCW to assert through this lawsuit that its mission is to affect the manner of immigration enforcement when its own literature makes no mention of this purpose.

Rather than addressing the proper standard an organization must meet to show individual standing, Plaintiffs construct their own standard. Plaintiffs state that, "[a]n association suffers a direct injury sufficient to establish standing where it has expended resources to counteract the effects of the challenged activity." Opposition at 15. While this "expended resources" language derives from the court's decision in *ACORN*, Plaintiffs' parsing does not accurately reflect the standard the *ACORN* court articulated for determining whether an organization has individual standing. *See ACORN*, 178 F.3d at 361 (finding on summary judgment that there was "a genuine issue of material fact that ACORN . . . expended resources" to register voters and to counteract defendants' failure to properly implement the National Voter Registration Act); *see also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (citing allegation in complaint that plaintiff "has had to devote significant resources to identify and counteract the defendant's [sic] racially discriminatory steering practices").

---

[2] *See* http://www.ufcw.org/about_ufcw/who_we_are/voice.cfm (last visited January 28, 2008).

The plaintiff-organization's primary purpose in *ACORN* was the advancement of the interests of persons of low and moderate income using voter registration as an integral tool for such advancement. *ACORN*, 178 F.3d at 354. Plaintiff-organization in *Havens*, a counseling and referral organization for homeseekers, had as its primary purpose the establishment of equal opportunity in housing within the area it served. *Havens*, 455 U.S. at 368. Because the organizational purposes of the plaintiffs in these actions were clear in each instance, the question of whether these plaintiffs, in response to defendants' actions, were required to increase the resources necessary to accomplish their respective missions was easily answered by the court.[3] Contrasted with the instant matter, however, it simply is not reasonable to conclude that Defendants' lawful workplace enforcement actions injured Plaintiff UFCW by lessening UFCW's ability to protect its members against unfavorable labor practices by employers.

Contrary to Plaintiffs' proffered standard, use of an organization's resources does not automatically convert the target of those resources into the source of the organization's injury for purposes of conferring individual standing on that organization. *See, e.g., Spann v. Colonial Village, Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990) (explaining that "[a]n organization cannot, of course, manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit."). Although Plaintiffs contend that they expended resources for purposes of litigation, it is clear that having an "in-house legal department of four attorneys put aside all of other [sic] duties" and diverting local staff to "perform interviews" and "translations"

---

[3] Voter registration could readily have been hampered by the failure of a state's election commissioner to comply with the National Voter Registration Act in *ACORN*. Similarly, referral services for homeseekers could easily have been hindered by the alleged discriminatory actions of defendants in *Havens*.

(Opposition at 16) were activities taken to assist in bringing litigation. Plaintiff UFCW simply fails to demonstrate injury in its Complaint because the injuries that UFCW alleges – as an international organization, rather than as a local union – all flow from its affirmative decision to embark upon the instant lawsuit.[4] Costs associated with ligation are simply insufficient demonstrators of the use of an organization's resources for the purpose of conferring standing on an organization. *ACORN*, 178 F.3d at 358.[5]

Plaintiffs' argument regarding expenditure of resources as a result of challenging ICE's immigration workplace enforcement does not satisfy the Fifth Circuit's articulated standard of demonstrating a direct conflict between the challenged conduct and the organization's mission. *ACORN*, 178 F.3d at 361. Plaintiffs' omission of allegations that support this standard is fatal to Plaintiff UFCW's argument that it possesses standing as an organizational plaintiff in the instant matter.

---

[4] It is significant that, aside from expenses undertaken to initiate litigation, such as interviewing witnesses and preparing translations (Opposition at 16), Plaintiff UFCW does not show that the UFCW international union, rather than its locals, has actually expended resources as a result of Defendants' workplace enforcement actions. *See, e.g.*, Opposition at 16 ("local staff, including the local's organizing director, was diverted from their usual duties in order to perform interviews, translations, communicate and coordinate with detention centers . . ").

Also of note is the fact that a UFCW local union, Local 540, attempted to sue Defendants in this same court based on similar allegations. Plaintiff UFCW Local 540 voluntarily dismissed their action after Defendants filed a motion to dismiss demonstrating that the local union lacked standing. *See UFCW Local 540 v. ICE*, Civil Action No. 2:06-cv-350 (N.D. Tex).

[5] *See also Association for Retarded Citizens v. Dallas County Mental Health & Mental Retardation Ctr. Bd. of Trustees*, 19 F.3d 241, 244 (5th Cir. 1994) (holding that "[t]he mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization.").

