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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

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Gregory Martinez, Sr., etc.; et al,

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No. CV-12-1837-PHX-LOA

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Plaintiffs,

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**ORDER**

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vs.

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City of Avondale, etc; et al.,

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Defendants.

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For the second time in less than a month, the Court is called upon to resolve a  
disputed case management issue.

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On March 1, 2013, the last day to file an amended pleading under the Court’s case  
management order, Plaintiffs filed a Motion to Amend Complaint. (Doc. 63) Pursuant to  
Rule 15(a), Federal Rules of Civil Procedure (“Fed.R.Civ.P.”), they request leave to file  
another amended complaint to add seven Avondale police officers as defendants, in their  
individual and official capacities, and to allege violations of Plaintiffs’ rights under  
Fourth and Fourteenth Amendments to the United States Constitution pursuant to 42  
U.S.C. § 1983, and State-law claims of False Arrest and Imprisonment. (*Id.*, ¶ 4 at 2)  
The proposed Second Amended Complaint is attached to Plaintiffs’ Motion, indicating  
the additions and deletions to the First Amended Complaint, as required by Local Rule  
(“LRCiv”) 15.1.

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Defendants oppose the Motion, claiming 1) Plaintiffs unduly delayed adding these  
defendants when they knew the identities of the police officers they seek to add and the

1 factual basis of the new claims since prior to filing their original Complaint in August  
2 2012, and 2) by allowing amendment, it “will be impossible” for the parties to complete  
3 discovery by the Scheduling Order’s July 31, 2013 discovery deadline and the trial of this  
4 case will be delayed. (Doc. 69 at 5)

5 After considering the parties’ briefing, the Ninth Circuit’s controlling, extremely  
6 liberal policy in allowing amendments when timely made pursuant to Rule 15(a), and the  
7 absence of demonstrated prejudice to Defendants, the Court is compelled to grant the  
8 Motion.

### 9 **I. Background**

10 This is a 28 U.S.C. § 1983 fatal police shooting case, arising out of an October 28,  
11 2011 9-1-1 call by the decedent’s mother, asking for police assistance with her 20-year  
12 old son, Gregory Martinez, Jr., deceased. Because of the parties’ familiarity with the facts  
13 and current allegations, the Court will only discuss herein the facts material to the  
14 amendment motion.

15 Plaintiffs contend that, after Officer Kevin Sapp shot the decedent just outside of  
16 the Martinez’ home, seven Avondale police officers<sup>1</sup>unreasonably detained the decedent’s  
17 family members “for hours.” (Doc. 63 at 1) Although several family members, including  
18 three minors, witnessed the shooting death of their son or brother, Plaintiffs were  
19 allegedly not permitted to comfort each other, call their pastor, seek permission to use the  
20 restroom by seven Avondale police officers, who apparently had different roles in the  
21 separation and detention. (*Id.*) According to Plaintiffs, “[t]he restrictions placed on these  
22 traumatized individuals went beyond mere detention, but transmogrified into an actual  
23 arrest.” (*Id.*) Plaintiffs’ counsel represents that, “[d]uring depositions in this matter,  
24 Plaintiffs have learned the identities of the individual officers responsible for [Plaintiffs’]

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27 <sup>1</sup> Specifically, Plaintiffs seek to name as defendants: Officers Albert Bates, Robert  
28 Clement, Christopher Beckett, Reginald Sayles, Michael Unger, Edward Toxqui, and  
Raymond Harris, all purportedly employed as Avondale police officers on October 28,  
2011.

1 wrongful detention and arrests.” (*Id.* at 2) Plaintiffs move for leave to amend their  
2 complaint for a second time since removal to add the individual officers as named  
3 defendants, as required by 42 U.S.C. § 1983, and allege the State-law intentional torts of  
4 False Arrest and Imprisonment.

5 Defendants point out, and the docket confirms, Plaintiffs filed their initial  
6 Complaint in the Maricopa County Superior Court on August 2, 2012, alleging, *inter alia*,  
7 § 1983 excessive force claims against Officer Sapp, and, with leave of the Court after this  
8 action was removed on August 29, 2012, Plaintiffs filed their First Amended Complaint  
9 on October 30, 2012. (Docs. 1-1 at 4-10; 19) Plaintiffs’ First Amended Complaint added  
10 decedent’s three minor siblings, I.M., M.M., and L.M.,<sup>2</sup> as plaintiffs, whose interests in  
11 this action are represented by their parents and guardians *ad litem*, Plaintiffs Gregory  
12 Martinez, Sr. and Marisol Martinez. The First Amended Complaint also added § 1983  
13 wrongful seizure claims, alleging, among others, the police “[o]fficers with the City of  
14 Avondale seized Plaintiffs Gregory Martinez, Sr., Marisol Martinez, I.M., M.M., and  
15 L.M. . . . [and] refused to permit these Plaintiffs to be together or speak together; to leave  
16 the scene; or to attend to Gregory Martinez, Jr., in the hospital . . . [which] lasted for  
17 many hours.” (Doc. 19, ¶¶ 51-52 at 8) “This seizure was unreasonable and in violation of  
18 the Fourth Amendment and Due Process Clause of the Fourteenth Amendment to the  
19 United States Constitution.” (*Id.*, ¶ 54 at 8)

