PRELIMINARY STATEMENT

Defendants, The County of Westchester, and Sergeant Thomas McGurn, individually and in his official capacity, hereinafter (County defendants) by their attorney, Charlene M. Indelicato, Westchester County Attorney, Jane Hogan Felix, Senior Assistant County Attorney, of counsel submit this memorandum of law in support of their Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure ("FRCP").

STATEMENT OF FACTS

For a statement of material facts, County defendants respectfully refer this Honorable Court to their Rule 56.1 Statement.

ARGUMENT

POINT I

COUNTY DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE PROBABLE CAUSE EXISTED FOR THE ARREST, DETENTION AND STRIP SEARCH OF THE PLAINTIFF

Summary judgment should be granted if the evidence demonstrates that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505 (1986). The substantive law identifies the facts, which are material for each cause of action. *Id.* at 250.

The party opposing summary judgment must establish the existence of every element essential to its case on which the party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The burden of the party resisting summary judgment will not be satisfied by some metaphysical doubt as to the material facts, conclusory allegations, unsubstantiated assertions or only a scintilla of evidence. These types of allegations are clearly insufficient to raise genuine issues of fact. Matsushita Electrical Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986); Cifarelli v. Village of Babylon, 93 F.3d 47, 51 (2d Cir. 1996). A party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment. Knight v. U.S. Fire Ins. Co, 804 F.2d 9, 12 (2d. Cir. 1986) "Summary judgment is a tool to winnow out from the trial calendar those cases whose facts predestine them to result in a directed verdict." United National Ins. Co. v. Tunnel, Inc., 988 F.2d 351, 355 (2d Cir. 1993).

Also, it is well settled in this Circuit that a party is not permitted to create his or her own genuine issue of material fact simply by presenting contradictory or unsupported statements; and the existence of a disputed fact will not prevent the granting of a motion for summary judgment unless the disputed fact is material. Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Mack v. United States, 814 F.2d 120, 124-25 (2d Cir. 1987); Burlington Coat Factory Warehouse Corp. v. Esprit De Corp., 769 F.2d 919, 923 (2d. Cir. 1985); SEC v. Research Automation Corp., 585 F.2d 31, 33-34 (2d Cir. 1978)

As demonstrated below, the County defendants' motion should be granted based upon the pleadings, the deposition testimony, the undisputed facts and the applicable law.

Here, the County defendants are entitled to summary judgment, as there are no disputed issues of facts, which would prevent the Court from concluding that probable cause, existed for the arrest, detention and strip search of the plaintiff.

PROBABLE CAUSE

"Probable cause to arrest a person exists if the law enforcement official, on the basis of the totality of the circumstances, has sufficient knowledge or reasonably trustworthy information to justify a person of reasonable caution in believing that an offense has been or is being committed by the person to be arrested." United States v Michios, Rivera and DaSilva, 1998 U.S. App. LEXIS 23534; (Hogan Felix Declaration Exhibit "M") Dunway v. New York, 442 U.S. 200, 60 L.Ed. 2d 824, 99 S.Ct. 2248 (1979); United States v. Patrick, 899 F.2d 169, 171 (2d Cir. 1990). The defendant bears the burden of establishing that his actions were justified based on probable cause. (See Raysor v. Port Authority of New York & New Jersey, 768 F.2d 34 (2d Cir. 1985) To meet that burden the defendant must show that he had a quantum of evidence which amounted to "more than a rumor, suspicion, or even a strong reason to suspect". United States v. Fisher, 702 F. 2d 372 (2d cir. 1983)

It is also important to note, however, that probable cause requires neither a prima facie showing of criminal activity nor a showing that evidence of a crime will, more likely than not, be found. United States v. Cruz, 834 F.2d 47 (2d Cir. 1987) Probable cause requires only the possibility of criminal activity or the possibility that evidence of a crime will be found. Texas v. Brown, 460 U.S. 730 (1983). Moreover, in determining whether probable cause exists, the experience and expertise of the law enforcement

agents should be taken into consideration. United States v. Perea, 848 F. Supp. 1101 (E.D.N.Y. 1994)