Plaintiff UFCW also cannot satisfy any of the three prongs an organization must meet to establish associational standing. *See Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977). Neither the Complaint nor Plaintiffs' Opposition demonstrates that individual union members have standing,[6] that Plaintiff UFCW has an interest in the litigation that is germane to UFCW's purpose, or that the lawsuit could continue without the participation of individual union members in the suit. *Id.*

Plaintiff UFCW attempts to show that its interest in this lawsuit is germane to UFCW's purpose as an organization by referring the Court to five cases in which Plaintiffs claim the courts found plaintiff-unions possessed associational standing based on alleged impairment of the respective unions' interests. *See* Opposition at 12.[7] All of these decisions were cases where the courts found that labor unions established associational standing on the basis that certain interests were germane to the union's purposes – members' benefits, constitutional rights of speech, health/safety, and level of involvement in union activities. However, Plaintiffs omit reference to the critical factor common to these cases: defendants in each were organizations with direct responsibility over the unions' interests regarding terms and conditions of employment, whether as the actual employer or as a regulatory agency responsible for the

---

[6] Failure of Plaintiff individuals to establish standing is discussed *infra* in section I. B.

[7] Citing *United Food & Commercial Workers Int'l Union, Local 751 v. Brown Group, Inc.,*, 50 F.3d 1426 (8th Cir. 1995); *International Union, UAW v. Brock*, 477 U.S. 274 (1986); *San Bernardino Public Employees' Association v. Stout*, 946 F. Supp. 790 (C.D. Cal. 1996); *United Transp. Union-Illinois Legislative Bd. v. Surface Transp. Bd.*, 183 F.3d 606 (7th Cir. 1999); *Hotel & Restaurant Employees Union, Local 25 v. Smith*, 846 F.2d 1499 (D.C. Cir. 1988).

industry in question.[8] Contrary to the cases Plaintiffs cite where courts found that unions established associational standing, Defendants in the instant lawsuit constitute neither Plaintiffs' employer nor the regulator of the industry in which Plaintiffs operate. Unlike the defendants in any of the above-referenced cases, Defendants are neither employers nor regulators, but instead are enforcers of immigration laws. It therefore defies logic to find that the interest that UFCW seeks to protect as a party to this lawsuit – lawful enforcement of our nation's immigration laws in the workplace – is germane to UFCW's purpose as a labor union.

Moreover, Plaintiffs' Opposition points to no definitive statement by UFCW affirming that the enforcement of immigration law is an interest that is germane to its purpose. Plaintiffs' Opposition cites one phrase in UFCW's 37-page Constitution that states, as one of its several objectives, "to protect . . . civil rights and liberties." Opposition at 13. This generalized statement contains no mention of UFCW's purpose regarding the conduct of immigration law enforcement. Plaintiffs cannot point to an official, clear announcement that immigration law enforcement stands as UFCW's objective. If the conduct of such enforcement was, in fact,

---

[8] In *Local 751*, the union challenged a company's failure to give notice to employees of closure of a plant, *see Local 751*, 50 F.3d at 1431; in *Brock*, the union challenged the Secretary of Labor on the basis that certain eligibility determinations detrimentally affected employees' trade readjustment allowance benefits, *see Brock*, 477 U.S. at 286; in *Stout*, the union challenged an executive order implemented by public officials on the ground that the order impinged upon members' First Amendment rights in the workplace, *see Stout*, 946 F. Supp. at 796-97; in *United Transp. Union*, the union challenged a decision of a regulatory agency that jeopardized the employment status of union members, *see United Transp. Union-Illinois Legislative Bd.*, 183 F.3d at 611.

The last of these cases, *Hotel & Restaurant Employees Union, Local 25 v. Smith*, was a split decision of an equally divided court that affirmed the district court's finding of summary judgment for defendants. As such, and aside from the fact that the controlling holding of this case cuts against Plaintiffs' assertion of standing here, this decision can be of no consideration in resolving the instant matter.

UFCW's objective, one would think the articulation of such objective could be found in the UFCW Constitution.[9] The inclusion of such an objective is not present there, however, since UFCW's primary purpose or objective simply is not the insurance of proper immigration law enforcement. In demonstration of UFCW's actual objectives as a labor union, UFCW's Constitution understandably and more appropriately focuses on improvement of members' "wages, hours, benefits, and working conditions," all of which constitute terms of employment for which the respective employers of UFCW members are responsible. There is no mention of the word "immigration" anywhere in the UFCW Constitution. *See* Opposition, Ex. 1, Attachment A–UFCW Constitution.

