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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

EVELYN RIVERA-COLON, ET AL

Plaintiff

v.

PEDRO TOLEDO-DAVILA, ET AL

Defendants

Civil No. 08-1590(SEC)

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OPINION and ORDER

Before this Court is a Motion to Dismiss filed by co-defendants, Pedro Toledo (“Toledo”), Jose Figueroa Sancha (“Figueroa”), and Wally Matos (“Matos”) (Docket # 69), joined by Felipe Ortiz Diaz (“Ortiz”), Benjamin Rodriguez (“Rodriguez”), Francisco Quijano (“Quijano”), Felix Bauzo (“Bauzo”), Israel Lozada (“Lozada”), Carlos Toledo (“C. Toledo”), Eddi Vicente Rivera (“Rivera”), Carlos Guzman (“Guzman”), Ricardo Gonzalez (“Gonzalez”), Cesar Ostolaza (“Ostolaza”), Julio Fermaint (“Fermaint”), Enrique Mena (“Mena”), and Eric Velazquez (“Velazquez”) (collectively, “Defendants”). Dockets ## 102 & 146. Plaintiffs, Evelyn Rivera-Colon (“Rivera-Colon”), and her two sons E.P.R. I and E.P.R. II (collectively “Plaintiffs”), opposed.¹ Dockets ## 88 & 102. After considering the pleadings and the applicable law, the Motion to Dismiss is hereby **GRANTED in part** and **DENIED in part**.

Factual and Procedural Background

This suit makes claims for a series of incidents, which Plaintiffs allege constitute part of a larger pattern of racially motivated police brutality and harassment in the predominantly Afro-Caribbean Puerto Rico community of Villa Cañona in the Municipality of Loiza. The allegations are as follows:

¹E.P.R. I is a minor of 16 years of age. E.P.R. II is 24 years of age, but he has severe mental disabilities and Rivera-Colon is his legal guardian.

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3 Plaintiffs allege that on May 30th, 2007, unidentified Puerto Rico Police Department
4 (“PRPD”) agents approached E.P.R. I as he was walking down a road near his house and,
5 without provocation, struck him in the leg with a nightstick. Docket # 144 at 10. The Complaint
6 also alleges that the officers then followed E.P.R. I to his aunt’s home, where they
7 “indiscriminately pepper spray[ed] through the windows into the house where at least ten people
8 were gathered and became affected.” Id. Rivera-Colon soon rushed to the scene with her other
9 son, E.P.R. II, who Plaintiffs aver has developmental disabilities. The Complaint then narrates
10 that the same PRPD officer used pepper spray on E.P.R. II, and when Rivera-Colon intervened
11 on his behalf, telling them of his disability, she too was sprayed. Id. at 11-12. Plaintiffs allege
12 that on this occasion the intervening officers wore face coverings, and concealed the name tags
13 on their badges.² Both E.P.R. I and E.P.R. II received treatment at a local health clinic as a
14 result of the incident. Id. Because she felt that at no time she nor her sons threatened the PRPD
15 officers, Rivera-Colon filed an administrative complaint before the Auxiliary Superintendent’s
16 Office of Public Integrity (“PRPD Public Integrity”), which Plaintiffs allege was not
17 investigated.

18 Various months later, on August 8, 2007, E.P.R. II was riding his bicycle when agents
19 Jose Delgado-Ubiles (“Delgado”), Mena, and Velazquez allegedly started to pursue him in their
20 patrol car. Id. at 13. The police vehicle allegedly struck E.P.R. II, causing him to fall to the
21 ground. Id. As the officers exited the vehicle the Complaint avers that neighbors tried to inform
22 Delgado, Mena, and Velazquez about his disability, but the officers handcuffed E.P.R. II and
23 made him lay face-down against the ground. Id. At this point he was allegedly held and beaten.
24 The officers then departed, allegedly leaving E.P.R. II on the ground, in pain. After being

25 ² The Complaint alleges that these included some combination of Lozada, C. Toledo, Rivera, Guzman, Gonzalez,
26 Ostalaza, or Fermaid (collectively, “Tactical Agents”). Delgado, Mena, and Velazquez were also PRPD officers assigned
to the Tactical Operations Division in the Carolina Area.

