

1 I.

2 **Factual and Procedural Synopsis**

3 We derive the following facts from the parties' motions,
4 statements of uncontested material facts, and exhibits.¹ (Docket
5 Nos. 88, 89, 98, 99, 100, 105.)

6 Cruz-Acevedo is a schoolteacher who has worked for the Puerto
7 Rico Department of Education for eleven or twelve years. (Docket
8 Nos. 99-2, 105-2.) Cruz-Perocier is his daughter. (Id.)

9 Toledo is the superintendent of the Puerto Rico Police
10 Department ("PRPD"). Dennis has been the auxiliary superintendent of
11 the PRPD Drugs, Narcotics, Vice Control, and Illegal Firearms Bureau
12 ("PRPD Narcotics, Vice, and Firearms") since January 20, 2007.
13 (Docket Nos. 88-8, 98-8.) Orozco has been the director of PRPD
14 Narcotics, Vice, and Firearms since January 20, 2007. (Docket
15 Nos. 88-5, 98-5.) Ruiz is the director of the PRPD Illegal Firearms
16 Bureau. Rosado has been the PRPD commandant of the Aguadilla region
17 since August 1, 2007. (Docket Nos. 88-4, 98-4.) González is the
18 director of the PRPD Aguadilla Illegal Firearms Division; Pérez,
19 Arocho, Colón, and Nieves are his subordinates.

20 On November 21, 2006, Plaintiff Cruz-Acevedo was at home when
21 Arocho, Colón, and Nieves appeared at his house in Aguadilla.

¹ To the extent that each party has failed to address the other's proffered facts, we regard these facts as admitted. See L.Cv.R. 56(e).

1 (Docket Nos. 99-2, 105-2.) These PRPD officers had a search warrant
2 that authorized them to search Cruz-Acevedo's premises. (Id.)

3 A magistrate had issued the search warrant upon the sworn
4 affidavit testimony of Nieves on November 16, 2006. (Docket Nos. 88-
5 2, 98-2.) In the affidavit, Nieves asserted that an informant had
6 accused a man around the age of fifty, residing at Cruz-Acevedo's
7 house, of weapons possession and drug sales to youths in Aguadilla.
8 (Id.) The affidavit stated that Nieves had conducted surveillance of
9 the house and observed Cruz-Acevedo engage in a drug transaction
10 involving marijuana. (Id.) The affidavit requested a search of the
11 premises to seize firearms and marijuana. (Id.) The PRPD Illegal
12 Firearms Division of Aguadilla conducted the search, and González and
13 Pérez were the supervisors. (Docket Nos. 88-3, 98-3.) Pérez
14 authorized the search and certified that the investigative file on
15 Cruz-Acevedo complied with PRPD policy. (Id.)

16 After entering the house, Arocho, Colón, and Nieves informed
17 Cruz-Acevedo that they knew that he had filed an administrative
18 complaint against Víctor Cortés, a PRPD officer from Mayagüez,
19 alleging an earlier illegal search of Cruz-Acevedo's house. (Docket
20 Nos. 99-2, 105-2.) They warned Cruz-Acevedo that Cortés was well
21 connected. (Id.) Pérez entered the house after PRPD officers had
22 served the search warrant on Cruz-Acevedo. (Docket Nos. 99-5, 105-5.)
23 González entered Cruz-Acevedo's house after the search had begun.
24 (Docket Nos. 88-24, 88-25, 98-24, 98-25.)

1 The PRPD officers searched the house for some time without
2 finding drugs or firearms. (Docket Nos. 99-2, 105-2.) Then, Cruz-
3 Perocier arrived at the house and PRPD officers denied her entry.
4 (Id.) The officers threatened to arrest Cruz-Perocier if she tried to
5 enter but made no physical contact with her. (Id.) Cruz-Acevedo left
6 his bedroom and went to the door to calm his daughter. (Id.)