In addition, Plaintiffs' Opposition fails to demonstrate that Plaintiff UFCW meets the third prong of the *Hunt* test for associational standing – that neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.[10] Plaintiffs cite *Warth v. Seldin,* 422 U.S. 490, 515 (1975) for the proposition that prospective relief such as injunctive or declaratory relief, if granted, is "supposed" to result in a remedy that will "'inure to the benefit of those members of the association actually injured.'" *See* Opposition at 14. But this proposition comprises only half of *Hunt's* third prong. Indeed, for Plaintiffs to satisfy the third prong, it is not only the *relief requested* for which the requirement of the individual members' participation is probative. A plaintiff association also fails to satisfy *Hunt's* third prong if the

---

[9] The Supreme Court has looked to unions' constitutions in the past for evidence that a union meets the "germaneness" prong of the *Hunt* test for purposes of establishing associational standing. *See Brock*, 477 U.S. at 286.

[10] Although *Hunt's* third prong is prudential, rather than constitutional, its value as a measure of associational standing remains unquestioned nonetheless. *See United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 556 (1996).

participation of individual members is required for the *claim asserted*. *See Hunt*, 432 U.S. at 343. Plaintiff UFCW fails to satisfy the third prong here because the claim asserted – violations of individuals' rights under both the Constitution and the Immigration and Nationality Act (INA) – requires the participation of individual members throughout the suit.[11] As discussed in Defendants' Motion to Dismiss and *infra*, Plaintiff individuals fail to establish standing in this lawsuit. Plaintiff UFCW thus fails the third prong of the *Hunt* test on this basis, and this Court accordingly lacks jurisdiction and should dismiss Plaintiffs' claim.

Plaintiff UFCW should be dismissed because UFCW cannot satisfy any of the three prongs *Hunt* requires to establish associational standing.

B. Plaintiff Individuals Lack Standing

To establish standing, the eight individual named Plaintiffs must demonstrate injury in fact that is fairly traceable to the Defendants' actions and that will likely be redressed by a favorable decision. *See ACORN*, 178 F.3d at 356 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Because Plaintiffs seek injunctive or declaratory relief, they must prove not only a past injury, but also a real, immediate threat of future injury. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102-05 (1983) (requiring that, because injunctions regulate future conduct, a party seeking injunctive relief must allege a threat that is real and immediate, not merely conjectural or hypothetical, or based on allegations of a few instances of violations by individual actors). Plaintiffs fail to make this showing as there is no reasonable expectation that these eight

---

[11] *See Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978) ("'Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.'") (quoting *Alderman v. United States*, 394 U.S. 165, 174 (1969)); *Kotler Industries, Inc. v. INS*, 586 F.Supp. 72, 74 (N.D. Ill. 1984) (holding that employer did not have standing to assert employees' constitutional claims).

American citizens or lawful permanent residents will ever again be involved in an ICE workplace enforcement action targeting illegal aliens who commit identity fraud.

Plaintiffs' Opposition attempts to bolster Plaintiffs' argument that a real and immediate threat of future injury exists by relying on the purely speculative theorem that, because the named Plaintiff individuals experienced workplace enforcement actions once, it is reasonable to expect that they will experience these actions again. *See* Opposition at 4. Plaintiffs cite to *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974), for the proposition that, "past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury." Opposition at 5 n.4. Plaintiffs misrepresent *O'Shea's* full holding, however, since this quote is preceded by the following statement: "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief, however, if unaccompanied by any continuing, present adverse effects." *O'Shea*, 414 U.S. at 495-96; *see also Lyons*, 461 U.S. at 102-05.

The Supreme Court's holding in *Lyons* is directly on point here, and, Plaintiffs also attempt to obscure the extent to which *Lyons* is authoritative regarding Plaintiff individuals' standing. Contrary to Plaintiffs' assertion that "prudential concerns over federalism" in *Lyons* were "central" to the decision (Opposition at 7), such concerns were tangential in *Lyons,* and *Lyons* is not distinguishable on this basis. *Lyons* plainly held that the plaintiff, an alleged victim of chokeholds applied by Los Angeles police officers, lacked standing because he could not show a "'likelihood of substantial and immediate irreparable injury.'" *Lyons*, 461 U.S. at 111 (citing *O'Shea*, 414 U.S. at 502). Although the *Lyons* plaintiff based his complaint on 42 U.S.C. § 1983, which meant the Court was ultimately reviewing the administration of a state's laws by that state's law enforcement officers, the Supreme Court denied equitable relief to the plaintiff

because he demonstrated no likelihood of future injury, not because he maintained a section 1983 claim. *See id.* at 111-12.

