No. 16 CV 0553 (AKH)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT A. SCHRAMM, ET AL.,

Plaintiffs,

-against-

THE CITY OF NEW YORK, ET AL.,

Defendants.

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' PARTIAL MOTION FOR SUMMARY JUDGMENT PURSUANT TO RULE 56 OF FEDERAL RULES OF CIVIL PROCEDURE

ZACHARY W. CARTER
Corporation Counsel of the City of New York
Attorney for Defendants City of New York, Police Officer Emmanuel Delacruz, and Sergeant Noel Jugraj
100 Church Street
New York, N.Y. 10007
Of Counsel: Angharad K. Wilson
Tel: (212) 356-2572

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

PRELIMINARY STATEMENT

Plaintiffs Robert Schramm ("Schramm") and Gabriela Saenz ("Saenz") bring this action pursuant to 42 U.S.C. § 1983, arising from their arrests on June 7, 2015, after they were stopped at a sobriety checkpoint in upper Manhattan. While it is difficult to sift through plaintiffs' almost fifty (50) page memorandum of law in support of their motion for summary judgment ("Pl. Memo"), which is devoted is significant part to identifying what plaintiffs believe to be the shortcomings in the 33rd Precinct's completion and retention of vehicle checkpoint forms and procedure, generally – none of which is relevant to the constitutionality of plaintiffs' stop and arrest – the crux of plaintiffs' motion appears to be: (1) that even though the Supreme Court has found them to be constitutional, sobriety checkpoints violate the Fourth Amendment; (2) the sobriety checkpoint at issue in this case was unconstitutional because it ran afoul of the analysis set forth not in a Supreme Court or Second Circuit case, but in a California Supreme Court case;[1] (3) that plaintiffs should not have been arrested because, according to them, they were "innocent" and defendant Officer Delacruz was malicious in arresting them; and (4) that the City of New York has a policy or practice of constitutionally inadequate checkpoints.

Not only should plaintiffs' motion be denied, their claims should be dismissed.[2] There was probable cause, or at least arguable probable cause, for both plaintiffs' arrests based on the fact that Schramm smelled of alcohol and his evasive behavior, and that Saenz refused to obey police orders to move away from the vicinity of an investigation and arrest. Further, the sobriety checkpoint was constitutionally adequate because it was minimally intrusive and done for the purpose of public safety. In any event, defendants are entitled to qualified immunity in

[1] *Ingersoll v. Palmer*, 43 Cal. 3d 132 (1987).

[2] *See* Defendants' Memorandum of Law in Support of their Motion for Summary Judgment, dated August 2, 2019.

connection with the sobriety checkpoint and plaintiffs' arrests because the rights that were allegedly violated were not clearly established. Additionally, because there was no underlying violation of plaintiffs' constitutional rights and they have offered no evidence demonstrating that the City of New York has a policy or practice of engaging in unconstitutional sobriety checkpoints, or that the City's official checkpoint policies are constitutionally inadequate, the *Monell* claim should be dismissed. Finally, the Court should disregard and/or strike the majority of plaintiffs' Local Rule 56.1 Statement since it does not reflect statements of fact but, rather, largely consists of impermissible argument, legal conclusions, and unsubstantiated opinions.

STANDARD OF REVIEW

Summary judgment "should be rendered if the pleadings, the discovery, and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "A fact is material if it might affect the outcome of the suit under the governing law,' meaning that 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Higginbotham v. Sylvester*, No. 14-cv-8549 (PKC), 2016 U.S. Dist. LEXIS 151997, at *5-6 (S.D.N.Y. Nov. 2, 2016), *aff'd*, 741 Fed. Appx. 28, 31 (2d Cir. 2018) (Summary Order) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). "A court considering a motion for summary judgment must construe the evidence in the light most favorable to the ***non-moving*** party, and draw all ***reasonable*** inferences in its favor." *Excelled Sheepskin & Leather Coat Corp. v. Or. Brewing Co.*, 897 F.3d 413, 415 (2d Cir. 2018) (citation and internal quotes omitted) (emphasis added).

STATEMENT OF FACTS[3]

The Sobriety Checkpoint

This case arises out of a sobriety checkpoint conducted by the New York City Police Department ("NYPD"), during the early morning hours of June 7, 2015, in the vicinity of Riverside Drive and 158th Street. The checkpoint was part of a NYPD enforcement initiative to combat drunk driving. (Deft. 56.1 ¶¶ 6-7). The initiative, which was ordered by the Chief of Patrol,[4] mandated that each of the department's eight Patrol Boroughs identify three precincts within each borough to conduct increased DWI enforcement on Friday and Saturday nights for five summer weekends. (Deft. 56.1 ¶¶ 40-41). The individual Borough Commanders[5] were tasked with selecting the precincts within his/her borough that would conduct the DWI enforcement on any particular date. *Id.* The chosen precincts would then be responsible for organizing sobriety checkpoints pursuant to the initiative and reporting the results to the Patrol Borough, which were then reported to the Chief of Patrol. (Deft. 56.1 ¶ 42).

[3] In the interest of avoiding duplication of effort, defendants cite to their Local Rule 56.1 statement that was submitted in connection with their motion for Summary Judgment dated August 2, 2019 ("Deft. 56.1"). Further, in order to avoid confusion, additional statements of material fact submitted in response to plaintiff's Local Rule 56.1 statement begins numbering where defendants' original Rule 56.1 statement ends. The material facts set forth in Deft. 56.1 are adopted only for purposes of parties' respective motions for Summary Judgment. *See* Local Civil Rule 56.1(c) (facts are admitted only "for the purposes of the motion"). Defendants reserve the right to assert different and/or conflicting facts at trial. *See Vasconcellos v. City of N.Y.*, 12-CV-8445 (CM)(HBP), 2015 U.S. Dist. LEXIS 121572, at *4 (S.D.N.Y. Sept. 9, 2015) (Local Civil Rule 56.1 "means a party can 'admit' facts that it intends to dispute at trial without suffering any prejudice – the 'admission' . . . neither binds the party going forward if the motion is denied nor can it be admitted in evidence at trial.").