In the instant case the officer had sufficient information to believe that probable cause existed for the arrest, detention and subsequent strip search of the plaintiff. Sergeant McGurn was in charge of the field "buy and bust" drug operation on April 26, 2001. He was an officer with nearly thirty years of police experience and seven years of experience as a narcotics officer. Sergeant McGurn remained in constant, direct communication with all of the other officers who were assigned to the detail. Further, he was entitled to rely on the information provided to him by fellow police officers. Bernard v. United States, 25 F. 3d 98, 102-3 (2d Cir, 1994); Martinez v. Simonetti et. al., 202 F. 3d 625.

Sergeant McGurn personally participated in three prior drug transactions between undercover police officer, Detective Christopher Kelly, and Gabriel [redacted] On the day of the arrest, Sergeant McGurn was advised by one of his surveillance officers, that a second vehicle containing three passengers was following the [redacted] vehicle as [redacted] was traveling to meet the undercover officer. Sergeant McGurn formulated the impression that it was probable that the second vehicle contained the drug supplier who had followed the drugs to the transaction to ensure that he received his money. He remembered a similar incident involving the third drug transaction, which involved a smaller amount of drugs and money, where [redacted] was observed meeting with a man in Tarrytown just prior to meeting the undercover officer and then was observed returning to meet the same man immediately after consummating the drug deal. Sergeant McGurn opined, as did Sergeant Buonanno of the Tarrytown Police Department, that

such activity was "textbook", meaning that in their experience drug deals often occur in this manner.

On the day of the arrest, Sergeant McGurn observed the [redacted] vehicle pull into the parking lot where he and other officers were parked in undercover police vehicles. He observed a silver Dodge Durango; being driven by the plaintiff, pull into the parking lot immediately behind the [redacted] vehicle and park adjacent to the vehicle. Detective Rowan, who was in a different location in the parking lot, reported the description of the three individuals who exited the Durango over his police radio to Sergeant McGurn and all other units. [redacted] was observed to exit his vehicle and stand by the trunk apparently waiting for the three occupants of the Durango to exit their vehicle. The plaintiff, along with the two other occupants, (later identified to be Michael Tricardo and Frank Rossi) had a brief conversation with [redacted] in the parking lot. Michael Tricardo had been seated in the front passenger seat and Frank Rossi had been seated in the rear. Detective Rowan observed all four subjects apparently exiting the parking lot together and reported such information to Sergeant McGurn.

Moments later the undercover officer spotted [redacted] in his side view mirror. The officer believed [redacted] was walking with the plaintiff and Frank Rossi and that the three were engaged in conversation. Undercover officer, Detective Kelly, next observed the plaintiff and Frank Rossi look into the undercover vehicle as [redacted] was getting in the vehicle. Detective Kelly and [redacted] consummated the drug deal and [redacted] was arrested.

After the arrest of [redacted] Detective Kelly told Sergeant McGurn that he had observed the plaintiff walking and talking to [redacted] and Rossi just prior to [redacted]

getting into his vehicle. He volunteered to search for the plaintiff and Rossi because he believed he could readily identify them. Sergeant McGurn immediately began to question [redacted] about the identities of the three occupants of the Durango. After waving Miranda rights, [redacted] confirmed Sergeant McGurn's suspicion and advised him that Tricardo was his drug supplier. According to [redacted] Tricardo insisted on following [redacted] to the site of the drug deal because of the amount of money involved. [redacted] further stated that he and Tricardo had talked on the cell phone repeatedly on the way from Brooklyn to Tarrytown during which time Tricardo dictated how the drug deal should take place and that it should happen quickly. [redacted] further advised Sergeant McGurn that when the four conversed in the parking lot prior to the drug deal, Tricardo, once again, reiterated that the deal should happen quickly.