Plaintiffs devote the brunt of their substantive argument, not to the identification of applicable caselaw and the standard Plaintiff individuals must meet here to establish standing, but instead to pure speculation regarding Plaintiff individuals' expectation that they will again experience similar workplace enforcement actions. *See* Opposition at 4-5. These expectations are speculative and lack foundation. The primary foundation on which Plaintiffs base their expectation – statements by Homeland Security Secretary Michael Chertoff – does not support Plaintiffs' speculation.[12] Opposition at 4 n.3. In fact, the transcript of the December 13, 2006, press conference at which Secretary Chertoff made the statements referenced by Plaintiffs show that, since the December 12, 2006, Swift enforcement actions, ICE is now *less* likely to include Swift plants in possible future actions.[13] Secretary Chertoff's statements indicate that ICE does *not* intend to concentrate similar such workplace efforts solely on the food service industry since the problem addressed in the workplace enforcement action – identity theft – is "found in a number of industries."[14]

Plaintiffs also attribute a quote from a Congressional Research Service Report of April 6,

---

[12] Defendants object to the attachments Plaintiffs submitted with their Opposition since these attachments call into consideration matters beyond the pleadings, but to the extent the Court considers these materials, Defendants address them.

[13] *See* http://www.dhs.gov/xnews/releases/pr_1166047951514.shtm (last visited January 28, 2008).

[14] *Id.* Plaintiffs' statement in their Opposition that Defendants "guarantee[d] . . . further raids singling out workers in the food processing industry" (Opposition at 8) simply has no basis in fact, and it is not surprising that Plaintiffs' statement lacks any citation to authority.

2006, (Report) to argue that the "Government also contends that illegal immigrants comprise 'a very large share' of all food processing workers." *See* Opposition at 4 n.3. Contrary to Plaintiffs' assertion, however, the Government makes no such contention because the cited Report – issued by the legislative branch, and not the Defendants in this action – does not make such a statement. Rather, the Report merely refers to the "large and growing unauthorized alien population, the majority of whom are in the [American] labor force."[15] Reliance on several general statements that do not discuss targeting Swift employees is hardly a sufficient basis to confer on Plaintiff individuals the real, immediate threat of future injury that individuals seeking injunctive relief are required to establish. *See, e.g., Lyons*, 461 U.S. at 111.

Plaintiffs argue that Plaintiff individuals possess standing by analogizing the instant matter to two cases – *Ciudadanos Unidos de San Juan v. Hidalgo County Grand Jury Comm'r*, 622 F.2d 807 (5th Cir. 1980) and *LaDuke v. Nelson*, 762 F.2d 1318 (9th Cir. 1985). *See* Opposition at 8. Plaintiffs' analogy fails. Plaintiffs in *Ciudadanos Unidos* and *LaDuke* established standing by respectively alleging a course of conduct of discriminatory grand juror selection "over ten years" and a "systematic pattern" of warrantless searches of migrant housing by the Immigration and Naturalization Service (INS). *Ciudadanos Unidos*, 622 F.2d at 820; *LaDuke*, 762 F.2d at 1326. No pattern of unlawful behavior has been alleged in this action as the Complaint references only a worksite enforcement action against Swift that occurred on a single day in 2006. Individual Plaintiffs have not alleged that they have previously been targeted or that they maintain a credible, real, and *immediate* threat of future injury. (*Cf.* Complaint at ¶ 32, alleging, inexplicably, that individual plaintiffs "are suffering and will continue to suffer

---

[15] *See* http://fas.org/sgp/crs/misc/RL33351.pdf (last visited January 28, 2008).

irreparable injury unless this Court orders relief.") Therefore, these cases are readily distinguishable from the instant matter.[16]

Plaintiffs' assertion of standing for the individual Plaintiffs also defies common sense. Indeed, to make such an argument, Plaintiffs would be in the awkward position of arguing that UFCW member companies continue to employ illegal immigrants, continue to employ those engaging in identity theft in violation of the privacy rights and economic rights of innocent Americans, and continue to employ persons subject to criminal felony sanctions, and, thus, there is an immediate threat of future injury because they will be targeted by ICE in the future.

