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.

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMET PURUSANT TO FED. R. CIV. P. 56

GEORGIA M. PESTANA
Acting 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

Other Authorities

PRELIMINARY STATEMENT

Plaintiffs Robert Schramm ("Schramm") and Gabriela Saenz ("Saenz") have brought the present suit pursuant to 42 U.S.C. § 1983, alleging that their constitutional rights were violated in connection with their arrests at a sobriety checkpoint during the early morning hours of June 7, 2015. Defendants moved for summary judgment on all claims on August 2, 2019. Plaintiffs' opposition, filed on August 30, 2019, voluntarily dismissed their procedural due process claim and clarified that plaintiffs were not pursuing a claim for unreasonably prolonged detention, and accordingly, only the viability of the unlawful stop, false arrest, and municipal liability claims remain to be determined by this Court.

Plaintiffs' arguments opposing defendants' summary judgment motion betray a fundamental misunderstanding of the Supreme Court's constitutional requirements for sobriety checkpoints – arguing that, rather than being *descriptive* of the particular checkpoint regime at issue in *Michigan v. Sitz*, the Court was being *prescriptive* in requiring that all checkpoints have precisely the same characteristics as that in *Sitz*. Plaintiffs are simply wrong. It is clear that, based upon the undisputed facts, defendants are entitled to summary judgment since: (1) the vehicle checkpoint was not administered in an arbitrary or unconstitutional manner; (2) there was probable cause to arrest Schramm, who had admittedly been drinking prior to the stop, for driving while impaired/intoxicated, and to arrest Saenz for interfering in the investigation and/or arrest of Schramm; (3) defendants are entitled to qualified immunity because it was not clearly established that the checkpoint procedures at issue were infirm and there was, at least, arguable probable cause to arrest plaintiffs; and (4) plaintiffs have failed to demonstrate an underlying constitutional violation and/or identify any specific deficiencies in the City's policies that are causally related to their purported unlawful stop.

POINT I

DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON THE CLAIM OF UNLAWFUL STOP BECAUSE IT IS WELL-ESTABLISHED THAT SOBRIETY CHECKPOINTS ARE CONSTITUTIONAL AND THE PROCEDURES USED DURING THE CHECKPOINT WERE NOT ARBITRARY AND DID NOT EVINCE A GENERAL INTEREST IN CRIME CONTROL.[1]

Plaintiffs' primary argument appears to be that the sobriety checkpoint at issue was not constitutional because it was not conducted in the precise manner as the checkpoint that the Supreme Court found was constitutional in *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990). However, neither in *Sitz*, nor any subsequent cases, has the Supreme Court proscribed that sobriety checkpoints must be conducted in a formulaic manner. Instead, in determining whether a sobriety 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." *Sitz*, 496 U.S. at 449.

As set forth in defendants' initial moving brief, the sobriety checkpoint at issue here was constitutional under the balancing test described in *Sitz*. First, there can be no dispute that the checkpoint was conducted for the purpose of curbing drunk driving. The checkpoint was set up pursuant to a DWI initiative. (Deft. 56.1 ¶ 40). Further, during the stop Schramm was asked

[1] Plaintiffs appear to allege this claim against both Sergeant Jugraj and Officer Delacruz. However, as it is undisputed that Officer Delacruz was not involved with setting up the vehicle checkpoint or in stopping 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).

whether he had been drinking alcohol (Deft. 56.1 ¶ 10), he was asked repeatedly to submit to a portable breath test, and was not asked any questions concerning general crime enforcement. (Deft. 56.1 ¶ 19). Second, preventing drunk driving is undeniably a significant governmental interest; indeed, the Supreme Court has found it to be so. *Sitz*, at 451. Third, the checkpoint was effective, as it resulted in the arrest of Schramm (who had indisputably been drinking), a motorcyclist with a blood alcohol concentration of 0.24, another driver whose blood alcohol concentration was over the legal limit, and two unlicensed drivers. Finally, the intrusion upon motorists, as in *Sitz*, was slight, and consisted of a brief stop and the answering of a few questions.

Rather than discussing the balancing test described in *Sitz*, however, plaintiffs attempt to demonstrate that the checkpoint at issue was unconstitutional by contrasting the way that the checkpoint regime in *Sitz* was set up with the way that the checkpoint at issue was set up. However, the distinctions plaintiffs attempt to draw between the checkpoints do not amount to a constitutionally meaningful difference.