2 informed of the altercation, Rivera-Colon came home to find E.P.R. II injured and distressed.
3 Id. at 14. She then called the PDPR to file a complaint at the Loiza station, and two officers
4 came to take the complaint. E.P.R. II had to receive treatment at the local clinic that evening,
5 allegedly as a result of Delgado, Mena, and Velazquez's use of excessive force. Id. at 15.
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7 A third incident is alleged to have occurred on the morning of March 20, 2008, when
8 E.P.R. II left his house on his bicycle. At the street-corner, he encountered nearly fifteen (15)
9 police officers for the PRPD's Narcotics Unit, who are alleged to have had their badges and
10 name tags covered. Id. at 16. After seeing the officers, E.P.R. II allegedly started to pedal away
11 in fear, at which point one of the officers yanked him off his bicycle, despite the fact that a
12 neighbor shouted to the officer that E.P.R. II was disabled. Plaintiffs maintain the officer then
13 punched E.P.R. II various times and held him against the ground. Rivera-Colon then came to
14 her balcony and began to shout at the officers regarding E.P.R. II's mental disability, but they
15 allegedly responded by mocking her. When she allegedly told the officers that she had seen
16 them before and that they should know of E.P.R. II's disabilities, they threatened her with arrest.
17 Id. at 17. After the situation ended, E.P.R. II once again went to the local health clinic for first
18 aid, and Rivera-Colon filed another administrative complaint, this time with Sgt. Juan Davila
19 ("Davila"). Plaintiffs aver that the police did not have probable cause to intervene with E.P.R.
20 II. Id. at 18.

21 In addition to these incidents, where administrative complaints were filed, Plaintiffs aver
22 that the alleged events narrated above constitute part of ". . . a pervasive pattern and practice
23 of police abuse adopted years ago by members of the Narcotics and Tactical Operations
24 Divisions of the P.R.P.D. in the Carolina area, in which defendants target residents of the Villa
25 Cañona Community." Id. at 19.
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3 This is allegedly evidenced by a July 11, 2008, meeting between Matos, community
4 leaders, and various organizations, including the ACLU. Furthermore, Plaintiffs allege that
5 Toledo and other supervisors should have been aware of the abuse through his weekly meetings
6 with Matos and Rodriguez.³ Id. at 20. They also aver, although only specifically in supplemental
7 motions, that in August of 2007 the Puerto Rico Civil Rights Commission (“the Commission”)
8 sent a letter to Toledo informing him of its concern regarding alleged acts of police brutality
9 committed against young people in Villa Cañona, Loiza. The letter also informs Toledo that
10 lawyers from the Commission had attended a meeting with residents in July of that year to
11 discuss those concerns. Docket # 39-2. The Commission informed Toledo that PRPD’s
12 interventions “. . . could reflect a pattern of discrimination based on the race and social status
13 of an underprivileged segment of Puerto Rican society . . .” Docket # 39-2.

14 In light of these facts, which must be considered at face value at this stage, but may be
15 disproved at a further point in the case, Plaintiffs have made a series of claims predicated on
16 alleged violations of federal civil rights under 42 U.S.C. 1983 (“Section 1983”) and local law.
17 At the present stage this Court will only discuss Plaintiffs’ federal causes of action, which are
18 based on Section 1983 claims for alleged violations of the United States Constitution. To wit,
19 these include, Plaintiffs’ Fourth Amendment right to be free from false arrest and to be free
20 from excessive use of force, substantive due process under the Fourteenth Amendment, and the
21 Equal Protection Clause of the Fourteenth Amendment.

22 Defendants have responded to the complaint with the Motion to Dismiss Pursuant to FED.
23 R. CIV. P. 12(b)(6) averring that some of Plaintiffs’ claims for monetary damages are barred by

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25 ³ As to specific knowledge of the alleged situation in Villa Cañona, Plaintiffs plead: “Aside from the administrative
26 complaints filed by plaintiffs in each of the incidents narrated above, during the last year civil rights organizations in Puerto
Rico, including the Puerto Rico Bar Association and the Civil Rights Commission, both requested that defendant Pedro
Toledo-Dávila investigate the incidents of police abuse in Villa Cañona, and adopt effective measures to stop the practice
of Police abuse against residents of this community.” Docket # 144 at 119.