Based on the totality of the circumstances, as outlined above, Sergeant McGurn ordered that the plaintiff be arrested and detained pending further investigation. Clearly the officer had probable cause to arrest the plaintiff under the circumstances of this case. While it is established law that "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause, Ybarra v. Illinois, 444 U.S. 85, 91, 62 L.Ed. 2d 238, 100 S.Ct. 338 (1979), the known circumstances tying the plaintiff to the drug transaction for which she was arrested were substantially more than a "mere propinquity" to another suspect. Unlike in Ybarra, where the defendant was arrested based solely on his presence in a public place, the plaintiff here transported the drug supplier from Brooklyn to the site of the drug transaction. She was present when the drug transaction was discussed during cell phone communications and during a final conversation minutes prior to [redacted] entering the under cover's

vehicle. It was reasonable for Sergeant McGurn to conclude that the plaintiff was a knowing participant in the drug transaction. The information provided to Sergeant McGurn by Detective Rowan and under cover officer, Detective Kelly, that the plaintiff was walking and talking with [redacted] up until the moment he entered the under cover's vehicle and that she looked in the vehicle as she walked by the under cover's vehicle, added to the reasonable impression of the plaintiff's participatory involvement.

As the Supreme Court has explained the evidence "must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement". United States v. Cortez, 449 U.S. 411, 418, 66 L.Ed. 2d 621, 101 S. Ct. 690 (1981) Sergeant McGurn was entitled to rely on his experience in the field and to reasonably conclude that the presence of the plaintiff and others, in the company of [redacted] under the circumstances, was consistent with the manner in which drug transactions generally occur. (See Perea, Supra.) Detective Pierro and Detective Rowan both testified that in their experience it was not unusual for the drug seller to arrive on the scene with additional people to act as lookouts or to be armed with weapons. Detective Pierro acknowledged that it was for that very reason that he and Detective Bravo were armed with shotguns. Detective Kelly testified that the large number of officers present as members of his backup team were necessary for his safety and security as well as the safety and security of the general public. .

The United States Court of Appeals for the First Circuit, in Martinez-Molina observed "we do not think officers in the field are required to divorce themselves from reality or to ignore the fact that criminals rarely welcome innocent persons as witnesses to serious crimes and rarely seek to perpetrate felonies before larger than necessary

audiences". United States v. Martinez-Molina, 64 F. 3d 719, 729 (1st Cir. 1995). Similarly, the Court in United States v. Baltodano, 2000 U.S. App. Lexis 6692 (9th Cir. 2000) found probable cause to arrest a passenger in a vehicle loaded with a commercial quantity of marijuana. The Court recognized that "the border agents' experience indicated that drug dealers do not normally carry out their criminal activity without the knowledge of all persons present".

The United States Court of Appeals for the Second Circuit reversed the District Court's decision in United States v. Patrick, 899 F.2d 169, (2d Cir. 1990) by easily distinguishing the case from Ybarra's "mere propinquity" doctrine. The Court found that the Customs officials knew much more about Patrick than just his "propinquity" to Taylor, a person for whom they had probable cause to make an arrest. The Court found that the officials observed the two enter the Customs office together, both carrying knapsacks, at a time when no other pedestrians were around. The two both told a similar story about accidentally crossing the border into Canada. Once cocaine was found in Taylor's knapsack the Court opined that the totality of the circumstances known to the Custom officials at the time provided an adequate basis for the officials to reasonably believe that Patrick was not just a mere innocent traveling companion but was traveling and acting in concert with Taylor in transporting cocaine.

In the instant case, Sergeant McGurn's suspicions about the plaintiff's involvement in the drug transaction, which were initially justifiably based on his experience in the field, were unquestionably confirmed by the information obtained from [redacted] within minutes of his arrest. Accordingly, his decision to arrest the plaintiff was justified as having been based on probable cause to believe that the plaintiff was

engaged in criminal activity. Consequently plaintiff's second cause of action should be dismissed.