7 While Cruz-Acevedo was speaking to Cruz-Perocier, Nieves
8 announced that he had found a box containing bullets inside the
9 bedroom. (Id.) Cruz-Acevedo recognized the box as one that formerly
10 contained checkbooks and vehemently denied that the bullets inside
11 were his. (Id.) Arocho then searched the house again and removed a
12 red bag from Cruz-Acevedo's dresser drawer. (Id.) Arocho opened the
13 bag and asserted that it contained marijuana. (Id.) The PRPD officers
14 then placed Cruz-Acevedo under arrest. (Id.)

15 On the way to the police station, Arocho suggested that Cruz-
16 Acevedo give him information on other, wealthier people to accuse of
17 crimes in exchange for ending the investigation. (Docket Nos. 99-2,
18 105-2.) At the station, a technician sampled the contents of the red
19 bag and found no marijuana. (Id.) Arocho again asked Cruz-Acevedo for
20 information on wealthy persons who violate the law. (Id.)

21 After the PRPD released Cruz-Acevedo, Nieves summoned Cruz-
22 Acevedo by telephone and they met near a park. (Id.) Nieves informed
23 Cruz-Acevedo that he, Arocho, and Colón had a reputation in the
24 Aguadilla area for being corrupt. (Id.) Nieves then tried to persuade

1 Cruz-Acevedo to agree not to file charges against Arocho, Colón, and
2 Nieves, in exchange for information on the person responsible for
3 fabricating the criminal investigation against Cruz-Acevedo. (Id.)
4 After several meetings that day with Arocho, Colón, and Nieves, Cruz-
5 Acevedo signed an agreement. (Id.)

6 On November 20, 2007, Plaintiffs filed this case in federal
7 court. (Docket No. 1.) On December 8, 2008, we dismissed all claims
8 except for Cruz-Acevedo's claim for substantive due process and his
9 claims under Puerto Rico law. (Docket No. 62.) On February 26, 2009,
10 we granted partial reconsideration, reinstating Cruz-Acevedo's Fourth
11 Amendment claim for arrest without probable cause, and granting him
12 leave to amend his complaint as to a potential claim for a
13 fraudulently-obtained search warrant. (Docket No. 69.) Plaintiffs
14 filed an amended complaint on March 12, 2009. (Docket No. 70.)
15 Movants moved for summary judgment on May 15, 2009 (Docket No. 89)
16 and Plaintiffs opposed on June 15, 2009 (Docket No. 100).

17 II.

18 Summary Judgment under Rule 56(c)

19 We grant a motion for summary judgment "if the pleadings, the
20 discovery and disclosure materials on file, and any affidavits show
21 that there is no genuine issue as to any material fact and the movant
22 is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).
23 A factual dispute is "genuine" if it could be resolved in favor of
24 either party, and "material" if it potentially affects the outcome of

1 the case. Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 19 (1st
2 Cir. 2004).

3 The movant carries the burden of establishing that there is no
4 genuine issue as to any material fact; however, the burden "may be
5 discharged by showing that there is an absence of evidence to support
6 the non-movant's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325,
7 331 (1986). The burden has two components: (1) an initial burden of
8 production, which shifts to the non-movant if satisfied by the
9 movant; and (2) an ultimate burden of persuasion, which always
10 remains on the movant. Id. at 331.

11 In evaluating a motion for summary judgment, we view the record
12 in the light most favorable to the non-movant. Adickes v. S.H. Kress
13 & Co., 398 U.S. 144, 157 (1970). However, the non-movant "may not
14 rely merely on allegations or denials in its own pleading; rather,
15 its response must . . . set out specific facts showing a genuine
16 issue for trial." Fed. R. Civ. P. 56(e)(2). Sometimes, we may grant
17 summary judgment sua sponte, provided that discovery has sufficiently
18 progressed for the court to determine relevant facts and the target
19 has at least ten days' notice to contest the impending judgment.
20 Stella v. Town of Tewksbury, 4 F.3d 53, 55-56 (1st Cir. 1993).

21 **III.**

22 **Analysis**

23 Movants argue for summary judgment on the basis of Plaintiffs'
24 failure to state claims under the First, Fourth, Fifth, Tenth, and

1 Fourteenth Amendments and inability to establish supervisory
2 liability. (Docket No. 89.) We address, in turn, our prior dismissal
3 of baseless claims, supervisory liability as to Toledo, Orozco, Ruiz,
4 Dennis, and Rosado ("the Supervisors"), and claims against González.