20 Defendants describe as “patently false” the representation that Plaintiffs “just  
21 recently discovered the identities of the officers who provided scene security and kept the  
22 witnesses from speaking to each other prior to being interviewed.” (Doc. 69 at 3)  
23 Defendants indicate that, in Plaintiffs’ October 19, 2012 Initial Disclosure Statement,  
24 doc. 16, Plaintiffs disclosed the Avondale police reports regarding this shooting, which  
25 Defendants surmise were obtained through a public records’ request and “[r]eflect a print  
26 date of January 19, 2012, which is, presumably, near the date of Plaintiffs[’] public  
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28 <sup>2</sup> The parties and the Court use the children’s initials in all public filings to protect  
their privacy interests as directed by Rule 5.2(a), Fed.R.Civ.P.

1 records request and receipt of the reports.” (Doc. 69 at 2) According to Defendants,  
2 before they filed their State-court complaint in August 2012, Plaintiffs possessed “several  
3 references to police officers interviewing and separating witnesses,” including: Officers  
4 Beckett, Sayles, Unger, Toxqui, and Clement. (*Id.* at 3) However, absent from this list of  
5 names are Officers Albert Bates and Raymond Harris.

6 Citing on *Federal Ins. Co. v. Gates Learjet Corp.*, 823 F.2d 383, 387 (10th Cir.  
7 1987) and *State Distributors, Inc. v. Glenmore Distilleries*, 738 F.2db 405, 416 (10th Cir.  
8 1987), Defendants contend that, because Plaintiffs knew or should have known of the  
9 facts on which the amendment request is based “for some time prior to the filing of the  
10 motion to amend,” leave to amend should be denied. (*Id.* at 4) Defendants argue  
11 “Plaintiffs should not be able to benefit by the delay created by their failure to properly  
12 plead their case in their original Complaint or even their First Amended Complaint.” (*Id.*)

13 In response, Plaintiffs acknowledge they had “some indication” which Avondale  
14 police officers separated the various family members from the “heavily redacted police  
15 reports” before commencing this litigation. (Doc. 72 at 2) Plaintiffs indicate, however,  
16 “these raised more questions than answers,” such as, who ordered the “sequestration and  
17 detentions,” how long did the detentions last, and under what conditions? (*Id.*) Plaintiffs  
18 describe this less-than-perfect information as “informational disadvantage,” citing  
19 *Colburn v. Upper Darby Township*, 838 F.2d 663, 667 (3d Cir. 1988). (*Id.*, n. 1)  
20 Conceding “marginal delay” may result if new defendants are added,” *id.* at 2, Plaintiffs  
21 point out that, while Plaintiffs have conducted six depositions to date, Defendants had  
22 taken only one deposition, I.M., by mid-March 2013, and have scheduled five depositions  
23 of Plaintiffs and their witnesses in April, suggesting Defendants will not be prejudiced by  
24 amendment as most defense depositions have not been completed. (Docs. 69 at 5; 72 at 3)  
25 Plaintiffs also note discovery does not close for another four months; Defendants have  
26 been on notice of the wrongful seizure issue since it was first formally raised in the  
27 October 30, 2012 First Amended Complaint, *id.* at 3; and, importantly, the amendment  
28 request is timely and consistent with the Court’s Scheduling Order, *i.e.*, “[m]otions to

1 amend pleadings and motions to join additional parties [must be filed] by **Friday, March**  
2 **1, 2013.**” (Doc. 17, ¶ 2 at 6) (footnote omitted).

### 3 **II. Amendment Motions**

4 As the Court noted in its October 23, 2012 Rule 16 Scheduling Order, motions to  
5 amend filed after the Scheduling Order’s deadline are governed, not by the liberal  
6 provisions of Fed.R.Civ.P. 15(a), but instead by the more restrictive provisions of Rule  
7 16(b) and the good-cause standard. (Doc. 17 at 6 fn. 4) Because Plaintiffs timely filed  
8 their amendment motion on March 1, 2013, the last possible day to do so under the  
9 Scheduling Order, the liberal provisions of Rule 15(a) apply to their motion. *See Schultz*  
10 *v. Wal-Mart Stores, Inc.*, 68 Fed. Appx. 130, 132 (9th Cir. 2003); *Coleman v. Quaker*  
11 *Oats Co.*, 232 F.3d 1271, 1294 (9th Cir. 2000); *Johnson v. Mammoth Recreations, Inc.*,  
12 975 F.2d 604, 610 (9th Cir. 1992).