[4] The Chief of Patrol oversees the Patrol Services Bureau, which is the largest bureau in the NYPD. The majority of the department's uniformed officers on patrol fall within the command of this bureau. The bureau is divided into eight borough commands, which are further divided into 77 police precincts. *See* https://www1.nyc.gov/site/nypd/bureaus/patrol/patrol-landing.page.

[5] A Commander is assigned to oversee each of the department's eight borough commands.

On the date of incident, the 33rd Precinct was chosen to participate in the DWI initiative. Sergeant Noel Jugraj, who was at that time, the traffic sergeant of the 33rd Precinct was tasked with complying with the DWI initiative. (Deft. 56.1 ¶ 43). Prior to the date of the checkpoint, Sergeant Jugraj, in consultation with supervisors at the 33rd Precinct, set the parameters of the checkpoint. (Deft. 56.1 ¶ 44). As one of the parameters, Sergeant Jugraj chose to stop all vehicles, except for taxis and livery cabs, because, in his estimation, individuals driving at 1:30 a.m. on a Sunday were likely to be headed home from drinking and socializing, while professional drivers were not. (Deft. 56.1 ¶ 46). Sergeant Jugraj also discussed the setting up of the sobriety checkpoint with Sergeant Leron Lewis, the traffic sergeant at the 28th Precinct, as the 28th Precinct would also be participating in the checkpoint. (Deft. 56.1 ¶ 44).

On the date of incident, both Sergeants Jugraj and Lewis were on scene to ensure that the checkpoint was conducted in compliance with the pre-determined procedures. (Deft. 56.1 ¶ 45). The checkpoint was delineated by police cars with electronic signs in the back stating "Checkpoint up ahead," in addition to cones set up on the street in the vicinity of the checkpoint. (Deft. 56.1 ¶ 49). There were six people arrested at the checkpoint in total: both plaintiffs here, one motorcyclist whose portable breath test ("PBT") result was a 0.21 blood alcohol level, another motorist whose PBT result was 0.084, and two individuals who were arrested for aggravated unlicensed driving. (Deft. 56.1 ¶ 52). Following the checkpoint, Sergeant Jugraj completed a Vehicle Checkpoint form pertaining to the checkpoint. (Deft. 56.1 ¶ 47).[6]

Plaintiffs' Stop and Arrest

[6] The NYPD's Vehicle Checkpoint Form includes information such as how long the checkpoint lasted, where it was located, why it was set up, which officers participated in the checkpoint, what kind of equipment was utilized to warn motorists of the upcoming checkpoint, what rules determined which vehicles were stopped (i.e., every vehicle, every other vehicle, etc.), the commanding officer, the number of vehicles stopped, the number of arrests and summonses, and the on-site supervisor. (Deft. 56.1 ¶ 48).

At approximately 1:30 a.m. on June 7, 2015, Schramm was driving his car in the vicinity of Riverside Drive and 158th Street when he encountered the sobriety checkpoint. (Deft. 56.1 ¶ 1). Saenz, Schramm's wife, and their friend, James Farrell, were passengers in the car. (Deft. 56.1 ¶ 1). The three was returning to Farrell's apartment after an evening of socializing with friends in various bars and restaurants in the Greenwich Village neighborhood of Manhattan. (Deft. 56.1 ¶¶ 2-3). Upon arriving at the checkpoint, Schramm's car was stopped by an officer who informed Schramm that a checkpoint was being conducted and asked him whether he had been drinking, to which Schramm replied that he had not, even though he admittedly consumed alcohol that night. (Deft. 56.1 ¶ 10).

After pulling further into the checkpoint, Schramm was directed to pull over to the right side of the street. (Deft. 56.1 ¶ 11). On the right side of the street, there was room for three cars to stop while their drivers spoke to officers. (Deft. 56.1 ¶ 50). If three cars were already on the right side of the street, further cars would be allowed to pass through the checkpoint, so as to maintain the flow of traffic. (Deft. 56.1 ¶ 51). Officer Delacruz walked to the car and spoke to Schramm. (Deft. 56.1 ¶ 12). During this conversation, Officer Delacruz observed that Schramm had bloodshot eyes and that he smelled of alcohol. (Deft. 56.1 ¶ 13). Accordingly, Officer Delacruz told Schramm to step out of the car to take a portable breath test. (Deft. 56.1 ¶ 14). In response, Schramm asked Officer Delacruz whether he was required to take a portable breath test. (Deft. 56.1 ¶ 15). Thereafter, instead of getting out of the car, Schramm rolled up his window and turned his head away from the driver's side window, where Officer Delacruz was speaking to him. (Deft. 56.1 ¶ 16).

Schramm eventually got out of the car. (Deft. 56.1 ¶ 18). After he got out of the car, he repeatedly asked Officer Delacruz whether he was required to take the portable breath test, and

stated that he would prefer not to take it. (Deft. 56.1 ¶ 19). Officer Delacruz asked plaintiff if he was refusing to take the portable breath test and plaintiff stated that it "was not his wish to take the breath test" and, indeed, he did not take the test. (Deft. 56.1 ¶¶ 20-21). Schramm was handcuffed and placed under arrest. (Deft. 56.1 ¶ 24). The arrest charges were driving while intoxicated and driving while ability impaired. *Id.* Schramm was also issued a traffic summons, charging him with failure to submit a portable breath test. (Deft. 56.1 ¶ 22).

Saenz and Farrell were told to step back from the area of the pending investigation involving Schramm. (Deft. 56.1 ¶ 27). Saenz refused to step back. (Deft. 56.1 ¶ 28). Officer Delacruz then told Saenz that if she did not step back, she would be arrested for obstruction of governmental administration. (Deft. 56.1 ¶ 29). She continued to refuse to step back and was placed under arrest by Sergeant Jugraj. (Deft. 56.1 ¶¶ 30-31).