LENGTH OF DETENTION

The Fourth Amendment to the United States Constitution guarantees the freedom from "unreasonable" seizures. (Untied States Constitution, Amendment IV). Plaintiff challenges the length of her detention in the fifth cause of action of her complaint. The length of the plaintiff's detention (approximately three hours and forty minutes) was reasonable under the totality of the circumstances in this case. Plaintiff was initially taken into custody and brought to the Westchester County Department of Public Safety Headquarters at approximately 7:00 P.M. She was thereafter released to the lobby of the police headquarters at approximately 10:40 P.M. During the intervening time period she was processed, searched and questioned. The three other individuals, who were taken into custody with her, were also questioned. Her statement was completed and signed at 8:45 P.M. By approximately 10:40 P.M. the plaintiff had collected all of her belongings and was waiting in the reception area of the police headquarters. Detective Pierro and Detective Antonecchia, who were part of a team of officers dispatched to Brooklyn to conduct a search of Tricardo's apartment, ultimately drove her back to Brooklyn. Accordingly, the length of her detention was not unreasonable under the totality of the circumstances of this case.

STRIP SEARCH

As an invasive procedure, a strip search requires probable cause. Dunway. New York, Supra., Rivera v. United States, 928 F.2d 592 (2d Cir. 1991); Walsh v. Franco, 849 F.2d 66 (2d Cir. 1988); M.M. v. Anker, 607 F2d 588, 589 (2d Cir. 1979)

Arrestees have a right, absent a reasonable suspicion of concealment of drugs or contraband, not to be subjected to a search by prison officials. Weber v. Dell, 804 F2d 796, 802 (2d Cir. 1986), cert denied 483 U.S. 1020 (1987). The suspicion justifying the search must arise from the nature of the charge or the circumstances of the arrest. United States v. Montoya De Hernandez, 473 U.S. 531, 87 L.Ed. 2d 381, 105 S. Ct. 3304 (1985)

In the instant case, the plaintiff was arrested based on the reasonable suspicion that she had knowingly participated in the sale of a substantial amount of narcotic drug known as ecstasy. It was reasonable for the officers to believe that based upon the circumstances the plaintiff could have secreted both a weapon and contraband on her person. Under the circumstances of this case, the nature of the crime for which the plaintiff was taken into custody, as well as the proven ability of drug dealers to secrete contraband on their persons the instant strip search did not violate the plaintiff's constitutional rights. (See Weber v. Dell, Supra., Campbell v. Fernandez 54 F. Supp. 2d 195. Moreover the circumstances of the search were not unreasonable. The plaintiff was taken to a secluded area outside of the view of any other individuals. A female officer who did not make any physical contact with the plaintiff searched her. Accordingly, the plaintiff's third cause of action should be dismissed.

POINT II

THE STATE CAUSES OF ACTION FOR FALSE ARREST AND FALSE IMPRISONMENT SHOULD BE DISMISSED AS THE POLICE ACTIONS WERE BASED UPON PROBABLE CAUSE

To the extent that plaintiff alleges false arrest and false imprisonment in the second cause of action, they are considered synonymous causes of action. (See Posr v. Doherty, 944 F. 2d 91, 96 (2d Cir. 1991). The elements necessary to state a claim for

false arrest under 42 U.S.C. Section 1983 are the same as those necessary to state a claim for false arrest under New York State law. Weyant v. Okst, 101 F.3d 845, 852 (2d Cir. 1996) To state a claim for false arrest under New York State law, a plaintiff must show that: (1) the defendant intentionally confined the plaintiff (2) the plaintiff was conscious of the confinement (3) the plaintiff did not consent to the confinement (4) the confinement was not otherwise justified. (See Posr, Supra.) The existence of probable cause to arrest is a complete defense to an action for false arrest. Bernard v. United States, 25 F. 3d 98, 102 (2d Cir. 1994). As set forth in the arguments outlined above, the officer had probable cause to believe that the plaintiff had engaged in the commission of a crime. Accordingly, her state claim of false arrest and false imprisonment contained in the sixth cause of action must be dismissed.