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3 the Eleventh Amendment. They also aver that facts of the complaint fail to plead a cognizable
4 claim for relief under Section 1983 as to the supervisory liability of some defendants, and that
5 Plaintiffs claims under the Fifth, Fourth (for false arrest and excessive force), and Fourteenth
6 Amendments (equal protection and substantive due process) are also defective. Plaintiffs finally
7 argue that Plaintiffs lack standing to sue, and that, in any event, Defendants are protected by the
8 doctrine of qualified immunity.

9 **Standard of Review**

10 It is well known that, “the general rules of pleading require ‘a short and plain statement
11 of the claim showing that the pleader is entitled to relief.’” Gargano v. Liberty Int’l
12 Underwriters, 572 F.3d 45, 49 (1st Cir. 2009) (FED. R. CIV. P. 8(a)(2)). The purpose of this is
13 to give a defendant fair notice of the claims against him and their grounds. Id. (citing Bell Atl.
14 Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). Therefore,
15 “even under the liberal pleading standards of FED. R. CIV. P. 8, the Supreme Court has recently
16 held that to survive a motion to dismiss, a complaint must allege ‘a plausible entitlement to
17 relief.’” Rodríguez-Ortíz v. Margo Caribe, Inc., 490 F.3d 92 (1st Cir. 2007) (citing Twombly,
18 127 S. Ct. at 1965). Although complaints do not need detailed factual allegations, the
19 “plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer
20 possibility that a defendant has acted unlawfully.” Twombly, 127 S. Ct. At 1965; see also
21 Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).

22 A plaintiff’s obligation to “provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires
23 more than labels and conclusions, and a formulaic recitation of the elements of a cause of action
24 will not do.” Twombly, 127 S. Ct. At 1965. That is, “factual allegations must be enough to raise
25 a right to relief above the speculative level, on the assumption that all allegations in the
26 complaint are true.” Parker v. Hurley, 514 F. 3d 87, 95 (1st Cir. 2008). Of course, this Court

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3 need not give credence to “. . . conclusions from the complaint or naked assertions devoid of
4 further factual enhancement.” Maldonado v. Fontanes, 568 F.3d 263, 266 (1st Cir. 2009) (citing
5 Ashcroft v. Iqbal, 129 S. Ct. 1937, 1960, 173 L. Ed. 2d 868 (2009)); see also Bell Atl. Corp.
6 v. Twombly, 550 U.S. 544, 557 (2007)). Accordingly, “[t]hreadbare recitals of the elements of
7 a cause of action, supported by mere conclusory statements, do not suffice.” Iqbal, 129 S. Ct.
8 at 1949.

9 **Applicable Law & Analysis**

10 *Eleventh Amendment*

11 Defendants argue that Plaintiffs have requested monetary damages against Matos in his
12 official capacity, as PRPD Chief in the Carolina Area, but that said claim is barred on the basis
13 of Eleventh Amendment immunity. The Eleventh Amendment protects state officials in their
14 official capacity from damages actions. The rationale behind this extension of the Eleventh
15 Amendment protection is that a claim against a state official in his or her official capacity for
16 monetary relief is an action for the recovery of money from the State. Ford Motor v. Dept. of
17 Treasury, 323 U.S. 459 (1945); Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 (1989).
18 However, this immunity does not preclude claims for injunctive relief for future actions.
19 Redondo-Borges v. U.S. Dept. Of Housing and Urban Dev., 421 F.3d 1, 7 (1st Cir. 2005).
20 Therefore all claims for damages against Defendants in their official capacities are
21 **DISMISSED with prejudice**, but the motion to dismiss as to injunctive relief under the
22 Eleventh Amendment must be **DENIED**.