First, plaintiffs take issue with the fact that the checkpoint in this matter was not set up by "an advisory committee or other policy-making officials," but rather by Sergeant Noel Jugraj, who plaintiffs contend was "an officer in the field." (Pl. Opp. pp. 16, 19-20). Preliminarily, defendant Jugraj is not a "field officer," but is a supervisory member of the NYPD. In any event, at the time of the underlying incident, Sergeant Jugraj was the traffic safety sergeant at the 33rd Precinct and, as such, his responsibilities included making decisions about traffic enforcement within the precinct. (Deft. 56.1 ¶ 6). Furthermore, it is undisputed that Sergeant Jugraj set up the parameters of the checkpoint in compliance with a Weekend DWI Initiative ordered by the Office of the Chief of Patrol – the bureau responsible for overseeing the majority of the

department's more than 35,000 uniformed officers. (Deft. 56.1 ¶ 7). Thus, rather than being a decision by the proverbial officer in the field, the decisions regarding the location and operation of this checkpoint were made in advance by a supervisor with knowledge of his command's traffic enforcement needs pursuant to an initiative ordered by higher-level executives in the NYPD.

Plaintiffs' reliance on *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), is inapposite. (Pl. Opp. p. 19) ("…The location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources") In *Martinez-Fuerte*, the Supreme Court drew a distinction between *permanent* Border Patrol checkpoints and "random roving-patrol stops" – neither of which is like the sobriety checkpoint at issue here. *Id.* at 558-559. It would, of course, be expected that, given their permanent nature, such checkpoints would be set up by officials whose responsibilities include "making overall decisions as to the most effective allocation of limited enforcement resources." *Id.* at 559. In any event, a simple reading of *Martinez-Fuerte* clearly reveals that the case does not stand for the proposition that policymaking officials *must* determine exact checkpoint locations and/or procedures. Moreover, plaintiffs have not cited to a single case that stands for that proposition.

The remainder of plaintiffs' arguments concerning the manner in which the checkpoint was conducted also falls flat. Plaintiffs argue that the checkpoint procedures here were constitutionally inadequate because: (1) none of the officers at the checkpoint were trained in the administration of field sobriety tests; (2) vehicles were directed to pull over prior to a determination regarding signs of intoxication; and (3) all vehicles were stopped at the checkpoint

except taxis and livery cars.[2] However, plaintiffs have failed to demonstrate that any of these enumerated procedures are either a constitutional requirement or that they are meaningfully different from the procedures employed in the present case. There is no constitutional requirement that officers be trained in "field sobriety tests" in order to take part in sobriety checkpoints. Additionally, regardless of whether any of the officers at the checkpoint were trained in the administration of "field sobriety tests," the checkpoint was equipped with portable breath tests, to which Schramm refused to submit. Plaintiffs have not explained the constitutional import between these alternatives. Similarly, it is difficult to discern a meaningful constitutional distinction between answering a few questions in the middle of the road versus first pulling over to the side of the road before answering questions - although the practical reasons that cars might be asked to pull over first are obvious. Finally, the decision not to stop taxis and livery cars was not arbitrary, as Sergeant Jugraj explained that he believed that professional drivers would be less likely to have consumed alcohol at 1:30 a.m. on a Sunday (as they were likely working), versus private citizens who were likely returning home from a night of socializing. While plaintiffs are free to disagree with the sergeant's rationale, their displeasure cannot turn an otherwise thought-out decision into an arbitrary one.

Finally, it was not clearly established that any of the purported deficiencies in the present sobriety checkpoint were unconstitutional at the time of the checkpoint, and thus, Sergeant Jugraj

[2] Plaintiffs also complain that no "written record of stops or [] log of vehicles" was kept in connection with this checkpoint. There is absolutely nothing in *Sitz* to suggest that such a log is required, and in fact, in order to support such a requirement, plaintiffs grossly mischaracterize two opinions in criminal cases under New York state law, wherein the courts addressed the suppression of evidence obtained from passengers in taxis and livery cars that were stopped pursuant to two different NYPD programs that authorized suspicionless stops of livery cars on roving patrols. Needless to say, neither of these cases involved a vehicle checkpoint, sobriety or otherwise. *See, In the Matter of Muhammad F.*, 94 N.Y.2d 136, 148 (1999); *People v. Abad*, 98 N.Y.2d 12, 18 (2002). Moreover, while both courts recognized that a written record of the stops would have assisted in the post-stop review of the underlying incidents, neither court found that such paperwork was a constitutional prerequisite for a vehicle checkpoint.