5 **A. First, Fifth, and Tenth Amendments and Cruz-Perocier**

6 We previously dismissed as baseless Plaintiffs' claims under the
7 First, Fifth, and Tenth Amendments, claims against unknown
8 defendants, and claims asserted by Plaintiff Cruz-Perocier. (See
9 Docket No. 62.) With the exception of averments relating to the
10 allegedly-fraudulent search warrant affidavit, Plaintiffs' amended
11 complaint essentially reiterates their original complaint without new
12 factual allegations. (See Docket No. 1; Docket No. 70 at ¶¶ 3.11-
13 .16.) We see no reason to rehash this dismissal of claims other than
14 those under the Fourth and Fourteenth Amendments. (See Docket
15 Nos. 62, 69.) We granted Plaintiffs leave to amend their complaint to
16 better explicate their causes of action under the Fourth Amendment in
17 good faith, not to resurrect other baseless claims. (See Docket
18 No. 69.) As Plaintiffs' amended complaint supplies no new averments
19 to support these previously-dismissed claims, we apply our previous
20 reasoning to dismiss them once again, sua sponte. (See id.)

21 We next consider Cruz-Acevedo's remaining Fourth Amendment
22 claims for execution of a fraudulently-obtained search warrant and
23 arrest without probable cause on the basis of planted evidence, and
24 his claim for substantive due process. (See Docket No. 70.)

1 **B. Supervisory Liability**

2 Plaintiffs' amended complaint charges the Supervisors under
3 three separate theories of supervisory liability for their alleged
4 failure to control González, Pérez, Nieves, Arocho, and Colón.
5 (Docket No. 70.) Plaintiffs accuse the Supervisors of failure to
6 adequately train these subordinates, wilful blindness towards a
7 pattern of misconduct by their offending subordinates, and failure to
8 discipline these subordinates for misconduct prior to the search in
9 this case. (Id.) Movants contend that Plaintiffs cannot establish
10 supervisory liability because (1) several Movants had not been
11 appointed to their positions at the time of the allegedly illegal
12 search, (2) Movants had promulgated policies relating to proper
13 police conduct in searches and seizures, and (3) the subordinate
14 officers had no record of civil rights abuses. (Docket No. 89.)

15 To establish supervisory liability under § 1983, a plaintiff
16 must demonstrate the supervisor's fault for his own acts or
17 omissions. Whitfield v. Meléndez-Rivera, 431 F.3d 1, 14 (1st Cir.
18 2005). Accordingly, a plaintiff must establish either (1) the
19 supervisor's direct participation in a constitutional violation, or
20 (2) conduct by the supervisor that is tantamount to tacit
21 authorization of illegal conduct. Id. (citing Camilo-Robles v.
22 Zapata, 175 F.3d 41, 44 (1st Cir. 1999)). Under the latter approach,
23 a plaintiff must show that (a) the conduct of the supervisor's
24 subordinate caused a constitutional violation, and (b) the

1 supervisor's acts or omissions were affirmatively linked to the
2 subordinate's conduct such that the supervisor's conduct constituted
3 "'supervisory encouragement, condonation or acquiescence,' or 'gross
4 negligence amounting to deliberate indifference.'" Id. (quoting
5 Hegarty v. Somerset County, 53 F.3d 1367, 1379-80 (1st Cir. 1995))
6 (ellipsis omitted).

7 A supervisor's failure to adequately train or to discipline
8 errant subordinates can be grounds for supervisory liability. See id.
9 at 9-10, 13, 14. The supervisor's omission "must amount[] to
10 deliberate indifference to the rights of persons with whom the police
11 come into contact." Id. at 10 (quoting City of Canton v. Harris, 489
12 U.S. 378, 388 (1989)). "The plaintiff must establish that the
13 particular officers who committed the violation had been deprived of
14 adequate training, and that this specific failure in training was at
15 least a partial cause of the ultimate injury." Id. (citing Young v.
16 City of Providence, 404 F.3d 4, 26 (1st Cir. 2005)). A supervisor's
17 promulgation of policy relating to proper police procedure precludes
18 his liability for inadequate training. Id. at 10-11.

