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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Elvira Fernandez, et al.,

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No. CV 11-02001-PHX-FJM

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Plaintiffs,

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**ORDER**

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vs.

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City of Phoenix, et al.,

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Defendants.

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Before the court is plaintiffs’ motion for summary judgment (doc. 90), defendant Chrisman’s response (doc. 100), plaintiffs’ reply (doc. 103), defendant’s sur-reply (doc. 106), and plaintiffs’ motion for leave to file a response to defendant’s sur-reply and proposed response (doc. 110). We also have before us defendant’s motion to amend admissions pursuant to Fed. R. Civ. P. 36(b) (doc. 93), plaintiffs’ response (doc. 96), and defendant’s reply (doc. 98).

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Plaintiffs’ motion to respond to defendant’s sur-reply is GRANTED (doc. 110). The clerk shall file the response appended to plaintiff’s motion.

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**I**

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Plaintiff Elvira Fernandez called 911 on October 5, 2010, following an argument with her son, Daniel Frank Rodriguez. Phoenix Police Officers Richard Chrisman and Sergio Virgillo arrived at the trailer that Daniel shared with his mother. Fernandez, who was by this

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1 time at a neighbor's trailer, told the officers that Daniel had not hurt her, had no weapons,  
2 and was in the neighboring trailer alone. She asked the officers to help resolve the dispute  
3 by asking Daniel to leave. The officers knocked on Daniel's door, and when no one  
4 answered, the officers entered. Daniel immediately demanded that the officers leave. In  
5 response, Chrisman placed the muzzle of his gun against Daniel's temple. In the ensuing  
6 minutes, Chrisman re-holstered his gun, grabbed Daniel, sprayed pepper spray into his eyes,  
7 and used a Taser on him twice. When Daniel's dog began barking, Chrisman shot the dog  
8 twice, killing it instantly. Daniel then attempted to leave the trailer, at which time Chrisman  
9 aimed his gun at Daniel. Daniel took a step back and put his hands up. He had nothing in  
10 his hands. Chrisman shot Daniel twice in the chest, killing him. The following day,  
11 Chrisman was charged with second degree murder, aggravated assault, and animal cruelty.

12 Daniel's parents, Elvira Fernandez and Frank Rodriguez, filed this action against the  
13 City of Phoenix and Chrisman, asserting Fourth Amendment violations under 42 U.S.C. §  
14 1983 on behalf of Daniel, and wrongful death. On June 20, 2012, the City was dismissed  
15 from the case (doc. 71).

## 16 II

17 Plaintiffs served a Request for Admissions on April 18, 2012 ("Request"). Defendant  
18 Chrisman did not respond. Unanswered requests are deemed admitted and may be relied  
19 upon as a basis for granting summary judgment. Fed. R. Civ. P. 36(a)(3) ("A matter is  
20 admitted unless, within 30 days after being served, the party to whom the request is directed  
21 serves on the requesting party a written answer or objection addressed to the matter and  
22 signed by the party or its attorney."). Relying on Chrisman's deemed admissions, plaintiffs  
23 filed their motion for summary judgment. One week later, defendant moved to amend the  
24 admissions, claiming that he had not received the Request.

25 We may permit withdrawal or amendment of admissions "if it would promote the  
26 presentation of the merits of the action and if the court is not persuaded that it would  
27 prejudice the requesting party in maintaining or defending the action on the merits." Fed.  
28 R. Civ. P. 36(b). In deciding whether to permit amendment, we will consider factors such

1 as “whether the moving party can show good cause for the delay and whether the moving  
2 party appears to have a strong case on the merits.” Conlon v. United States, 474 F.3d 616,  
3 625 (9th Cir. 2007).

4 Chrisman claims that good cause exists for his failure to respond because, although  
5 his counsel received an email notice of service of the Request for Admissions, he did not  
6 receive a hard copy of the Request and therefore was under no obligation to respond. Motion  
7 to Amend Admissions at 2, 5. Chrisman argues that permitting the amendment of the  
8 admissions will promote the presentation of the case on its merits. Nevertheless, he asserts  
9 that if he is granted the opportunity to amend, he will invoke his Fifth Amendment privilege  
10 in response to plaintiffs’ questions, Response to MSJ at 2, ex. 100-3, which he argues will  
11 “establish a genuine issue as to material facts, thus preventing the Plaintiffs from forming any  
12 basis for summary judgment,” id. at 3.