is entitled to qualified immunity on the claim for unlawful stop. *Reichle v. Howards*, 566 U.S. 658, 664 (2012). For example, plaintiffs have not cited to any Supreme Court or Second Circuit cases dictating that locations of and parameters of sobriety checkpoints can only be set by high-level policy makers and/or that officers manning such checkpoints must be trained in conducting "field sobriety tests." *See Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015) ("The dispositive question is whether the violative nature of particular conduct is clearly established. This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition.") (internal quotation omitted); *see also Pabon v. Wright*, 459 F.3d 241, 255 (2d Cir. 2006) (indicating that a right must be recognized by the Supreme Court or Second Circuit in order to be considered clearly established within this Circuit). As such, at a minimum, Sergeant Jugraj is entitled to qualified immunity.

Accordingly, for the reasons set forth in defendants' memorandum of law, dated August 2, 2019 and herein, plaintiffs' unlawful stop claim should be dismissed.

POINT II

DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON THE FALSE ARREST CLAIM BECAUSE THERE WAS PROBABLE CAUSE OR, AT A MINIMUM, ARGUABLE PROBABLE CAUSE TO ARREST PLAINTIFFS.

A. There was probable cause, or at a minimum, arguable probable cause to arrest Schramm.

Plaintiffs' opposition evinces a lack of understanding of Section 1983 law concerning false arrest. For example, plaintiffs argue that "[c]ontrary to the claim made in Defendants' memorandum of law, Delacruz did not testify that he relied on Schramm 'acting in an evasive manner." (Pl. Opp. p. 20). However, "whether 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 at the time the challenged action was taken." *Maryland v. Macon*, 472 U.S. 463, 470-71 (1985) (internal quotations and citations omitted). Therefore, regardless of whether Officer Delacruz specifically used the words "evasive manner" during his deposition, it is undisputed that, at the time he arrested Schramm, the officer was aware that Schramm had rolled up his window, refused to get out of the car, and refused to take the portable breath test; and, defendants are thus entitled to rely on such behavior in support of their probable cause analysis. Similarly, whether Officer Delacruz testified that he arrested Schramm for DWI (as opposed to DWAI) is irrelevant to the probable cause determination because, as long as there was probable cause to arrest Schramm for any crime, the false arrest claim must fail. *See, e.g. Figueroa v. Mazza*, 825 F.3d 89, 99 (2d Cir. 2016) ("The existence of probable cause to 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.") (citing *Devenpeck v. Alford*, 543 U.S. 146, 152-53 (2004)).

Further, plaintiffs' reliance on *Kent v. Katz*, 312 F.3d 568 (2d Cir. 2002), is misplaced. *Kent*, presents a peculiar set of circumstances that is factually dissimilar to the present case and does not inform the probable cause analysis here. Kent, who had been burning brush on his property for the 18 day period leading up to the incident, left home to run an errand, and encountered the defendant officer upon his return home. The officer was at Kent's home responding to a complaint about the brush fire. One of the factors that the officer relied on in arresting Kent for drunk driving was the fact that Kent's eyes were bloodshot. Crucial to the Second Circuit's determination that it may not have been reasonable for the officer to rely on Kent's bloodshot eyes was the fact that Kent told the officer he had been burning brush for the

previous 18 days – indeed, the officer was responding to Kent's property because of complaints concerning the brush fire.

In contrast, here, there was ample probable cause to believe that Schramm might be driving while impaired. First, Schramm had bloodshot eyes. Unlike in *Kent*, where the defendant officer received complaints about the brush fire prior to responding to Kent's property, Officer Delacruz did not have any first-hand knowledge of any circumstances that could have resulted in Schramm's bloodshot eyes.[3] Second, despite Schramm's denial that he had ingested alcohol, his breath smelled of alcohol.[4] Third, Schramm engaged in a number of evasive actions that were not present in *Kent*. Specifically, he rolled up his window during his interaction with the officers, refused to get out of the car when requested to, and refused to blow into the portable breath test. While plaintiffs contend that Schramm was not legally obligated to engage with officers at the checkpoint or to submit to a portable breath test, that does not mean that Officer Delacruz was not permitted to take Schramm's refusal into account when determining whether there was probable cause to believe that Schramm was impaired/intoxicated. Indeed, taken together, all of