19 In a case for failure to discipline, the omission "must be 'so
20 well settled and widespread that the [defendants] can be said to have
21 either actual or constructive knowledge of it yet did nothing to end
22 the practice.'" Id. at 13 (quoting Bordanaro v. McLeod, 871 F.2d
23 1151, 1156 (1st Cir. 1989)). This pattern of neglect "must have been

1 the cause of and 'the moving force behind' the constitutional
2 violation." Id. (quoting Bordanaro, 871 F.2d at 1157).

3 As an initial matter, the facts preclude all claims against
4 Dennis, Orozco, or Rosado. These officials were all appointed to
5 their respective positions months after the alleged violations in
6 this case. (See Docket Nos. 88-4, 88-5, 88-8, 98-4, 98-5, 98-8.) They
7 cannot be liable as supervisors. See Whitfield, 431 F.3d at 14.

8 With respect to claims against Toledo and Ruiz, Toledo
9 promulgated General Order 98-16 on October 16, 1998, which
10 specifically addressed the appropriate procedures for obtaining a
11 search warrant.² (Docket Nos. 88-28, 98-28.) Ruiz conducted a meeting
12 on August 16, 2006, in which he discussed compliance with General
13 Order 98-16, and which González and others attended. (Docket Nos. 88-
14 10, 88-11, 98-10, 98-11.) As Toledo disseminated policy on correct
15 police procedure, and Ruiz conducted a seminar to instruct his
16 subordinates on the policy, Toledo and Ruiz did not deliberately fail
17 to train the offending officers. See Whitfield, 431 F.3d at 10.

18 Furthermore, the administrative record for Pérez, Nieves, Arocho, and
19 Colón does not show a pattern of corruption, falsification of
20 testimony, or false arrest at the time of the search against Cruz-
21 Acevedo. (See Docket Nos. 88-29, 88-30, 88-31, 88-32, 98-29, 98-30,
22 98-31, 98-32.) There was a single charge of false arrest lodged

² We are perplexed as to how Plaintiffs' counsel could erroneously argue that General Order 98-16, issued in 1998, postdated the alleged misconduct in 2006 by two years. (See Docket Nos. 99, 100.)

1 against Arocho in 2005. (Docket Nos. 88-31, 98-31.) Although Nieves
2 informed Cruz-Acevedo that he, Arocho, and Colón had a reputation for
3 corruption in Aguadilla (Docket Nos. 99-2, 105-2), Toledo and Ruiz
4 operated at the most general level of supervision on an island-wide
5 basis and could not have overseen personnel matters on a local level
6 in Aguadilla. If Toledo and Ruiz could not have had personal
7 knowledge of Pérez', Nieves', Arocho's, and Colón's records, they
8 also cannot be responsible for disciplining these officers for any
9 prior instances of corruption or false arrest. Therefore, Toledo and
10 Ruiz were not deliberately blind to misconduct at the level of the
11 PRPD regional command for Aguadilla. See Whitfield, 431 F.3d at 14.

12 As noted below, we find no basis for the allegation that
13 González participated in the fraudulent procurement of a search
14 warrant. See infra part III-C. Similarly, we find no basis to hold
15 González liable as a supervisor for the search and arrest, see infra
16 part III-C, and hence Toledo and Ruiz cannot be held responsible for
17 González' participation in the alleged abuses. See Rodríguez v. Doral
18 Mortgage Corp., 57 F.3d 1168, 1171-72 (1st Cir. 1995). Even if
19 Plaintiffs can show that González facilitated the fraud on the
20 magistrate, or that he failed to supervise the culpable officers,
21 Plaintiffs have adduced no evidence that Toledo and Ruiz assisted or
22 were deliberately blind to such abuses. Therefore, Toledo and Ruiz
23 did not fail to supervise González as a matter of law. See Whitfield,
24 431 F.3d at 14.

1 **C. Defendant González**

2 In their amended complaint, Plaintiffs' sole allegation against
3 González is that he "unlawfully cooperat[ed]" in Nieves' fraudulent
4 procurement of a search warrant (Docket No. 70 at ¶ 3.17). The record
5 is devoid of evidence that González participated in this Fourth
6 Amendment violation. His name does not appear on the warrant
7 affidavit signed by Nieves. (Docket Nos. 88-2, 98-2.) Pérez, not
8 González, authorized the search. (Docket Nos. 88-3, 98-3.)