Plaintiffs additionally maintain that, even if the individual Plaintiffs lack standing, a live controversy still remains between Defendants and the proposed class. Opposition at 9. Plaintiffs cannot circumvent standing requirements by alleging that a class as a whole faces a threat of injury. *See O'Shea*, 414 U.S. at 494 ("Moreover, if none of the named plaintiffs purporting to

---

[16] The cases are further distinguishable for three reasons. First, *Ciudadanos Unidos* was decided *before* the Supreme Court in *Lyons* definitively articulated the standard for establishing individual standing. Thus, the court in *Ciudadanos Unidos* did not apply the same standard for establishing standing as is now applicable in the Fifth Circuit after *Lyons*. Second, there was no question whether the process under review in *Ciudadanos Unidos* was unlawful since it resulted in the discriminatory omission of four identifiable groups – Mexican-Americans, women, young people, and poor people – from selection as grand jurors. *Ciudadanos Unidos*, 622 F.2d at 822-24. Conversely, in the instant matter, Defendants proceeded with their workplace enforcement actions under valid, unchallenged laws. Third, in *LaDuke*, the Ninth Circuit Court of Appeals pointed to the fact that the INS was not required to provide an articulable suspicion before conducting its searches, as well as the fact that these searches occurred in the home, rather than in the workplace, as primary factors considered in finding that plaintiffs established standing. *LaDuke*, 762 F.2d at 1328. Unlike *LaDuke*, Defendants here conducted their searches in accordance with lawfully issued administrative search warrants and in the public sphere of the workplace, rather than in the private sphere of the home. *See INS v. Delgado*, 466 U.S. 210 (1984) (noting the public, rather than private, context of a factory and the existence of other people in the area during a workplace enforcement action by the INS).

represent a class establishes the requisite of a case of controversy with the defendants, none may seek relief on behalf of himself or any other member of the class."); *Doe v. Blum*, 729 F.2d 186, 190 n.4 (2d Cir. 1984) (explaining that satisfaction of standing's injury requirement must be determined with respect to named plaintiffs).

II. Plaintiffs Fail to State Claims upon which Relief May Be Granted

A. Plaintiffs' Constitutional Claims Fail to State a Claim

Plaintiffs' Opposition includes legal conclusions and creates nonexistent factual disputes to support Plaintiffs' claims by arguing that Defendants disregarded the Federal Rules of Civil Procedure in their Motion to Dismiss and overstretched the bounds of Defendants' warrants during the workplace enforcement actions. To their detriment, and perhaps in recognition of the high hurdle Plaintiffs must overcome to state a claim in light of the controlling decision in *INS v. Delgado*, 466 U.S. 210 (1984), Plaintiffs misinterpret the Federal Rules of Civil Procedure, ignore controlling precedent that cuts against their claims, and ignore Defendants' arguments that the searches were reasonably conducted – especially given the safety considerations inherent in conducting an enforcement action in a meatpacking plant.

First, Plaintiffs assert that, in disregard of "basic federal civil procedure," Defendants ground their Motion to Dismiss on evidentiary materials outside the pleadings. Opposition at 17. This argument faults Defendants for attaching to their Motion to Dismiss the Declaration of Matthew C. Allen, Deputy Assistant Director, Narcotics, Financial, and Public Safety Division of the Office of Investigations at ICE. However, as the Court is aware, the Court may review any outside materials to help it determine whether or not subject matter jurisdiction exists for purposes of a motion under Fed. R. Civ. P. 12(b)(1). *See Menchaca v. Chrysler Credit Corp.*,

613 F.2d 507, 512 (5th Cir.1980) (finding that, "[a]lthough the allegations of a complaint are taken as true in a challenge to a plaintiff's right to any relief, they may be tested by extraneous evidence when the court's jurisdiction is attacked" under a Rule 12(b)(1) motion) ; *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981) (citing *Menchaca*, 613 F.2d 507); *see also Ramming v. U.S.*, 281 F.3d 158, 161 (5th Cir. 2001).

In truth, it is Plaintiffs who have disregarded the Federal Rules of Civil Procedure by attaching and referencing in their Opposition numerous declarations in an effort to state claims that were not alleged in the Complaint. *See* Opposition at 23 n.30. Plaintiffs' reliance on evidence outside the pleadings to support their claims at this stage of the lawsuit is both premature and contrary to the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 12(b)(6), 12(b)(1); *Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Co.*, 469 F.2d 416, 417-18 (5th Cir. 1972); *Plotkin v. IP Axess Inc.*, 407 F.3d 690, 696 (5th Cir. 2005). Plaintiffs' own extensive reference to their declarations to support their claims should be disregarded.