Schramm was transported to the 28th Precinct. (Deft. 56.1 ¶ 32). While there, the Intoxicated Driver Testing Unit ("I.D.T.U.") administered sobriety tests to Schramm at 4:41 a.m., over three hours after his car was originally stopped. (Deft. 56.1 ¶¶ 33-34). The chemical testing revealed that Schramm had a blood alcohol concentration of .034. (Deft. 56.1 ¶ 34). Officer Delacruz forwarded the arrest paperwork pertaining to Schramm to the New York County District Attorney's Office ("DANY") at approximately 7:20 a.m. on June 7, 2015. (Deft. 56.1 ¶ 35). DANY declined to prosecute Schramm. (Deft. 56.1 ¶ 36). Schramm was subsequently released from the New York County Criminal Court. (Deft. 56.1 ¶ 37). As to Saenz, she was charged with obstruction of governmental administration. (Deft. 56.1 ¶ 31). She accepted an adjournment in contemplation of dismissal. (Deft. 56.1 ¶ 38).

ARGUMENT

POINT I

PLAINTIFFS' MOTION FOR SUMMARY JUDMGENT ON THE CLAIM OF FALSE ARREST SHOULD BE DENIED BECAUSE THERE WAS PROBABLE CAUSE OR, AT A MINIMUM, ARGUABLE PROBABLE CAUSE TO ARREST PLAINTIFFS SCHRAMM AND SAENZ.

Plaintiffs' motion for summary judgment on the claim of false arrest should be denied, and furthermore, the claim should be dismissed because there was probable cause to arrest both plaintiffs. Further, because an officers' subjective intent is not part of a probable cause determination and malice is not an element of the claim of false arrest, plaintiffs' alleged proof of malice – Officer Delacruz's purported statement that Schramm now had to play his game and Officer Delacruz's choice to forward Schramm's arrest paperwork to prosecutors rather than immediately releasing him – do not undermine that there was probable cause to arrest plaintiffs.

A. Plaintiffs' motion on the false arrest claim must fail because it relies on improper "facts."

Preliminarily, defendants note that Pl. Memo. does not cite to paragraphs contained in their Local Rule 56.1 statement, which makes it difficult to determine which facts plaintiffs purport to rely on for any given argument. Further, plaintiffs' Local Rule 56.1 statement consists largely of "factual" allegations that are, in fact, arguments, legal conclusions, and/or unsupported conjecture that must be disregarded. *Congregation Rabbinical College of Tartikov, Inc. v. Vill. of Pomona*, 138 F. Supp. 3d 352, 394 (S.D.N.Y. Sept. 29, 2015) ("[T]he Court can also disregard legal conclusions or unsubstantiated opinions in a Local Rule 56.1 statement.") Finally, many of the facts upon which plaintiffs rely in support of their motion (e.g., that Officer Delacruz told Schramm that now he would have to play his game) do not appear in their Rule 56.1 statement

and are, in fact, disputed by defendants in this matter and, accordingly, should be disregarded. *See*, Fed. R. Civ. P. 56(c): "summary judgment should be rendered if the pleadings, the discovery, and disclosure materials on file, and any affidavits show that there is *no genuine issue as to any material fact* and that the movant is entitled to judgment as a matter of law." (emphasis added).

Further, although plaintiffs do not explicitly do so, to the extent that plaintiffs rely on their affidavits in support of their false arrest claim, these exhibits should be disregarded. They are, again rife with conjecture, disputed facts, and conclusions of law. Moreover, although Schramm's affidavit is 19 paragraphs long and Saenz's affidavit is 13 paragraphs long, they are only cited plaintiff's Local Rule 56.1 statement in support of paragraphs 8-11 and 13, nearly all of which are disputed by defendants. Thus, any of the statements in the affidavits that are not contained within plaintiffs' Local Rule 56.1 statement should be disregarded in their entirety. *Epstein v. Kemper Ins. Co.*, 210 F. Supp. 2d 308, 314 (S.D.N.Y. 2012) ("Statements in an affidavit or Rule 56.1 statement are inappropriate if they are not based on personal knowledge, contain inadmissible hearsay, are conclusory or argumentative, or do not cite to supporting evidence."). Further, the many "facts" contained in plaintiffs' 13 page statement of facts (Pl. Memo. pp. 3 -16) that are not in plaintiffs' Local Rule 56.1 statement should also be disregarded for the purposes of plaintiffs' motion for summary judgment. The purpose of Local Rule 56.1 is "to streamline the consideration of summary judgment motions by freeing district courts from the need to hunt through voluminous records without guidance from the parties." *Holtz v. Rockefeller & Co., Inc.*, 258 F.3d 62, 74 (2d Cir. 2001). It would thus be wholly contrary to the purpose of Local Rule 56.1 to consider the many purported "facts" contained in plaintiffs' memorandum of law that are not contained in plaintiffs' Rule 56.1 statement.

B. There was probable cause to arrest both plaintiffs at the checkpoint.

Plaintiffs erroneously conflate their alleged unlawful stop claim with their false arrest claim. The claims, however, are distinct. *See Townes v. City of New York*, 176 F.3d 138, 145 (2d Cir. 1999) (weapons and narcotics were found on plaintiff after the cab he was a passenger in was stopped; his criminal conviction was reversed after the appellate division found the search of the cab should have been suppressed; in a subsequent civil rights action the Second Circuit found that plaintiff could only recover damages for the stop and search, not for the subsequent arrest and prosecution); *see also*, *Cabral v. City of New York*, 2014 U.S. Dist. LEXIS 131342 at *21 (S.D.N.Y. Sep. 17, 2014) (holding that plaintiff could not recover damages for his arrest for possession of marijuana even if the search leading to the discovery of the marijuana was illegal); *Morgan v. City of New York*, 2014 U.S. Dist. LEXIS 94693 at *14-15 (E.D.N.Y. July 10, 2014) (finding that, because probable cause existed once an illegal knife was found, plaintiff could only seek recovery for the time he was detained until the knife was found).