13 Chrisman’s explanation does not constitute good cause. Counsel conceded that his  
14 office received an email notification of the Requests. Counsel also acknowledged notice of  
15 the Requests by referencing them in his Motion to Stay (doc. 46 at 2). Although counsel  
16 admittedly had notice of the Requests, he made no effort to inquire further. Then on January  
17 16, 2013, after the present motions became fully briefed, counsel notified the court that he  
18 had discovered the Requests in his office (doc. 107).

19 Allowing an amendment to the deemed admissions would not promote the  
20 presentation of the merits in this case. Chrisman’s failure to respond to the Requests is  
21 consistent with his strategy throughout this litigation to delay or avoid answering questions  
22 about the shooting under oath. Chrisman has stated that in the event we allow amendment,  
23 he will assert his Fifth Amendment rights and continue to refuse to answer plaintiffs’  
24 questions, providing no evidence to create a factual issue, as he is required to do under Rule  
25 56(e), Fed. R. Civ. P.

26 In addition, plaintiffs’ case would be significantly prejudiced by the withdrawal of  
27 defendant’s deemed admissions. Plaintiffs filed their motion for summary judgment on the  
28 dispositive motion deadline. See doc. 86. Discovery has now closed and the case is set for

1 trial on April 16, 2013. Plaintiffs will not have another opportunity to move for summary  
2 judgment or to otherwise develop their case.

3 We conclude that defendant has not established good cause for his failure to respond  
4 to the Request for Admissions. Moreover, an amendment just to assert the Fifth Amendment  
5 would be futile. Defendant's failure to come forth with contradicting evidence would lead  
6 to summary judgment anyway. Therefore, IT IS ORDERED DENYING defendant's motion  
7 to amend the deemed admissions (doc. 93). Plaintiffs' Requests are deemed admitted.

### 8 III

9 Plaintiffs move for summary judgment on count 1 (Fourth Amendment unlawful  
10 search), count 2 (Fourth Amendment excessive use of force), count 5 (negligent use of  
11 deadly force), and count 6 (grossly negligent use of deadly force).<sup>1</sup> Through the use of  
12 defendant's deemed admissions, plaintiffs have established that no genuine issue of material  
13 fact exists on any of these claims. The same would be true if defendant were allowed to  
14 amend to assert the Fifth Amendment.

### 15 A

16 Absent exigent circumstances or consent, a warrantless entry by a police officer into  
17 an individual's home is an impermissible search under the Fourth Amendment. United States  
18 v. Perea-Rey, 680 F.3d 1179, 1185 (9th Cir. 2012). Exigent circumstances exist to justify  
19 a warrantless entry by police officers if the officers have a reasonable belief that their entry  
20 is "necessary to prevent physical harm to the officers or other persons, the destruction of  
21 relevant evidence, the escape of the suspect, or some other consequence improperly  
22 frustrating legitimate law enforcement efforts." Fisher v. City of San Jose, 558 F.3d 1069,  
23 1075 (9th Cir. 2009) (citations omitted).

24 The undisputed facts show that Chrisman entered Daniel's trailer without permission  
25 and without a reasonable basis to believe that Daniel posed a threat or was committing a

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27 <sup>1</sup>Plaintiffs also asserted a claim in count 3 for violation of their constitutional right to  
28 be free from interference with their right to family society and companionship of Daniel.  
They do not move for summary judgment on this count.

1 crime. MSJ, ex. A ¶¶ 11,14-21. Daniel told Chrisman that he owned the trailer, that  
2 Chrisman did not have permission to enter, and Chrisman was asked to leave. Id. ¶¶ 10-13.  
3 In response, Chrisman drew his weapon and placed it against Daniel’s temple. Id. ¶¶ 32-34.  
4 These undisputed facts are sufficient to show that, by entering Daniel’s trailer in the absence  
5 of consent or exigency, Chrisman violated Daniel’s Fourth Amendment right to be free from  
6 unlawful searches. Summary judgment is granted on count 1.

## 7 **B**

8 In count 2, plaintiffs assert a claim for violation of Daniel’s Fourth Amendment right  
9 to be free from an excessive use of force. In counts 5 and 6, plaintiffs assert that Chrisman’s  
10 negligence and gross negligence in the use of excessive force caused Daniel’s death.