Second, Plaintiffs argue that the warrants on which Defendants relied did not authorize detention "without individualized cause" and that *Delgado* does not authorize "mass arbitrary detentions" without probable cause. Opposition at 18, 27. Plaintiffs devise their own standard regarding the level of "cause" necessary for immigration officials to approach individuals for questioning, terming this standard "individualized cause." *See id.* Plaintiffs' standard stands in contrast to the standard articulated in *Blackie's House of Beef v. Castillo*, 659 F.2d 1211 (D.C. Cir. 1981).[17] As a starting point, the warrants at issue here are administrative warrants

[17] Plaintiffs' Opposition devotes considerable attention to analysis of *Ybarra v. Illinois*, 444 U.S. 85 (1979) and *Illinois Migrant Council v. Pilliod*, 531 F.Supp. 1011 (N.D. Ill. 1982). Opposition at 19-20. The *Ybarra* decision preceded the *Blackie's* decision, and the case is

"evaluated under a standard of probable cause that is different than that applied to criminal warrants." *Id.* at 1218-19. Any of Plaintiffs' assertions to the contrary – that the standard applicable for Defendants to search for suspected immigration violations is on par with that of "probable cause" as that term is understood in the criminal context – must be soundly dismissed. *See id.* at 1222. Moreover, Plaintiffs' self-fashioned standard fatally dismisses the legal premise, based in both statute and established precedent, that immigration officials can conduct warrantless interrogations of persons reasonably believed to be undocumented aliens without offending the Fourth Amendment. *See* INA § 287(a)(1), 8 U.S.C. § 1357(a)(1); *Blackie's*, 659 F.2d at 1221 (citing *Yam Sang Kwai*, 411 F.2d 683). That Plaintiffs fail to state a claim regarding their Fourth and Fifth Amendment allegations becomes clear when one accounts for the recognized level of authority that lawfully ensues when immigration officials obtain a *Blackie's* warrant and couple this warrant with their enforcement capabilities under INA section 287. INA § 287(a)(1), 8 U.S.C. § 1357(a)(1); *Blackie's*, 659 F.2d at 1222.[18]

---

therefore of limited applicability on this basis. More important, however, is the fact that the plaintiff in *Ybarra* challenged the manner in which a *criminal*, rather than an *administrative*, warrant was effected. There is no criminal warrant at issue in the instant matter, and *Ybarra* is thus inapposite. Additionally, *Illinois Migrant Council*, while recognizing the *Blackie's* holding that the immigration service may utilize an administrative warrant to enter and search a given commercial location, was decided before *Delgado* and thus fails to account for the Supreme Court's more recent guidance on the extent to which immigration officials can couple administrative warrants with their authority under INA section 287 to approach suspected undocumented aliens for questioning. *See Delgado*, 466 U.S. at 214-18; *Blackie's*, 659 F.2d at 1221 (citing *Yam Sang Kwai v. INS*, 411 F.2d 683 (D.C. Cir. 1969)).

[18] *See Blackie's*, 659 F.2d at 1218-19 ("Congress, in passing the Immigration and Nationality Act, contemplated a vigorous enforcement program that might include INS entries onto private premises for the purpose of questioning 'any alien or person believed to be an alien' . . ."). In reference to 8 U.S.C. § 1357(a)(1), the court stated it reveals "Congress's strong interest in effectively enforcing the immigration laws, rather than merely creating a set of normative prohibitions devoid of any means of enforcement." *Id.* at 1221.

Third, Plaintiffs argue that *Delgado* does not authorize "mass arbitrary detentions" without probable cause. Plaintiffs accompany this argument with reference to matters outside the pleadings, thereby seeking to improperly add to the deficient allegations in their Complaint. *See* Opposition at 22. Even if this Court considers the declarations appended to Plaintiffs' Opposition, however, the declarations are of no help to Plaintiffs. Many of them only state that a particular individual "felt" or "believed" that they were not free to leave during the enforcement actions.[19] These individuals' subjective feelings are not evidence that they were not free to leave at any time. *See Delgado*, 466 U.S. at 220-21 (finding that, even though the workplace enforcement action "created a psychological environment which made [individuals interviewed] reasonably afraid they were not free to leave," individuals who did not attempt to leave were not in fact detained and "may only litigate what happened to them.").