Focusing on the false arrest claim, plaintiffs' summary judgment motion on this claim should be denied, and defendants' motion granted, since there was probable cause to arrest both plaintiffs.[7] Probable cause is a complete defense to a claim of false arrest. *Weyant v. Okst*, 101 F.3d 845, 852 (2d Cir. 1996). Probable cause is present when an officer has knowledge of, or reasonably trustworthy information as to, facts and circumstances sufficient to reasonably believe that an individual, has or is going to commit a crime. *Bernshtein v. City of New York*, 496 Fed. Appx. 140, 142 (2d Cir. 2012). Further, probable cause is a "fluid concept" that does not require "absolute certainty." *United States v. Clark*, 638 F.3d 89, 94 (2d Cir. 2011) (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983)). In this regard, "[t]he existence of probable cause to

[7] Plaintiffs' unlawful stop claim is addressed in Point II, *infra*.

arrest—even for a crime other than the one identified by the arresting officer—will defeat a claim of false arrest under the Fourth Amendment." *Figueroa v. Mazza*, 825 F.3d 89, 99 (2d Cir. 2016).

Regarding Schramm, he was arrested and/or received a summons for: (1) Driving while ability impaired pursuant to V.T.L. § 1192(1), which states, "[n]o person shall operate a motor vehicle while the person's ability to operate such motor vehicle is impaired by the consumption of alcohol," (2) Driving while intoxicated pursuant to V.T.L. § 1192(2), and (3) violating V.T.L. § 1194(1)(b), which states, in relevant part, that "[e]very person operating a motor vehicle … in violation of any of the provisions of this chapter shall, at the request of a police officer, submit to a breath test to be administered by the police officer." As long as there was probable cause to arrest Schramm for any one of these offenses, his false arrest claim fails. *Figueroa, supra.*

At a minimum, there was probable cause to arrest Schramm for driving while ability impaired. Schramm denied drinking alcohol, yet, he smelled like alcohol and had bloodshot eyes at the time of his stop. (Deft. 56.1 ¶ 13). He rolled up his window while he was in the car and turned his head away from Officer Delacruz during the encounter with Officer Delacruz. (Deft. 56.1 ¶ 16). Additionally, Schramm repeatedly refused to get out of his car and repeatedly refused to take the portable breath test. (Deft. 56.1 ¶¶ 14-21). Based on these observations, it was reasonable for Officer Delacruz to believe that Schramm was driving while ability impaired and to arrest him. In fact, while plaintiffs' affidavits both aver that plaintiffs were not intoxicated or impaired, there is absolutely no dispute that both plaintiffs had consumed alcoholic beverages on the date of the incident, and, indeed Schramm had a blood alcohol concentration of .034 over

three hours after he was initially pulled over, suggesting that his blood alcohol concentration was at or near the legal limit at the time that he initially detained by Officer Delacruz.[8]

Further, Schramm's reliance on *Sakoc v. Carlson*, No. 15-1793-cv, 656 Fed. Appx. 573 (2d Cir. 2016) is inapposite. In *Sakoc*, unlike in the present case, the plaintiff was administered field sobriety tests, in addition to a portable breath test, that indicated that there was no alcohol in her system. *Id.* at 574. Nonetheless, the *Sakoc* plaintiff was arrested for driving while ability impaired by drugs other than alcohol. *Id.* Whether there was probable cause, or arguable probable cause, to arrest the plaintiff in *Sakoc* for driving while under the influence of drugs other than alcohol following the negative portable breath test is wholly dissimilar to the disputed issues in this case.

Regarding Saenz, she was arrested for obstruction of government administration. "A person is guilty of [OGA] when he intentionally prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference . . . ." N.Y. Penal Law § 195.05. Further, "'[a]n officer has probable cause to arrest for obstructing governmental administration where a person refuses to comply with an order from a police officer.'" *Marcavage v. City of New York*, No. 05-CV-4949 (RJS), 2010 U.S. Dist. LEXIS 107724, at **29-30 (S.D.N.Y. Sept. 29, 2010), *aff'd*, 689 F.3d 98, 110 (2d Cir. 2012) (quoting *Johnson v. City of New York*, No. 05-cv-7519, 2008 WL 4450270 (S.D.N.Y. Sept. 29, 2008), and citing *Lennon v. Miller*, 66 F.3d 416 (2d Cir. 1995)).

[8] Although defendants dispute its relevance to the claims in the present case, plaintiff has cited a manual entitled "DWI Detection and Standardized Field Sobriety Testing," 2018 edition in support of their motion. (Pl. Memo. p. 12). That manual states that the average person's blood alcohol concentration decreases through metabolism by 0.015 per hour – suggesting that Schramm's blood alcohol concentration was likely approximately 0.079 at the time he was initially pulled over.

There was ample probable cause to arrest Saenz for the offense of OGA. Saenz got out of the car and stood near the area where Sergeant Jugraj and Officer Delacruz were interacting with Schramm. (Deft. 56.1 ¶¶ 25-26). Saenz was repeatedly told to step back. (Deft. 56.1 ¶¶ 27-29). Not only was Saenz repeatedly told to step back, she was further told that she would be arrested if she did not step back. (Deft. 56.1 ¶¶ 27-29). Saenz did not comply, and thus, there was probable cause to arrest her for obstructing governmental administration.

Because there was probable cause to arrest Schramm and Saenz, their motion for summary judgment on the false arrest claim should be denied and defendants' summary judgment motion should be granted.

C. Officer Delacruz's subjective intent is not relevant to the question of probable cause for arrest; therefore, his disputed alleged statement and the fact that he forwarded the arrest paperwork to the prosecutor rather than immediately releasing Schramm is irrelevant to probable cause for arrest.