POINT III

THE CLAIMS AGAINST THE COUNTY SHOULD BE DISMISSED BECAUSE EVEN IF THE COURT FINDS THAT THE PLAINTIFF'S CONSTITUTIONAL RIGHTS WERE VIOLATED THERE IS NO EVIDENCE THAT A COUNTY POLICY OR PRACTICE CAUSED THE VIOLATION OF THE PLAINTIFF'S CONSTITUTIONAL RIGHTS

Plaintiff's first and fourth causes of action appear to assert claims based upon the alleged existence of a County policy or practice which caused the deprivation of her constitutional rights. It is well settled that when a municipality is to be held liable for violation of an individual's constitutional rights pursuant to 42 U.S.C. Section 1983, it must be established that an employee was acting pursuant to an officially adopted municipal policy or custom. Monell v. New York City Department of Social Services, 436 U.S. 658, 98 S. Ct. 2018 (1978); Zanghi v. Incorporated Village of Old Brookville, 752 F.2d 42 (2d Cir. 1985). Since plaintiff has failed to establish a

violation of her constitutional rights as a result of her arrest, detention and strip search, she lacks standing to challenge the policies and practices of Westchester County Department of Public Safety. Dietz v. Damas, 932 F. Supp 459.

Assuming arguendo, that the Court finds a constitutional violation, the record is devoid of any evidence demonstrating that any such County policy resulted in the deprivation of the plaintiff's rights. The policy of a municipality must be either express, Monell, supra, or inferred from a single decision taken by the highest official responsible for setting policy in that area of municipal business. City of St. Louis v. Praprotnik, 485 U.S. 112, 108 S. Ct. 915 (1988). In the absence of such a policy, plaintiffs must demonstrate a custom or practice of the municipality by establishing facts outside their own case constituting similar unconstitutional conduct. Thurman v. Torrington, 595 F. Supp. 1521 (D. Conn. 1984). To amount to a custom or practice, there must be a persistent pattern or practice by municipal officials, which is "so widespread as to have the force of law." Board of the County Commissioners of Bryan County, Oklahoma v. Brown et al., 117 S. Ct. 1382, rehearing denied, 117 S.Ct. 2472 (1997) Turpin v. Mailet, 619 F.2d 196, 199 (2d Cir.), cert denied, 449 U.S. 1016 (1980) (emphasis added).

Finally, and perhaps most importantly in this case, plaintiff must establish that the policy or custom is causally related to the alleged constitutional deprivation. Monell v New York City Department of Social Services, 436 U.S. at 2036. As stated previously, a municipality cannot be held liable solely because it employs a tortfeasor, and traditional notions of respondeat superior do not apply to actions against a municipality under Section 1983. Id.; See also, Dominguez v.

Beame, 603 F.2d 337 (1979), cert. denied, 446 U.S. 917 (1980). A municipality will only be held liable under Section 1983 if "deliberate action attributable to the municipality itself is the 'moving force' behind the plaintiff's deprivation of federal rights." Board of the County Commissioners of Bryan County, Oklahoma v. Brown et al., 117 S. Ct. at 1388. Indeed, "[w]here a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employees." Id. at 1389 (citations omitted).

At the outset, plaintiff has failed to allege, except in a conclusory fashion, that a municipal policy or custom caused the alleged constitutional violations here. Even assuming this single incident (the alleged arrest, detention and strip search of the plaintiff) was unconstitutional, it is insufficient to support plaintiff's' claim of a policy or custom. The record in this case is devoid of any information, which would support the conclusion that the plaintiff's rights were violated as a result of a persistent pattern or practice of the County of Westchester. Certainly the record reflects no express policy of Westchester County Department of Public Safety to make arrests on less than a probable cause standard. The County's policy on strip-searching certain arrestees is consistent with applicable law. Rather, the record reflects a policy, which is Constitutionally sound. Bare assertions, in the absence of any evidence of the existence of a policy or practices, which were so persistent as to constitute custom or usage, are insufficient to create an issue of fact. Amato v. City of Saratoga Springs, 972 F. Supp. 120, 127 (N.D.N.Y. 1997)

In light of the foregoing failure of plaintiff to attribute the purported constitutional violations directly to a municipal policy or custom, plaintiff's first and fourth causes of action must be dismissed.