In determining whether detention or seizure occurred in the context of immigration "surveys" of factories, *Delgado* held that no seizure occurs so long as INS agents' conduct does not give workers reason to believe that they would be detained if they gave truthful answers to the questions put to them. *Martinez v. Nygaard*, 831 F.2d 822, 826 (9th Cir. 1987) (citing

---

[19] *See, e.g.*, Declaration of Rosalva Rodriguez at ¶ 9 ("I did not *feel* free to leave . . . I *feel* certain and *believed* at the time that I would have been stopped and arrested if I tried to leave without ICE permission."); Declaration of Delfina Arias at ¶ 8 ("During this time I do not *believe* that I was *free* to leave. I *believe* that if I had tried to leave, I would have been handcuffed and arrested."); Declaration of Michelle Svenningsen at ¶ 8 ("I did not *feel* free to leave . . . I *felt* that if I . . . did not obey the ICE agents, I would have been arrested or detained."); Declaration of Alicia Rodriguez at ¶ 9 ("At no time . . . did I *feel* free to leave . . ."); Declaration of Anna Arellanes at ¶ 8 ("I *felt* that if I had tried to leave, I may also have been arrested."); Declaration of Manuel Lujan at ¶ 9 ("During this time I did not *feel* free to leave . . .") (emphasis supplied). No allegations in either the Complaint or the submitted declarations indicate that any individual Plaintiff sought counsel during the enforcement action and was denied access to such counsel. Further, no allegations in the Complaint indicate that any individual Plaintiff attempted to and was prevented from leaving.

Delgado, 466 U.S. at 218). Plaintiffs' claims that they were detained arise from the time it took ICE agents to question everybody and investigate their citizenship status. Given the size of the operation, Plaintiffs do not make any showing that the amount of time they were questioned is disproportionate to what was reasonably necessary to question and arrest the large number of illegal aliens present.

Fourth, contrary to Plaintiffs' assertion that Defendants' motion to dismiss glosses over Plaintiffs' allegations of violations of the First, Fourth, and Fifth Amendments (Opposition at 18), Defendants' motion to dismiss thoroughly explains how the workplace enforcement actions Defendants conducted on December 12, 2006, were done within the parameters *Delgado* laid out to expressly avoid violations of Constitutional rights. *See* Plaintiffs' Motion to Dismiss at 16-21.

Finally, Plaintiffs' argument does not address the reality of the situation that Defendants faced in conducting the workplace enforcement actions at issue – the paramount issue of safety in the context of a meatpacking plant brimming with sharp knives and tools. Declarations accompanying the Opposition are replete with indications that ICE agents were armed and/or blocked doorways.[20] These allegations do nothing to help Plaintiffs' claims because they show the extent to which Plaintiffs overlook the safety concerns Defendants were required to consider in this specific workplace enforcement action.

It should come as no surprise that the ICE agents involved in the action were armed; the operation was conducted in industrial slaughterhouses filled with knives that potentially could be used as weapons, and the officers therefore had legitimate safety concerns not only for

---

[20] *See, e.g.*, Opposition, Ex. 6, Declaration of Michelle Svenningsen, stating that, "[a]ll the agents had guns, and agents blocked all the doorways"; Opposition, Ex. 9, Declaration of Anna Arellanes, stating that, "I saw ICE agents all around the hallway with guns on their thighs."

themselves but for those around them. Indeed, many of the individuals the agents came to arrest were known to be felons, thereby heightening the concern that some persons might take desperate measures to prevent being arrested. Given these safety concerns, the minor inconveniences Plaintiffs complain of (e.g., having to wait to use the bathroom, being asked to leave the meatcutting floor, or "feeling" detained because agents were standing by doorways) are completely legitimate in the context of the workplace enforcement action taking place in a meatpacking plant where knives and sharp instruments are omnipresent. Plaintiffs conduct of the workplace enforcement actions balanced potential threats with the dictates of *Delgado* regarding the conduct of workplace enforcement actions. At no point do Plaintiffs address the safety issue in either their Complaint or Opposition. Their omission in this regard shows Plaintiffs' failure to account for both the extent to which Defendants were called upon to balance these considerations and how successful Defendants were in doing so.

B. Plaintiffs' *Bivens* Claims Fail Because They Constitute Fictitious Party Pleading

Plaintiffs' Opposition cites two cases to counter Defendants' assertion that, because fictitious party practice is not permitted in Federal court, Plaintiffs do not state a claim for damages under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Opposition at 24 n.32.