9 Although González was present during the search of Cruz-
10 Acevedo's house (Docket Nos. 88-24, 88-25, 98-24, 98-25), the amended
11 complaint does not charge him with involvement in the search, arrest,
12 and extortion, or with failure to supervise. (See Docket Nos. 70,
13 100.) Instead, Plaintiffs accuse González of supervisory liability in
14 the warrantless arrest of Cruz-Acevedo for the first time in their
15 opposition to summary judgment. (See Docket No. 100.)

16 Generally, courts cannot entertain claims on summary judgment
17 which never appeared in the complaint. Ruíz-Rivera v. Pfizer Pharms.,
18 LLC, 521 F.3d 76, 84 (1st Cir. 2008). "The fundamental purpose of our
19 pleadings rules is to protect a defendant's 'inalienable right to
20 know in advance the nature of the cause of action being asserted
21 against him.'" Id. (quoting Doral, 57 F.3d at 1171) (affirming
22 summary judgment where claim was not sufficiently pleaded in amended
23 complaint). Even under the notice pleading standard, plaintiffs may
24 not "leave defendants to forage in forests of facts, searching at

1 their peril for every legal theory that a court may some day find
2 lurking in the penumbra of the record." Doral, 57 F.3d at 1172.

3 However, litigants may constructively amend pleadings by implied
4 consent under Federal Rule of Civil Procedure 15(b) in either of two
5 ways. Id. First, a new "claim may be actually introduced outside the
6 complaint . . . and then treated by the opposing party as having been
7 pleaded, either through his effective engagement of the claim or
8 through his silent acquiescence." Id. Alternatively, "and more
9 conventionally, 'consent to the trial of an issue may be implied if,
10 during the trial, a party acquiesces in the introduction of evidence
11 which is relevant only to that issue.'" Id. (quoting DCPB, Inc. v.
12 City of Lebanon, 957 F.2d 913, 917 (1st Cir. 1992)). However, if it
13 would be futile for a plaintiff to constructively amend his
14 complaint, we need not consider his proffered amendment for the
15 purpose of summary judgment. Hatch v. Dep't for Children, Youth &
16 Their Families, 274 F.3d 12, 19 (1st Cir. 2001).

17 _____ In the case at bar, we granted Plaintiffs leave to amend their
18 complaint after the close of discovery. (Docket Nos. 61, 69.)
19 Plaintiffs, thus, had ample opportunity to include any new claims
20 against González but failed to do so.³ (Compare Docket Nos. 1, 70.)

³ As we have repeatedly warned Plaintiffs' counsel, the generous pleading standard of Federal Rule of Civil Procedure 8 does not relieve him of the duty to represent his clients with competence and diligence. (Docket No. 62 nn.1 & 3; Docket No. 69 n.3.) Counsel's neglect is particularly egregious in light of our leave for Plaintiffs to amend their complaint. (See Docket No. 69.)

1 Nevertheless, Movants have erroneously treated González as a
2 supervisory defendant in their motion for summary judgment. (See
3 Docket No. 89.) In opposition, Plaintiffs traverse the issue by
4 asserting their new claim against González for his alleged role as a
5 supervisor at the search of Cruz-Acevedo's house. (Docket No. 100.)
6 Therefore, Movants have unwittingly introduced the question of
7 González's supervisory role at the search and arrest, creating
8 colorable grounds to constructively reform the pleadings to reflect
9 this new claim. Cf. Doral, 57 F.3d at 1172-73 (finding no
10 constructive amendment and vacating judgment).

11 In their opposition brief, Plaintiffs allege that "González was
12 also present during the preparation meeting prior to executing the
13 search and seizure," and "González was inside the house" when Nieves
14 and Arocho found the evidence. (Docket No. 100.) From these facts,
15 Plaintiffs insist that "González acquiesced to plaintiff's violation
16 [sic] of constitutional rights." (Id.) By referring to González'
17 acquiescence rather than active involvement, Plaintiffs attempt to
18 state a claim for González' supervisory liability by tacit
19 authorization, rather than direct participation. See Whitfield, 431
20 F.3d at 14.