Schramm argues that because Officer Delacruz did not immediately release him after receiving the results of the sobriety tests at the precinct, and allegedly said something to the effect of "now you're going to play my game" before arresting him, it is indicative of malice on the officer's part. It is well-established that an officer's subjective intent is irrelevant as long as there is probable cause to arrest an individual. *See, e.g.*, *Maryland v. Macon*, 472 U.S. 463, 470-71 (1985) ("[W]hether a Fourth Amendment violation has occurred turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time and not on the officer's actual state of mind the challenged action was taken." (internal quotations and citations omitted)); *see also Whren v. United States*, 517 U.S. 806, 812-13 (1996); *Lee v. Sandberg*, 136 F.3d 94, 103 n.5 (2d Cir. 1997) (citing *Mozzochi v. Borden*, 959 F.2d 1174, 1179-80 (2d Cir. 1992)). Further, malice is not an element of a claim for false arrest. *Ricciuti v.*

New York City Transit Auth., 70 F. Supp. 2d 300, 323 (S.D.N.Y. 1999) ("Malice is not an element of false arrest.").

First, as discussed above, there was probable cause to arrest Schramm, therefore, whether or not Officer Delacruz made the statement about Schramm playing his game is wholly irrelevant. Moreover, Officer Delacruz denies making any such statement, and, as such, because there is a dispute of fact concerning the statement, plaintiff may not base his summary judgment motion on same. Second, because malice is not an element of a false arrest claim, plaintiff's contention that his purported excessive detention shows malice on the part of Officer Delacruz sufficient enough to warrant summary judgment on his false arrest claim should be summarily declined.[9,10]

[9] Defendants also note that Schramm was not excessively detained. A plaintiff's claim for an unreasonably long detention under the Fourth Amendment is judged by the same objective reasonableness test for excessive force claims set forth in *Graham v. Connor*, 490 U.S. 386 (1989). *Bryant v. City of New York*, 404 F.3d 128 (2d Cir. 2005) (applying the *Graham* test to determine the reasonableness of pretrial detentions following warrantless arrests). "[T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham*, 490 U.S. at 397. As an initial matter, Schramm's detention of less than 24 hours is considered presumptively reasonable. *Bryant v. City of New York*, 404 F.3d 128, 138 (2d Cir. 2005). Further, even if plaintiff could overcome the presumption of reasonableness, which he cannot, as set forth herein there was probable cause to arrest Schramm for driving while ability impaired and/or driving while intoxicated at a minimum. Schramm had bloodshot eyes, smelled of alcohol, refused to consent to the portable breath test, and he rolled up his window during the encounter with Officer Delacruz. In light of this indicia of impairment and/or intoxication, it was objectively unreasonable to detain Schramm while Officer Delacruz forwarded Schramm's arrest paperwork to the District Attorney's Office such that the decision could be made concerning the propriety of a criminal proceeding rather than releasing Schramm immediately after receiving the results of sobriety testing that was done hours after Schramm was first stopped.

[10] Plaintiff's assertion that, pursuant to NYPD policy, he should have been released after the results of the sobriety tests performed at the 28th Precinct is also unavailing. First, plaintiffs' Local Rule 56.1 statement cites to no such policy. Second, even assuming the existence of such a NYPD policy, violation of a departmental regulation is not tantamount to a constitutional violation.

POINT II

PLAINTIFFS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON THEIR CLAIM FOR UNLAWFUL STOP BECAUSE THE SOBRIETY CHECKPOINT WAS CONSTITUTIONAL.[11]

It is well-established that authorities may set up a vehicle checkpoint if its purpose is to address special needs beyond ordinary crime control. *United States v. Amerson*, 483 F.3d 73, 80 (2d Cir. 2007) ("a warrantless suspicionless search [or seizure] may be justified 'when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable") (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)). The Supreme Court has long recognized that vehicle checkpoints for the purpose of detecting intoxicated drivers is the type of special need that justifies a warrantless suspicionless stop. *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990). In determining whether a suspicionless checkpoint is permissible, the Supreme Court employs a balancing test which evaluates "the state's interest in preventing accidents caused by drunk drivers, the effectiveness of sobriety checkpoints in achieving that goal, and the level of intrusion on an individual's privacy caused by the checkpoints." *Id.* at 449.

First, plaintiffs cannot genuinely dispute that the purpose of the checkpoint was to curb drunk driving. Plaintiffs' conclusory and unsupported allegation that the checkpoint may have been for some other purpose must be discredited out of hand, and further, cannot be credited in

[11] Plaintiffs appear to allege this claim against both Sergeant Jugraj and Officer Delacruz on behalf of plaintiffs Schramm and Saenz. However, as it is undisputed that Officer Delacruz was not involved with setting up the vehicle checkpoint or that he stopped Schramm as part of the checkpoint, there can be no viable claim against him. *See, Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994) ("It is well settled in this Circuit that 'personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983.") (*quoting Moffitt v. Town of Brookfield*, 950 F.2d 880, 885 (2d Cir.1991).

light of the evidence in the record. Specifically, that the sobriety checkpoint was set up pursuant to a DWI Initiative that was ordered by the NYPD Chief of Patrol. (Deft. 56.1 ¶ 40). Indeed, Schramm admits that at the time of the initial stop he was asked whether he had been drinking alcohol. (Deft. 56.1 ¶ 10). Further, Schramm was asked multiple times whether he would submit to a portable breath test. (Deft. 56.1 ¶ 19). At no point in time was he asked questions regarding crime generally. As such, there can be no genuine contention that the checkpoint was organized for some purpose other than addressing intoxicated driving.