23 *Supervisory Liability*

24 Besides the Tactical Officers and the Narcotics Officers alleged to have directly
25 intervened with Plaintiffs this suit also involves claims against several PRPD employees in their
26 supervisory capacity. To wit, Toledo acted as Superintendent of the PRPD; Ortiz was at the time

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3 of the Complaint, Auxiliary Superintendent of Field Operations for the PRPD in the Carolina
4 Area; Matos and Rodriguez were Chief Commanders of the Carolina Area PRPD department;
5 Quijano acted as Supervisor of the PRPD Tactical Operations Division in the Carolina Area;
6 Bauzo acted as Director of the Narcotics Division for the Carolina Area. Defendants aver that
7 Plaintiffs' allegations against the abovementioned supervisory Defendants for being
8 "responsible for the actions and policies that led to the events described in this complaint."
9 (Complaint Par. 14 and 18), and that the other defendants acted pursuant to the authority
10 delegated by Toledo and Matos, do not meet the applicable pleading standards for a Section
11 1983 claim.

12 They also correctly point out that there is no *respondent superior* liability, and
13 supervisors are not automatically liable for the acts those under their command. Carmona v.
14 Toledo, 215 F.3d 124, 132 (1st Cir. 2000). Under First Circuit case law, "supervisors may only
15 be found liable on the basis of their own acts or omissions." Febus-Rodriguez v. Betancourt-
16 Lebron, 14 F.3d 87, 91 (1st Cir. 1994). Supervisory responsibility can only constitute a claim
17 under Section 1983 if "(1) the behavior of [his] subordinates results in a constitutional violation,
18 and (2) the [supervisor]'s action or inaction was affirmative[ly] link[ed] to that behavior in the
19 sense that it could be characterized as supervisory encouragement, condonation or acquiescence
20 or gross negligence amounting to deliberate indifference." Pineda v. Toorney, 533 F.3d 50, 54
21 (1st Cir. 2009)(citing Lipsett v. University of Puerto Rico, 864 F.2d 881, 902 (1st Cir. 1988)).
22 Therefore, for Defendants behavior to equate to a possible violation this Court ". . . must find
23 that [the supervisory Defendants] knew of the risk of constitutional violations . . . but failed to
24 take reasonable steps to abate that risk." Rodriguez-Rivero v. Toledo-Davila, 2009 U.S. Dist.
25 LEXIS 102885 (D.P.R. 2009); Burrell v. Hampshire County, 307 F.3d 1, 7-8 (1st Cir. 2002).
26 They also may be liable if they encouraged, condoned, acquiesced, or were deliberately

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3 indifferent to the behavior of their subordinates, which requires effective notice. Febus-
4 Rodriguez, 14 F.3d at 93.

5 The Complaint does not compellingly plead a racial motivation for the alleged use of
6 excessive force, nor does it directly tie these events in to the alleged existence of a larger trend
7 of profiling, besides the fact that they involve allegations of excessive force in Villa Cañona.
8 Furthermore, nothing in the complaint suggests that high ranking officials were aware of the
9 specific incidents involving Plaintiffs. Of course, the public meetings might in some other
10 circumstances suffice, but the alleged general trend has only been linked to the events at bar
11 through conclusory statements, which simply cannot pass the post-Iqbal standard. What is
12 concerning is that nothing was done at the unit level regarding Rivera-Colon's alleged
13 complaints. However, no facts have been pled to indicate that the inaction went far up the chain
14 of command. Given this, only the immediate supervisors should have plausibly known about
15 the series of events described in the Complaint. However, it is plausible they might have been
16 wilfully indifferent to the allegedly violent acts of the officers who intervened with Plaintiffs.

17 Moreover, this Court finds that no solid allegations regarding the training of PDPR
18 officers has been proffered. Therefore, no supervisory liability can be found as to Matos,
19 Rodriguez, Ortiz, and Toledo, and all Section 1983 claims against them shall be **DISMISSED**
20 **with prejudice**. Nevertheless, the motion to dismiss as to Quijano and Bauzo for supervisory
21 liability must be **DENIED**.