[3] Plaintiffs cite Officer Pina's testimony to support his assertion that Officer Delacruz knew that Schramm had recently had eye surgery at the time of Schramm's arrest. However, the cited testimony, besides being hearsay, merely suggests that Schramm informed Officer Delacruz that he had eye surgery after his arrest, when Officer Delacruz was filling out the DWI processing paperwork. Even if this hearsay could be considered, it is well settled that the determination of whether there is probable cause to arrest is based on the information known to the officer prior to arrest. *Singer v. Fulton County Sheriff*, 63 F.3d 110, 118 (2d Cir. 1995). Further, even if Schramm had told Officer Delacruz that he had eye surgery prior to the time that he was arrested, Officer Delacruz was not in possession of any independent evidence verifying the claim as was available in *Kent* and, moreover, he was not required to accept Schramm's assertions. *Jocks v. Tavernier*, 316 F.3d 128, 135-36 (2d Cir. 2003).

[4] Plaintiffs cite Officer Pina's testimony regarding Schramm's condition several hours after his arrest to support their assertion that Schramm did not smell like alcohol at the time of his arrest; however, Officer Pina was not present at the time of Schramm's arrest and, accordingly, has no firsthand knowledge of whether Schramm smelled of alcohol at the time he was arrested. Furthermore, Schramm admits that he drank alcohol prior to his arrest.

these facts could lead a reasonable officer to conclude that Schramm had committed the offense of driving while intoxicated or driving while ability impaired.[5]

At a minimum, it cannot said that no reasonable officer could conclude that these facts would support a finding of probable cause for driving while intoxicated or driving while ability impaired, which means that defendants are entitled to qualified immunity on Schramm's false arrest claim. *See, Escalera v. Lunn*, 361 F.3d 737, 743 (2d Cir. 2004). Further, as *Kent* is inapplicable here as set forth above, plaintiffs' reliance on *Kent* for the contention that qualified immunity for Schramm's arrest is unavailable is misplaced.[6]

B. There was probable cause, or at a minimum, arguable probable cause to arrest Saenz.

Additionally, there was probable cause, or at least arguable probable cause to arrest Saenz for obstruction of governmental administration (OGA). As an initial matter, plaintiffs' attempt to create an issue of fact by citing to minor differences in certain witnesses' testimony should be summarily disregarded since, based on Saenz's own admissions, there was probable

[5] Plaintiffs also argue that pursuant to VTL 1194(1)(b), Schramm could not have been arrested because he had not been in an accident and his vehicle was not operated in "violation of any provisions of [the VTL]." Pl. Opp. at 24. The term "operated in violation of any provision of this chapter," however, can be understood to mean that an individual must take a portable breath test if an officer has reasonable suspicion to believe that the individual is driving while intoxicated or ability impaired as it is a violation of the VTL to drive while ability impaired or intoxicated. Regardless, as (1) the word "checkpoint" is not mentioned in the statute; (2) there is no controlling Second Circuit authority finding that an individual cannot be arrested for failing to submit to a portable breath test; and (3) the phrase "which is operated in violation of any provision of this chapter" is not specifically defined, Officer Delacruz is entitled to qualified immunity for summonsing Schramm for refusing to submit to the portable breath test as he would not have been on notice that he could not arrest plaintiff under the circumstances.

[6] Curiously, plaintiffs contend that "[i]t is not even clear if drivers are required to obey police instructions to stop at a checkpoint." (Pl. Opp. p. 23). This argument actually supports that defendants are entitled to qualified immunity, since if it is not clear that drivers are required to obey police instructions to stop at a checkpoint, then it is equally unclear whether an officer is entitled to rely on such a refusal in determining whether there is probable cause to arrest. *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (finding that 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.").

cause or arguable probable cause to arrest her.[7] (Deft. 56.1 ¶ 28). Saenz was undisputedly in the vicinity of Schramm when he was arrested. (Deft. 56.1 ¶¶ 25-26). In fact, she and Farrell were standing close enough to Schramm and the officers that they could hear at least part of the conversation between Schramm and the officers. (Deft. 56.1 ¶ 26). Moreover, Sanez admits that she was told to leave the vicinity and she further admits that she refused to do so. (Deft. 56.1 ¶¶ 27-30). Indeed, even plaintiffs' opposition confirms that Saenz was ordered "to leave the scene" but that "she asserted her right to remain[.]" Pl. Opp. at p. 26. These undisputed facts demonstrate that there was probable cause to arrest Saenz for obstructing governmental administration or, at a minimum, that defendants are entitled to qualified immunity on Saenz's false arrest claim since there was arguable probable cause to arrest her. Further, the fact that Saenz and/or Farrell did not believe that Saenz was interfering with investigation and/or arrest of Schramm is wholly irrelevant since the officers believed that she was doing so. *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 an 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").