Second, as far back as 1990, the Supreme Court in *Sitz* stated that "[n]o one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it…Drunk drivers cause an annual death toll of over 25,000 and in the same time span cause nearly one million personal injuries and more than five billion dollars in property damage." *Sitz*, 496 U.S. 451 (internal quotation omitted). Regardless of this longstanding recognition of the severity of the drunk driving problem, based on statistics that were neither produced during discovery nor reflected in plaintiffs' Local Rule 56.1 statement – and should be disregarded on that basis alone – plaintiffs argue that defendants did not have a significant governmental interest in preventing intoxicated driving because there were very few deaths as a result of drunk driving in New York City generally, and in the borough of Manhattan in particular. In essence, plaintiffs are arguing that the government has no interest in preventing relatively uncommon but real safety concerns. Putting aside the evidentiary issue, even if the Court were to take judicial notice of the cited statistics, and assuming that the statistics are accurate, a low number of deaths is not the sole measure of whether there is a significant governmental interest in preventing drunk driving. As an initial matter, it is unclear why the avoidance of any number of deaths should not be viewed as a significant governmental interest. In any event, as set forth in *Sitz*, drunk driving

results in more than deaths, it results in personal injuries and property damage. Plaintiffs' motion conveniently ignores the governmental interests in preventing these types of injuries and damage. That there is a significant governmental interest in preventing any deaths, personal injuries, and property damage, that result from drunk driving is a foregone conclusion.

Third, plaintiffs argue that checkpoints are not as effective as other measures in preventing drunk driving. Plaintiffs misunderstand this prong of the balancing analysis. In resolving whether a checkpoint is effective at addressing drunk driving, the Court need not engage in a comparison between checkpoints and other law enforcement measures to determine which method is best, it need only be assured that the checkpoint effectively addressed its intended purpose. *See Sitz*, 496 U.S. 453-454 ("This passage from *Brown* was not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement technique should be employed to deal with a serious public danger…[F]or the purposes of Fourth Amendment analysis, the choice among reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers"). Regardless of plaintiffs' ponderings concerning what the most effective method for addressing drunk driving is, the sobriety checkpoint at issue was effective since, in addition to arresting Schramm whose blood alcohol level was either at or dangerously close to the legal limit, officers also arrested a motorcyclist with the staggeringly high blood alcohol concentration of 0.24, and a third individual whose portable breath test results were above the legal limit. Additionally, although it was beyond the target enforcement action, two other individuals were arrested for aggravated unlicensed driving.

Fourth, plaintiff argues that the intrusion upon plaintiffs' liberties was unreasonable based on a multitude of factors as described in *Ingersoll v. Palmer*, 43 Cal. 3d 1321 (1987). *Ingersoll*, however, was decided by the Supreme Court of California and, as such, has no precedential value in this circuit. Rather than relying on *Ingersoll*, this Court must follow the Supreme Court in *Michigan v. Sitz.* In *Sitz*, the Supreme Court found that, similar to this case, a brief stop at a sobriety checkpoint, and the answering of several questions was a slight intrusion on the drivers. In fact, although plaintiffs state that all drivers were ordered out of their vehicles to perform a breath test (Pl. Memo. at 37), Schramm himself testified that not all of the drivers were ordered out of their vehicles to perform a breath test: "[M]ost of the vehicles were going to the curb and then either then they would leave once they got to the curb or in that one or two instances the driver would exit the vehicle, um, submit to the test and then get back in the vehicle and drive away." (Exh. 9 at 38:14-18). Focusing on the checkpoint, rather than the subsequent investigation for arrest, following the car stop, Schramm admits that he was simply asked for his license. (Exhibit 9 at 39:2-8). He testified that then, approximately one minute later, he was asked to take a portable breath test. (Exhibit 9 at 41:4-7). Schramm, who displays signs of drinking – bloodshot and the odor of alcohol – thus was only detained for a short period of a few minutes before reasonable suspicion that he was under the influence of alcohol was developed.

Finally, the checkpoint was not conducted in an arbitrary manner. Contrary to plaintiffs' argument, the checkpoint was not orchestrated by a field officer. Sergeant Jugraj is a supervisory officer, not a "field officer," and at the time of the incident he was the traffic sergeant. Further, Sergeant Jugraj set the parameters of the sobriety checkpoint in conjunction with executive staff of the 33rd Precinct prior to the checkpoint. Moreover, the checkpoint was part of a DWI initiative ordered at the behest of the Chief of Patrol, and the participating

precincts were selected by Borough Commanders – all undoubtedly executive staff of the NYPD. Furthermore, there was little, to no discretion, in who was stopped since according to the parameters of the checkpoint all cars, with the exception of taxis and livery cabs, were to be stopped.[12] In fact, according to Schramm, all of the vehicles he saw were being stopped, confirming that the selection process was not arbitrary.

Based on the foregoing, similar to *Sitz*, when balancing the substantial government interest in preventing drunk driving and the relatively small intrusion on the drivers going through the checkpoint, and the fact that the checkpoint was conducted in a non-arbitrary manner, it is clear that the checkpoint was constitutional. Plaintiffs' allegation that because the checkpoint form could not be located means that there were no written guidelines does not undermine the constitutionality of the checkpoint. As an initial matter, there is no logical connection between the assertion that because a checkpoint form could not be located means there were no guidelines. Additionally, there is evidence in record demonstrating that a checkpoint form was, in fact, prepared, and that there were checkpoint guidelines – Sergeant Jugraj's testimony. Plaintiffs cannot create a genuine issue of fact based on their own speculation and conjecture concerning either the existence of the form or the checkpoint procedures, nor can they rely on it in support of their motion. What's more, Schramm confirms at least one aspect of the procedure – that all cars were stopped. Plaintiffs' allegation that because the checkpoint form could not be located means that there were no written guidelines for the checkpoint cannot turn an otherwise constitutional checkpoint into an unconstitutional one.

[12] Plaintiffs are free to disagree with Sergeant Jugraj's decision to exclude taxis/livery cabs from the checkpoint, however, the decision was not arbitrary. The sergeant explained that the decision to exclude taxi and livery cab drivers was due to the fact that he believed them less likely to have consumed alcohol since they would have been working, versus non-professional drivers who were likely heading home after socializing.

POINT III

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT MUST FURTHER BE DENIED BECAUSE SERGEANT JUGRAJ AND OFFICER DELACRUZ ARE ENTITLED TO QUALIFIED IMMUNITY.