Plaintiffs' citation to *Doleac v. Michalson*, 264 F.3d 470 (5th Cir. 2001) is inapplicable here because the decision's analysis of fictitious party practice focuses on diversity jurisdiction and whether, after initially naming fictitious defendants, a plaintiff's actual later naming of these defendants – one of whom is found to defeat diversity jurisdiction – defeats diversity jurisdiction of the case as a whole. *Doleac*, 264 F.3d at 476-77. *Doleac* therefore fails to address the

propriety of fictitious party practice in Federal pleading and has no application here.

Plaintiffs also cite to *Nagle v. Lee*, 807 F.2d 435 (5th Cir. 1987) in support of their claim for *Bivens* damages. However, it is unclear why Plaintiffs cite to *Nagle* for such support since, as Plaintiffs point out, *Nagle* unequivocally finds that naming a person through fictitious pleading does not make that person a party to a suit. *Nagle*, 807 F.2d at 440 (citing *Hart v. Yahama-Parts Distributors, Co.*, 787 F.2d 1468, 1471 (11th Cir. 1986)); Opposition at 24 n.32. Rather, a person becomes a party when they are both named as a party and subjected to the court's jurisdiction through either voluntary appearance in court or subjection to valid service of process; neither of these actions has occurred here. *See Nagle*, 807 F.2d at 440. Thus, Plaintiffs' naming of fictitious parties constitutes fictitious party practice that is not permitted in federal court.[21]

Conclusion

For the foregoing reasons, the Court should dismiss Plaintiffs' Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and/or 12(b)(6).

//

//

---

[21] Plaintiffs' final argument in their Opposition asserts that "Plaintiffs' prayer for injunctive relief is sufficiently specific." Opposition at 25. In support of this position, Plaintiffs offer their statement of belief that the Court "will be capable of crafting an injunction that prevents the defendants from committing the illegal acts." Opposition at 25 n.34. However, Plaintiffs offer no counter to Defendants' position that the relief Plaintiffs seek is too broad and generalized for the Court to accommodate through injunctive relief. Fifth Circuit precedent plainly holds that "obey the law" injunctions go beyond the allowable specificity standards of Rule 65(d). *See Payne v. Travenol Laboratories, Inc.*, 565 F.2d 895, 898 (5th Cir. 1978); *see also Burton v. City of Belle Glade*, 178 F.3d 1175, 1201 (11th Cir. 1999). Defendants accordingly reiterate their position that Plaintiffs fail to state a claim because the Court cannot grant the injunctive relief Plaintiffs request.

Respectfully submitted,

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

RICHARD B. ROPER
United States Attorney

D. GORDON BRYANT
Assistant United States Attorney

DAVID J. KLINE
Principal Deputy Director

VICTOR M. LAWRENCE
Senior Litigation Counsel

By: /s/ Christopher W. Hollis
CHRISTOPHER W. HOLLIS
Trial Attorney
Office of Immigration Litigation
U.S. Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
(202) 305-0899
(202) 305-7000 (fax)
Christopher.Hollis@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendants' Reply to Plaintiffs' Opposition to Defendants' Motion to Dismiss was served via the district court's electronic filing system on this 28th day of January 2008 to the following counsel:

Philip R Russ
Law Office of Philip R Russ
2700 S Western
Suite 1200
Amarillo, TX 79109
806/358-9293
Fax: 806/358-9296 FAX
Email: philiprruss@russlawfirm.com

Carlos R Holguin
Center for Human Rights & Constitutional Law
256 S Occidental Blvd
Los Angeles, CA 90057
213/388-8693
Fax: 213/386-9484
Email: crholguin@centerforhumanrights.org

Edward P Wendel
United Food & Commercial Workers Intl Union
1775 K St NW
Washington, DC 20006-1598
202/466-1521
Fax: 202/728-1803

Gening Liao
United Food & Commercial Workers Intl Union
1775 K St NW
Washington, DC 20006-1598
202/466-1521
Fax: 202/728-1803

Peter A Schey
Center for Human Rights & Constitutional Law
256 S Occidental Blvd
Los Angeles, CA 90057
213/388-8693 ext 104
Fax: 213/386-9484
Email: pschey@centerforhumanrights.org

Stephanie Richard
Center for Human Rights & Constitutional Law
256 S Occidental Blvd
Los Angeles, CA 90057
213/388-8693
Fax: 213/386-9484

/s/ Christopher W. Hollis
CHRISTOPHER W. HOLLIS
U.S. DEPARTMENT OF JUSTICE