[7] To the extent that plaintiffs seek to create an issue of fact by citing to testimony of individuals other than Saenz, this is inappropriate, as the present motion relies on the facts as described by plaintiff Saenz herself. *Quaratino v. Tiffany & Co.*, 71 F.3d 58, 64 (2d Cir. 1995).

POINT III

DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' *MONELL* CLAIM BECAUSE PLAINTIFFS HAVE NOT PROVEN AN UNDERLYING VIOLATION OF THEIR CONSTITUIONAL RIGHTS AND BECAUSE THEY CANNOT DEMONSTRATE THAT ANY MUNICIPAL POLICY CAUSED ANY VIOLATION OF THEIR RIGHTS.

As an initial matter, defendants address plaintiffs' two general, wrongheaded arguments concerning the purported *Monell* claim. First, plaintiffs argue that, rather than having to meet their obligation to plead their claim with specificity, including identifying a specific deficiency in the City's policy or training and then linking such specific deficiency to the alleged violation of plaintiffs' constitutional rights, it is somehow the City's burden to guess plaintiffs' constantly changing *Monell* claim and to generally defend the constitutionality of its policies. This is simply incorrect as a matter of law. *See, e.g.*, *Missel v. County of Monroe*, No. 09-0235-cv, 2009 U.S. App. LEXIS 24120, at *6 (2d Cir. 2009); *Brown v. City of New York*, No. 11 Civ. 6379 (KBF), 2013 U.S. Dist. LEXIS 124691, at **8-10 (S.D.N.Y. Aug. 27, 2013).

Second, plaintiffs argue that, because defendants successfully opposed certain discovery, specifically the depositions of Deputy Commissioner Ann Prunty and Chief of Patrol Borough Manhattan North Kathleen O'Reilly, the City should now be precluded from pointing out that plaintiffs have not identified any municipal policy that led to their alleged constitutional deprivations. Plaintiffs' argument is absurd and meritless. That the Court denied plaintiffs' requests for the depositions was no fault of defendants, but instead was the result of plaintiffs' inability to articulate the relevance of either of these depositions at the May 3, 2019 Court

conference.[8] Indeed, even now facing the impending dismissal of their ill-defined and nonsensical *Monell* claim, plaintiffs still have not articulated a compelling reason for the depositions and, as such, their requests to disallow defendants from moving to dismiss the *Monell* claim and to reopen discovery for the purposes of a fishing expedition should be summarily denied.

As to the merits of plaintiffs' *Monell* claim, their claim should be dismissed because they have failed to demonstrate an underlying violation of their constitutional rights. *See, City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986). As addressed in Points I-II, *supra*, and defendants' initial memorandum of law, plaintiffs were neither unlawfully stopped nor falsely arrested. Therefore, there can be no *Monell* liability premised on those claims.

Further, assuming for the sake of argument that plaintiffs could establish an underlying constitutional violation, plaintiffs' arguments concerning municipal liability reflects a fundamental tension – plaintiffs claim that the City's policies with respect to checkpoints are constitutionally inadequate, but they also claim that their rights were violated by the 33rd Precinct's failure to follow the City's policies. To the extent that plaintiffs allege the latter, there can be no municipal liability claim because no City policy is implicated. To the extent that they allege the former, plaintiffs have failed to describe in any but the most vague, conclusory terms how the City's policies and practices led to their purported constitutional violation. The failing

[8] Defendants submit that plaintiffs were not able to articulate the relevance of the depositions because the depositions are not, in fact, relevant. For example, the subject of the proposed testimony of Deputy Commissioner Prunty was to be a letter that she wrote to Google regarding a phone application (Waze) that allows users to report the location of NYPD checkpoints. According to plaintiffs, this is proof positive that the City does not provide advance public notice of checkpoints. Plaintiffs ignore, however, that public notice is not a constitutional requirement. Furthermore, it cannot be overstated that, of the eleven depositions plaintiffs conducted, three were of the commanding officer of the 33rd Precinct and two successive precinct Executive Officers. That plaintiffs could not identify a municipal policy after having conducted depositions of such high level supervisory personnel is quite telling.

is fatal to their claim. *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. 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").