22 *Fifth Amendment*

23 The Fifth Amendment provides that “[n]o person shall... be deprived of life, liberty, or
24 property, without due process of law...” U.S. CONST. AMEND. V. This amendment applies to
25 actions of the federal government, not those of private individuals, or of state, local or
26 municipal governments. Gerena v. Puerto Rico Legal Services, 697 F. 2d 447, 449 (1st Cir.

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3 1983); see also Martínez-Rivera v. Sánchez-Ramos, 498 F. 3d 3, 8 (1st Cir. 2007). The
4 Complaint does not allege that any of the Defendants are federal actors, but instead establishes
5 that they are Commonwealth officials acting under color of state law. Accordingly, their claims
6 pursuant to the Fifth Amendment are hereby **DISMISSED with prejudice**.

7 *Fourth Amendment False Arrest*

8 The First Circuit has summarized the requirements for a typical false arrest claim as
9 follows: “(1) the defendant intended to confine the plaintiff; (2) the plaintiff was conscious of
10 the confinement; (3) the plaintiff did not consent to the confinement; and (4) the defendant had
11 no privilege to cause the confinement.” Calero-Colon v. Betancourt-Lebron, 68 F.3d 1, 3 n. 6
12 (1st Cir. 1995) ; see also Rodriguez v. Garcia, 403 F.Supp. 2d 174, 177 (D.P.R. 2005). If taken
13 as true, the facts of the Complaint suggest that Defendants did not have probable cause to
14 intervene or stop Rivera-Colon, or her two sons, during the various incidents. However, the
15 question remains if such brief interventions can constitute arrests, or confinements.

16 In the case of Rivera-Colon, this Court understands that she was not detained by the
17 alleged use of pepper spray or threat of arrest. Furthermore, Plaintiffs’ citation of Henderson
18 v. Munn, 439 F.3d 497, 503 (8th Cir. 2006), is misleading because the use of pepper-spray came
19 in conjunction with an unquestionable detainment when the Eighth Circuit was addressing the
20 use of excessive force. The facts surrounding the third incident involving E.P.R. II are less
21 clear, because the Complaint avers that he was pinned down. Nevertheless, this Court finds that
22 these facts are more appropriately addressed under an excessive force claim. Therefore,
23 Plaintiffs’ cause of action for Fourth Amendment false arrest is **Dismissed with prejudice**.

24 *Fourth Amendment Excessive Force*

25 Excessive force claims “. . . must show that the defendant officer employed force that
26 was unreasonable under the circumstances.” McLeod-Lopez v. Algarin, 602 F.Supp.3d 330, 341

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3 (D.P.R. 2009)(citing Jennings v. Jones, 449 F.3d 2, 11 (1st Cir. 2008)); see also Kentucky v.
4 Graham, 473 U.S. 159, 166 (1985). This is an objective standard, to be determined “in light of
5 the facts and circumstances confronting [the officer], without regard to their underlying intent
6 or motivation.” Graham, 490 U.S. at 397. This must be judged through the lens of “a reasonable
7 officer on the scene.” Id.

8 Here, the Complaint has presented three separate incidents, which if true, clearly
9 constitute the infliction of unnecessary pain on each of the three (3) Plaintiffs, especially E.P.R.
10 I and E.P.R. II. The Complaint avers three separate unprovoked interventions, all involving
11 some sort of violence on the part of the PRPD against Plaintiffs. Furthermore, the use of pepper
12 spray on Rivera-Colon could also have been unreasonable depending on the circumstances.
13 Taking the facts of the Complaint as true, she does not appear to have posed an immediate threat
14 to the officers, or been at risk of evading arrest by flight.

15 At present, the allegations are sufficient to establish a Fourth Amendment Claim for
16 excessive force. As such, the motion to dismiss on these grounds will be **DENIED**.