THERE IS NO CAUSE OF ACTION EMINATING FROM THE CLAIM OF NEGLIGENT ARREST

There is no independent cause of action under New York law for the negligent arrest and prosecution of an individual. Shea v County of Erie, 202 AD2d 1028, (4th Dept. 1979); Staltieri v County of Monroe, 107 AD2d 1071; Boose v Rochester, 71 AD2d 59. Consequently all negligence claims asserted by plaintiff in her seventh cause of action, relative to her arrest must be dismissed.

QUALIFIED IMMUNITY

Qualified Immunity is available if it was objectively reasonable for the officer to believe his acts were not unconstitutional. Anderson v. Creighton 483 U.S. 635, 638, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987); Frank v. Relin 1 F. 3d 1317 (2d Cir. 1993). When a valid defense of qualified immunity is raised, summary judgment is appropriate to eliminate merit less actions against public officials at early stages in the litigation. Mitchell v. Forsyth, 472 U.S. 511, 86 L. Ed. 2d 411, 105 S. Ct 2806 (1985).

Summary judgment is appropriate in the context of this case if it can be demonstrated that reasonable officers could have disagreed that probable cause existed for the arrest, detention and strip search of the plaintiff. Anderson, 483 U.S. at 641. Even evidence insufficient to sustain a finding of probable cause may be adequate to show qualified immunity. "The question of immunity remains, as it should, distinct from

the question of probable cause." Warren v. Dwyer, 906 F. 2d 70, 75 (2d. Cir. 1990) The defense of qualified immunity protects all but the "plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335,341, 89 L.Ed. 2d 271, 106 S. Ct. 1092 (1986) While the subjective beliefs of the defendant are not to be considered on a qualified immunity determination "for the purposes of qualified immunity and arguable probable cause, police officers are entitled to draw reasonable inferences from the facts they possess at the time of the seizure based upon their own experiences". Cerrone v. Cahill, 246 F. 3d. 194, 202, (2d Cir. 2001) In other words, the "court must evaluate the objective reasonableness of the officer's conduct in light of clearly established law and the information the officers possessed." Cerrone v Cahill, 246 F. 3d at 202.

The officer must show that (a) it was objectively reasonable to believe that probable cause existed, or (b) that officers of reasonable competence could disagree on whether the probable cause test was met. Elk v. Townson, 839 F. Supp 1047; Anderson v. Creighton, 483 U.S. at 641. Under the circumstances of this case, the totality of information known to Sergeant McGurn at the time of the plaintiff's arrest was enough to support probable cause. If the Court finds that probable cause did not exist, it is respectfully suggested that reasonable officers could have disagreed as to the existence of probable cause. In fact, Detective Pierro, Sgt. Buonanno, Detective Kelly and Detective Antonnechia all testified that in their opinion the plaintiff was a knowing participant in the criminal activity and that probable cause existed for her arrest.

Moreover, based upon all of the information available to Sergeant McGurn at the time of the plaintiff's arrest, it cannot be said that Sergeant McGurn's "judgment was so flawed that no reasonable officer would have made a similar choice." Lennon v. Miller,

F. 3d 416, 425 (2d Cir. 1995). Accordingly, even if the Court finds that the plaintiff's Constitutional rights were violated, Sergeant McGurn in entitled to summary judgment based upon the principles of qualified immunity.

CONCLUSION

It is respectfully requested that this Honorable Court grant the County defendants' motion for summary judgment dismissing the action in its entirety, together with costs, fees, disbursement, and for such other and further relief as this Honorable Court deems just and proper.

Dated: White Plains, New York
February 6, 2002

Respectfully submitted,

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