Unsurprisingly, plaintiffs cite to no Supreme Court or Second Circuit case law for their novel position that qualified immunity must be resolved prior to discovery, otherwise it is waived. Indeed, qualified immunity is routinely resolved at the summary judgment stage and, oftentimes, after trial. *See, e.g., Jones v. Muniz*, 349 F. Supp. 3d 377, 379 (S.D.N.Y. 2018) (granting qualified immunity after trial); *Brown v. City of New York*, 862 F.3d 182 (2d Cir. 2017) (affirming District Court's grant of qualified immunity on a summary judgment motion). In any event, defendants are entitled to qualified immunity for plaintiffs' arrests and stop.

"Qualified immunity is a complete defense to false arrest claims." *Ackerson v. City of White Plains*, 702 F.3d 15, 21 (2d Cir. 2012). "The affirmative defense of qualified immunity sets a "high bar" for those seeking to challenge it, as the Supreme Court has firmly established that "qualified immunity 'gives ample room for mistaken judgments' and 'provides ample protection to all but the plainly incompetent or those who knowingly violate the law.'" *Brown v. City of New York*, No. 13-CV-1018 (KBF), 2016 U.S. Dist. LEXIS 53365, at *17 (S.D.N.Y. Apr. 20, 2016) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). Further, "[t]he Supreme Court has made it clear that an officer's actions are not to be assessed with 20/20 hindsight." *Salim v. Proulx*, 93 F.3d 86, 91 (2d Cir. 1996). An officer making an arrest is entitled to qualified immunity "if he can establish that there was 'arguable probable cause' to arrest," defined by the Second Circuit as: "'if either (a) it was objectively reasonable for the officer to

believe that probable cause existed, or (b) officers of reasonable competence could disagree on whether the probable cause test was met.'" *Escalera v. Lunn*, 361 F.3d 737, 743 (2d Cir. 2004).

The "doctrine of qualified immunity shields public officials performing discretionary functions from civil liability insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known…or insofar as it was objectively reasonable for them to believe that their acts did not violate those rights." *Bradway v. Gonzales*, 26 F.3d 313, 317-318 (2d Cir. 1994) (internal citations and quotations omitted). Qualified immunity operates "to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (citations and internal quotation marks omitted). In order to put officers on notice that their conduct is unlawful, a plaintiff must establish that the statutory or constitutional right was "clearly established" at the time of the challenged conduct. *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011)). The law at the time must have been so clear that "every reasonable official would have understood that what he [was] doing violate[d] that right." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (citation omitted). "Controlling authority serves to put officials on notice of what is unlawful; however, 'existing precedent must have placed the statutory or constitutional question beyond debate.'" *Brown*, 853 F.3d at 190 (quoting *al-Kidd*, 563 U.S. at 741).

The Supreme Court has "repeatedly told courts …not to define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular cirucmstances that he or she faced." *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014) (omission in original) (citations and internal quotation marks omitted); *see also, White v. Pauley*, 137 S. Ct. 548 (2017) ("[I]t is again necessary to reiterate the longstanding

principle that 'clearly established law' should not be defined at a high level of generality." (quoting *al-Kidd*, 563 U.S. at 742)).

It was objectively reasonable to believe that there was probable cause to arrest Schramm for driving while ability impaired or intoxicated. Schramm smelled like alcohol, had bloodshot eyes, rolled up the window during his encounter with Officer Delacruz, refused to take the portable breath test, refused to get out of the car, and had a 0.034 blood alcohol concentration several hours later. It cannot be said that no reasonable officer would have arrested Schramm for driving while intoxicated or impaired, and/or held him in custody pending the prosecutor's decision concerning a criminal prosecution, under these circumstances.

Further, there was, at minimum, arguable probable cause to arrest Saenz for obstruction of governmental administration. Saenz came into the area where the defendants were attempting to administer a portable breath test and arrest Schramm. She refused several orders to leave the area, even after she was specifically told that she would be arrested if she stayed there. Therefore, there was at least arguable probable cause to arrest her. *See, e.g., Antic v. City of New York*, 740 Fed. Appx. 203, 206 (2018) (finding that where plaintiff had repeatedly been told to leave the area by police officers, his "failure to obey, even if short-lived provided [the officers] with arguable probable cause to arrest and prosecute [plaintiff] for OGA").

Sergeant Jugraj is further entitled to qualified immunity in connection with plaintiffs' claim that they were unlawfully stopped as a result of the vehicle checkpoint in this case. First, contrary to plaintiffs' contention, sobriety checkpoints are constitutional. *See Sitz*, 496 U.S. at 455. Second, regardless, plaintiffs have not identified the constitutional right that they claim to be clearly established. Plaintiffs' argument that "[their] Fourth Amendment right to be free from unreasonable seizure …is clearly established." (Pl. Memo. p. 45), is unavailing as it describes the

alleged constitutional right with the greatest degree of generality possible, not particularity, as is required by all recent Supreme Court decisions on qualified immunity. *See, al-Kidd*, 563 U.S. at 742. Plaintiffs' reliance on the *Ingersoll* factors does not save them. *Ingersoll*, as a decision of the California Supreme Court, by definition, is a non-precedential decision in this Circuit, and thus cannot serve as the basis for a claim that a right is clearly established *Brown*, 853 F.3d at 190. Third, plaintiffs cannot demonstrate that no reasonable officer would have stopped plaintiffs for the purposes of a sobriety checkpoint in accordance with the NYPD's DWI initiative.

Thus, at a minimum, defendants are entitled to qualified immunity on the claims of unlawful stop and false arrest, and plaintiffs' motion for summary judgment on those claims should be denied.

POINT IV

PLAINTIFFS' MONELL CLAIM MUST BE DISMISSED BECAUSE PLAINTIFFS HAVE FAILED TO DEMONSTRATE AN UNDERLYING CONSTITUTIONAL VIOLATION OR ARTICULATE A PATTERN OR PRACTICE OF DEFENDANT CITY.