11 An objectively unreasonable use of force violates the Fourth Amendment’s  
12 prohibition against unreasonable seizures. Torres v. City of Madera, 648 F.3d 1119, 1123-24  
13 (9th Cir. 2011). Similarly, A.R.S. § 13-410(C) permits the use of lethal force “only when the  
14 peace officer reasonably believes that it is necessary . . . [t]o defend himself or a third person  
15 from what the peace officer reasonably believes to be the use or imminent use of deadly  
16 physical force.”

17 The undisputed evidence shows that Chrisman had responded to a report of an  
18 argument that had ended by the time Chrisman arrived at the scene. Daniel’s mother was at  
19 a neighbor’s trailer and thus was in no danger. Chrisman shot and killed Daniel although  
20 Daniel was unarmed and posed no threat to the officers or others, but instead had both of his  
21 hands in the air as he stepped away from Chrisman. MSJ, ex. A ¶¶ 22-25. Chrisman’s use  
22 of deadly force in such circumstances was clearly unreasonable and violated both federal and  
23 state law. Summary judgment is granted on count 2 (Fourth Amendment unlawful seizure),  
24 count 5 (negligent use of deadly force), and count 6 (grossly negligent use of deadly force).

## 25 **IV**

26 Even if we were to allow defendant to amend his admissions, we would nevertheless  
27 grant plaintiffs’ motion for summary judgment. Chrisman has stated that if allowed to amend  
28 his admissions, he would assert his Fifth Amendment privilege and refuse to answer

1 plaintiffs' questions. In that case, we would draw an adverse inference from the privilege  
2 assertion and summary judgment would be granted on that basis.

3 "When a party asserts the privilege against self-incrimination in a civil case, the  
4 district court has discretion to draw an adverse inference from such assertion." Nationwide  
5 Life Ins. Co. v. Richards, 541 F.3d 903, 911 (9th Cir. 2008) (internal citations omitted).  
6 Where the issue about which the defendant is silent is central to the case, a negative inference  
7 is appropriate because a "decision not to draw the inference poses substantial problems for  
8 an adverse party who is deprived of a source of information that might conceivably be  
9 determinative in a search for the truth." Id. A negative inference should be drawn when  
10 "there is a substantial need for the information and there is not another less burdensome way  
11 of obtaining that information." Id. at 912. However, "the inference may be drawn only when  
12 there is independent evidence of the fact about which the party refuses to testify." Id.; see  
13 also SEC v. Colello, 139 F.3d 674, 678 (9th Cir. 1998) (adverse inference permissible where  
14 other evidence corroborated facts about which defendant refused to testify).

15 Here, the allegations to which Chrisman refuses to respond are central to the case as  
16 they specifically relate to Chrisman's knowledge of the events surrounding his decision to  
17 use deadly force against Daniel. In addition, independent evidence exists in the form of  
18 Officer Virgillo's testimony that Daniel had nothing in his hands and posed no threat that  
19 would have justified the use of deadly force. Reply to MSJ, ex. A at 52, 56-57. This  
20 testimony independently demonstrates that the shooting was objectively unreasonable.  
21 Chrisman cannot show that he would be prejudiced by the adverse inference where there is  
22 ample independent evidence of his culpability. Therefore, if Chrisman were permitted to  
23 amend his admissions and assert the Fifth Amendment, the drawing of an adverse inference  
24 would be appropriate.

## 25 V

26 In conclusion, plaintiffs are entitled to summary judgment both on the basis of the  
27 deemed admissions and the adverse inference that would otherwise be given to Chrisman's  
28 assertion of his Fifth Amendment right.

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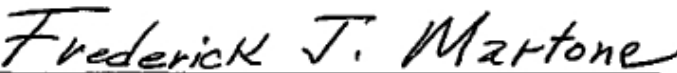
**IT IS ORDERED GRANTING** plaintiffs' motion for leave to file a response (doc. 110).

**IT IS ORDERED DENYING** defendant's motion to amend his admissions (doc. 93).

**IT IS ORDERED GRANTING** plaintiffs' motion for summary judgment on counts 1, 2, 5 and 6 (doc. 90).

Trial on the remaining issues, including damages, is set for April 16, 2013.

DATED this 5<sup>th</sup> day of March, 2013.

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**Frederick J. Martone**  
**Senior United States District Judge**