17 *Fourteenth Amendment Substantive Due Process Clause*

18 Fourth Amendment excessive force generally supplants Fourteenth Amendment
19 substantive due process. That is, “[t]he Supreme Court has held that all claims that law
20 enforcement officers have used excessive force -- deadly or not -- in the course of ... [the]
21 ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment and its
22 ‘reasonableness’ standard, rather than under a ‘substantive due process’ approach.” McLeod-
23 Lopez, 603 F.Supp. 2d at 340(citing Graham, 490 U.S. at 395) (internal citations omitted). The
24 threshold question is whether the behavior is egregious and outrageous enough to shock the
25 contemporary conscience. Ramos-Pinero v. Puerto Rico, 453 F.3d 48, 53 (1st Cir. 2006). This
26 generally involves the intentional infliction of harm. Id.

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3 However, in the case at bar, Plaintiffs' substantive due process claims are better posed
4 as excessive force claims. Estate of Bennett v. Wainwright, 548 F.3d 155, 162 (1st Cir. 2008);
5 see also Graham, 490 U.S. at 395. They are thus better analyzed under the Fourth Amendment's
6 reasonableness standard. Id. This is because "... an alternative constitutional claim is available
7 in this case, Plaintiff's substantive due process claims on this front cannot prevail." McLeod-
8 Lopez v. Algarin, 603 F.Supp. 2d 330, 340 (D.P.R. 2009). Plaintiffs' substantive due process
9 claims are therefore **DISMISSED with prejudice.**

10 *Fourteenth Amendment Equal Protection Clause*

11 An equal protection claim based on alleged racial profiling requires showing "... that
12 the challenged law enforcement practice had a discriminatory effect and was motivated by a
13 discriminatory purpose." Carrasca v. Pomeroy, 313 F.3d 828, 834 (3rd Cir. 2002); Marshall v.
14 Colombia Lea Rel'l Hosp., 345 F.3d 1157, 1168 (10th Cir. 2003). The Complaint does not
15 compellingly plead a racial motivation for the alleged use of excessive force. In fact, none of
16 the three (3) alleged incidents include averments regarding racially disparaging language. The
17 general allegation that Villa Cañona is subject to racial discrimination does not suffice to make
18 a plausible pleading regarding the specific events in this Complaint. This Court finds that such
19 a statement is conclusory in the absence of specific facts to link the general phenomenon to the
20 discreet acts constituting the claim. Furthermore, the allegations are not averred to be connected
21 to any other trends within Puerto Rico. Therefore, this Court shall grant the motion to dismiss
22 on equal protection grounds, and those claims are therefore **DISMISSED with prejudice.**

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24 *Qualified Immunity*
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3 Qualified immunity is an affirmative defense against personal liability which may be
4 raised by state officials. *Whitfield v. Meléndez-Rivera*, 431 F. 3d 1, 6 (1st Cir. 2005). It
5 “provides a safe harbor for public officials acting under the color of state law who would
6 otherwise be liable under 42 U.S.C. §1983 for infringing the constitutional rights of private
7 parties.” *Id.*; see also *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). In determining whether
8 a defendant is entitled to qualified immunity, courts shall apply a three-part test: “(1) whether
9 the plaintiff has alleged a constitutional violation; (2) whether the law was clearly established
10 that defendants’ action violated a constitutional right of the plaintiff; and (3) whether a
11 reasonable official would have understood that his actions violated a constitutional right.”
12 *Rivera-Jiménez v. Pierluisi*, 362 F. 3d 87, 93 (1st Cir. 2004); *Jennings*, 499 F.3d at 11.

13 In the case at bar Plaintiffs have presented a valid Section 1983 cause of action against
14 certain Defendants for the use and condonation of excessive force. If true, a reasonable police
15 officer, or supervisor, would not have believed that the incidents described above were lawful
16 in light of clearly established law. Therefore, the motion to dismiss on these grounds must be
17 **DENIED.**

18 **Conclusion**

19 Based on the foregoing, Defendants’ motion to dismiss is **GRANTED in part and**
20 **DENIED in part**, and Plaintiff’s Fifth and Fourteenth Amendment claims are **DISMISSED**
21 **with prejudice**, as are all claims against Matos, Rodriguez, Ortiz, and Toledo.

22 **IT IS SO ORDERED.**

23 San Juan, Puerto Rico, this 24th day of March, 2010.

24 *S/Salvador E. Casellas*
25 Salvador E. Casellas
26 U.S. District Judge