To state a claim for municipal liability, a plaintiff must plausibly allege one of four different types of violations: (1) the existence of a formal policy, officially promulgated or adopted by a municipality, *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-91 (1978); (2) the official responsible for establishing a policy, with respect to the subject matter in question to the specific action, caused the alleged violation of plaintiff's rights, *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483-484 (1986) (plurality opinion); (3) the existence of an unlawful practice by proof that this practice was so manifest as to imply the acquiescence of policy-making officials, *City of St. Louis v. Praprotnik*, 485 U.S. 112 127-30 (1985) (plurality opinion), *Sorlucco v. New*

York City Police Dep't, 971 F.2d 864, 871 (2d Cir. 1992); or (4) a failure to train or supervise that amounts to "deliberate indifference" to the rights of those with whom the municipality's employees interact, *City of Canton v. Harris*, 489 U.S. 378, 388 (1989); *Jenkins v. City of New York*, 478 F.3d 76, 94 (2d Cir. 2007).

As an initial matter, where a plaintiff has failed to establish a violation of his constitutional rights, there is no basis for a claim of municipal liability. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (if plaintiff cannot show that her constitutional rights were violated by a City actor, then there cannot be *Monell* liability); *Martinez v. City of New York*, No. 06 Civ. 5671 (WHP), 2008 U.S. Dist. LEXIS 49203, at *12 (S.D.N.Y. June 27, 2008) (noting that "[a] municipality cannot be liable for acts by its employees which are not constitutional violations."), *aff'd Martinez v. Muentes*, 340 Fed. Appx. 700 (2d Cir. July 27, 2009). As discussed above, plaintiffs have not demonstrated that the sobriety checkpoint at which they were stopped was unconstitutional; therefore, they cannot establish the requisite for a Monell claim.

Further, even if plaintiffs could establish that their constitutional rights were violated by their stop, which they cannot, "[t]o establish *Monell* liability, the causal link must be strong; that is, the policy must be the 'moving force' behind a constitutional violation." *Mercado v. City of New York*, No. 08 Civ. 2855 (BSJ) (HP), 2011 U.S. Dist. LEXIS 140430, at *23 (S.D.N.Y. Dec. 5, 2011) (quoting *Monell*, 436 U.S. at 691, 694). Therefore, in order to establish municipal liability, plaintiff must establish that an identified municipal policy or practice was "the moving force [behind] the constitutional violation." *Monell*, 436 U.S. at 694. The Second Circuit has held that "the mere assertion . . . that a municipality has such a custom or policy is insufficient in the absence of allegations of fact tending to support, at least circumstantially, such an inference."

Bradley v. City of New York, No. 08 Civ. 1106 (NGG), 2009 U.S. Dist. LEXIS 51532, at *8-*9 (E.D.N.Y. June 18, 2009) (*citing Dwares v. City of New York*, 985 F.2d 94, 100 (2d Cir. 1993)). Thus, a plaintiff's claim should be dismissed where he merely states conclusory allegations of municipal policy and practice and fails to allege facts from which the court may infer an actual causal link between the custom or policy and alleged constitutional violation. *See, e.g., Cuevas v. City of New York*, No. 07 Civ. 4169 (LAP), 2009 U.S. Dist. LEXIS 114984, at *12 (S.D.N.Y. Dec. 7, 2009) ("Baldly asserting that Plaintiff's injuries are the result of the City's policies does not show this Court what the policy is or how that policy subjected Plaintiff to suffer the denial of a constitutional right").

Here, plaintiffs' argument appears to be twofold and, at times, in conflict. On the one hand, plaintiffs appear to allege that the City's checkpoint policies were insufficient to avoid officers violating their constitutional rights. On the other hand, plaintiffs allege that their constitutional rights were violated because members of the 33rd Precinct failed to follow the City's checkpoint policy. As to the latter, plaintiffs cannot establish that the City was the moving force behind the deprivation their constitutional rights if the officers who allegedly violated such rights were not acting in accordance with a municipal policy. As to the former, plaintiffs' do not, in fact, identify a City policy that caused their alleged constitutional violations, as they must in order to sustain a municipal liability claim. *Monell*, 436 U.S. at 690-91. Instead, plaintiffs' motion discusses at length what *they* believe to be an ideal vehicle checkpoint policy and how the Patrol Guide section governing sobriety checkpoints does not conform to their self-identified optimal parameters. Even if plaintiffs' reflections on the City's purported checkpoint policy were sufficient to meet the "policy" necessity of *Monell*, plaintiffs do not explain how any of the purported deficiencies causally led to their alleged constitutional violations as a result of

being stopped at the sobriety checkpoint. *See, generally* Pl. Memo. pp. 17 – 39. At best, Pl. Memo. contains only conclusory allegations that the City's policies and practices led to a violation of plaintiffs' constitutional rights (Pl. Memo. at p. 42).

Plaintiffs' reliance on *Ingersoll v. Palmer*, 43 Cal. 3d 1321 (1987), a Supreme Court of California case, does not save their otherwise faulty *Monell* claim. Plaintiffs have not cited to a single Supreme Court or Second Circuit case dictating that the courts in this circuit should undertake to analyze the factors set forth in *Ingersoll* in resolving a *Monell* claim. Indeed, *Ingersoll* did not discuss *Monell* at all.

For these reasons, plaintiffs' motion for summary judgment on the *Monell* claim should be denied and, in fact, plaintiffs' Monell claim should be dismissed.

CONCLUSION

For the foregoing reasons, defendants City of New York, Officer Emmanuel Delacruz, and Sergeant Noel Jugraj, respectfully request that the Court deny plaintiff's partial motion for summary judgment, together with such other and further relief the Court deems just and proper.

Dated: New York, New York
September 6, 2019

GEORGIA M. PESTANA
Acting Corporation Counsel of the
City of New York
Attorney for Defendants
100 Church Street
New York, New York 10007
(212) 356-2572

By: /s/
Angharad K. Wilson
Senior Counsel

To: Counsel of Record (Via ECF)