21 To establish a claim for supervisory liability on the basis of
22 tacit authorization, a plaintiff must show that "it would be manifest
23 to any reasonable official that his conduct was very likely to
24 violate an individual's constitutional rights." Maldonado v.

1 Fontanes, 568 F.3d 263, 275 (1st Cir. 2009) (quoting Pineda v.
2 Toomey, 533 F.3d 50, 54 (1st Cir. 2008)) (internal quotation marks
3 omitted). “[M]ere presence at” the scene of an alleged violation “is
4 insufficient to create the affirmative link necessary for a finding
5 of supervisory liability, even under a theory of deliberate
6 indifference.” Id. (holding that allegation of presence is
7 insufficient to survive dismissal).

8 At this late juncture, Plaintiffs’ sole basis for their
9 proffered new claim is González’ own version of facts submitted by
10 Movants in support of their motion for summary judgment.⁴ (See Docket
11 No. 100.) González states that, although he was on Cruz-Acevedo’s
12 premises, he did not observe Arocho and Nieves uncover the allegedly
13 planted evidence. (Docket Nos. 88-25, 98-25.) Moreover, González’
14 deposition testimony is entirely devoid of admission of knowledge of
15 his subordinates’ misdeeds. (See Docket Nos. 88-14, 88-15, 88-16, 88-
16 17, 88-20, 88-21, 88-22, 88-23, 88-24, 88-25, 88-26, 98-14, 98-15,
17 98-16, 98-17, 98-20, 98-21, 98-22, 98-23, 98-24, 98-25, 98-26.)

18 Without more evidence than González’ mere presence at the
19 planning and execution of the search against Cruz-Acevedo, Plaintiffs
20 cannot establish the necessary causal link to prevail on their new
21 claim against González. See Maldonado, 568 F.3d at 275.
22 Consequently, it would be futile for Plaintiffs to constructively

⁴ Plaintiffs also point to their own sworn statement which they never submitted. (Docket No. 100.) We cannot accept arguments on summary judgment that are unsupported by evidence. See L.Cv.R. 56(e).

1 amend their complaint to charge González with supervisory liability,
2 and we need not consider this claim for the purpose of summary
3 judgment. See Hatch, 274 F.3d at 19.

4 We, therefore, order Plaintiffs to show cause as to why we
5 should not order summary judgment, sua sponte, in favor of González
6 on all claims. As we treat all federal claims against Movants on
7 other grounds, we need not address their arguments for sovereign or
8 official immunity. (See Docket No. 89.)

9 **IV.**

10 **Conclusion**

11 Accordingly, we hereby **GRANT IN PART** Movants' motion for summary
12 judgment (Docket No. 89):

13 We **DISMISS**, sua sponte, Plaintiffs' § 1983 claims under the
14 First, Fifth, and Tenth Amendments, all claims against unknown
15 defendants, and all claims by Cruz-Perocier **WITH PREJUDICE** (Docket
16 No. 70). We **DISMISS** all federal claims against Toledo, Rosado,
17 Orozco, Dennis, and Ruiz **WITH PREJUDICE** (id.). We **ORDER** Cruz-Acevedo
18 to **SHOW CAUSE, on or before July 31, 2009**, as to why we should not
19 also grant summary judgment, sua sponte, in favor of González.

20 We **RETAIN** jurisdiction over Cruz-Acevedo's Fourth Amendment
21 claims for execution of a fraudulently-obtained search warrant and
22 arrest without probable cause, and Fourteenth Amendment claim for
23 substantive due process, against Arocho, Colón, Nieves, and Pérez, as

1 well as his claims under Puerto Rico law against Arocho, Colón,
2 Nieves, Pérez, the Supervisors, and González (id.).

3 **IT IS SO ORDERED.**

4 San Juan, Puerto Rico, this 15th day of July, 2009.

5 S/José Antonio Fusté
6 JOSE ANTONIO FUSTE
7 Chief U.S. District Judge