The thrust of plaintiffs' vague and conclusory allegations appears to be based on a purported lack of training. It is worth noting that no such claim was articulated with particularity in the complaint and was only advanced for the first time during summary judgment motion practice.[9] Regardless, in order to state a plausible claim for municipal liability based on failure to train, plaintiffs must provide specific facts indicating that a policymaker was put on notice of a pattern of constitutional violations, and was deliberately indifferent in failing to curb that pattern through discipline, training, or some other means. *See Okin v. Vill. of Cornwall-on-Hudson Police Dep't*, 577 F.3d 415, 439 (2d Cir. 2009) ("A municipality may be found to have a custom that causes a constitutional violation when 'faced with a pattern of misconduct[, it] does nothing, compelling the conclusion that [it] has acquiesced in or tacitly authorized its subordinates' unlawful actions.'") (quoting *Reynolds v. Giuliani*, 506 F.3d 183, 192 (2d Cir. 2007)); *see also Connick v. Thompson*, 131 S. Ct. 1350, 1360 (2011) (holding that, to adequately state a municipal liability claim based on a failure to train or discipline, a plaintiff must allege "[a] pattern of similar constitutional violations by untrained employees[.]") (citing *Board of Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 409 (1997)).

Here, plaintiffs have not established that anyone besides themselves was subjected to the same constitutional violations that plaintiffs allegedly suffered, and the *Monell* claim should be dismissed on that basis alone. In any event, the purported shortcomings identified by plaintiffs

[9] It should also be noted that the only discovery plaintiffs took on this purported claim consisted of quizzing the individual officers about types of field sobriety testing at their depositions.

did not plausibly lead to what plaintiffs allege was an unlawful stop. Plaintiffs argue generally that the NYPD officers at the checkpoint were inadequately trained in "DWI investigation" and had not received training in field sobriety testing. And, further, that, "[s]ince Schramm had a BAC below the legal limit, the use of field sobriety testing by a non-malicious trained officer at the scene would have likely exonerated him on the spot and prevented his arrest." *Id*.

Preliminarily, Schramm's suggestion that he "likely" would not have been arrested had other field sobriety testing measures been employed is pure speculation. In any event, plaintiffs' argument assumes a fact that is very much in dispute (that Schramm's blood alcohol concentration was under the legal limit at the time he was arrested)[10], and ignores one of the cornerstone facts of this case – that Schramm was, in fact, given the opportunity to perform a sobriety test at the checkpoint (the portable breath test), and he refused. Schramm's evident preference for being administered the horizontal gaze nystagmus test rather than the portable breath test notwithstanding, plaintiffs have not demonstrated that there is a constitutionally cognizable difference between conducting that field sobriety test versus a portable breath test.[11]

Accordingly, for the reasons set forth in defendants' initial moving memorandum of law, and herein, plaintiffs' *Monell* claim should be dismissed.

---

[10] In fact, in a manual cited by plaintiffs on their own summary judgment motion, it is estimated that the average person metabolizes sufficient alcohol to reduce their blood alcohol concentration by 0.015 per hour. Given that Schramm's blood alcohol concentration over three hours after the arrest was measured at 0.034, it is reasonable to infer that his BAC likely would have been around the legal limit of 0.08 at the time of arrest. *See*, "DWI Detection and Standardized Field Sobriety Testing," 2018 Edition, Session 2, p. 51 of 64.

[11] Plaintiffs' further arguments regarding the failure to train are conclusory statements that a properly trained officer would "know" certain legal propositions that are in dispute in this case, and that other officers would have acted differently than the defendant officers. However, plaintiffs cannot rely on these conclusory statements in support of their *Monell* claim, and accordingly the arguments should not be afforded any weight. *See, e.g., Dwares v. City of New York*, 985 F.2d 94, 100 (2d Cir. 1993) ("[T]he simple recitation that there was a failure to train municipal employees does not suffice to allege that a municipal custom or policy caused the plaintiff's injury.")

CONCLUSION

For the reasons set forth in defendants' memorandum of law dated August 3, 2019, and herein, defendants City of New York, Officer Emmanuel Delacruz, and Sergeant Noel Jugraj, respectfully request that the Court grant defendants' motion for summary judgment and dismiss plaintiffs' suit in its entirety, together with such other and further relief the Court deems just and proper.

Dated: September 20, 2019
New York, New York

Respectfully submitted,

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: _____
Angharad K. Wilson
Senior Counsel