13 Federal Rule of Civil Procedure 15(a) instructs district courts that “leave [to  
14 amend] shall be freely given when justice so requires.” “In the absence of any apparent or  
15 declared reason - such as undue delay, bad faith or dilatory motive on the part of the  
16 movant, repeated failure to cure deficiencies by amendments previously allowed, undue  
17 prejudice to the opposing party by virtue of allowance of the amendment, futility of  
18 amendment, etc. - the leave sought should, as the rules require, be freely given.” *Schultz*,  
19 68 Fed. Appx. at 132 (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962) (internal  
20 quotation marks omitted). “The Federal Rules reject the approach that pleading is a game  
21 of skill in which one misstep by counsel may be decisive to the outcome and accept the  
22 principle that the purpose of pleading is to facilitate a proper decision on the merits.” *Id.*  
23 (citation and internal quotation marks omitted). “The strong policy permitting amendment  
24 is to be applied with ‘extreme liberality.’” *Id.* (quoting *Eminence Capital, L.L.C. v.*  
25 *Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (citation omitted in original).

26 The Ninth Circuit strongly endorses a liberal approach to allowing amendments.  
27 *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (“[W]e have repeatedly stressed that  
28 the [district] court must remain guided by the underlying purpose of Rule 15 . . . to

1 facilitate decision on the merits, rather than on the pleadings or technicalities.”) (citing  
2 Rule 15(a)(2) and quoting *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987) (internal  
3 quotation marks omitted), partially superceded by statute. Leave to amend, however, is  
4 not granted automatically. *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir.  
5 1990); *see also Zivkovic v. S. California Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002)  
6 (no abuse of discretion denying motion to amend complaint to allege additional causes of  
7 action that would have required further discovery, which was to close five days after the  
8 motion to amend was filed.) (citing *Solomon v. North Am. Life & Cas. Ins. Co.*, 151 F.3d  
9 1132, 1139 (9th Cir. 1998) (affirming the district court’s denial of motion to amend filed  
10 on the eve of the discovery deadline).

11 District courts commonly consider the four *Foman* factors when determining  
12 whether to grant leave to amend: (1) bad faith on the part of the movant; (2) undue delay;  
13 (3) prejudice to the opposing party; and (4) futility of the proposed amendment. *Lockheed*  
14 *Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 986 (9th Cir. 1999); *Bowles v.*  
15 *Reade*, 198 F.3d 752, 757 (9th Cir. 1999). These factors do not merit equal consideration.  
16 “Prejudice to the opposing party is the most important factor.” *Jackson*, 902 F.2d at 1387  
17 (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330-31 (1971)  
18 (district court “required” to take potential prejudice into account in deciding Rule 15(a)  
19 motion). “Absent prejudice, or a strong showing of any of the remaining *Foman* factors,  
20 there exists a presumption under Rule 15(a) in favor of granting leave to amend.”  
21 *Eminence Capital*, 316 F.3d at 1052 (citation omitted). “The party opposing leave to  
22 amend bears the burden of showing prejudice.” *DCD Programs, Ltd v. Leighton*, 833  
23 F.2d 183, 187 (9th Cir. 1987) (citation omitted).

24 “A need to reopen discovery and therefore delay the proceedings supports a  
25 district court’s finding of prejudice from a delayed motion to amend.” *Lockheed Martin*  
26 *Corp.*, 194 F.3d at 986; *see also Johnson v. Couturier*, 2009 WL 256546, at \*3 (E.D. Cal.  
27 Feb. 3, 2009) (finding prejudice where a defendant’s late addition would make it  
28 “extremely difficult and inconvenient” for the defendant to catch up with discovery).

1           The Ninth Circuit also instructs district courts that undue delay alone is insufficient  
2 to justify denying a motion to amend. *See Bowles*, 198 F.3d at 758 (“Undue delay by  
3 itself . . . is insufficient to justify denying a motion to amend.”); *see also Owens v. Kaiser*  
4 *Found. Health Plan, Inc.*, 244 F.3d 708, 712-13 (9th Cir. 2001) (applying this rule from  
5 *Bowles* and affirming leave to amend); *Roberts v. Arizona Bd. of Regents*, 661 F.2d 796,  
6 798 (9th Cir. 1981) (“Ordinarily, leave to amend pleadings should be granted regardless  
7 of the length of time of delay by the moving party absent a showing of bad faith by the  
8 moving party or prejudice to the opposing party.”) (citations omitted). A moving party  
9 may be precluded from asserting an amendment on the basis of undue delay where the  
10 matters asserted in the amendment were known to them from the beginning of the suit.  
11 *Komie v. Buehler Corp.*, 449 F.2d 644, 648 (9th Cir. 1971) (finding that where the  
12 moving party filed a motion to amend answer 31 months after the answer was filed, three  
13 weeks before the trial date, and the prejudice to the opposing party was evident, the trial  
14 court did not abuse its discretion in denying leave to amend); *Mende v. Dun & Bradstreet,*  
15 *Inc.*, 670 F.2d 129, 131 (9th Cir. 1982) (affirming denial of motion for leave to amend  
16 complaint 25 months after the original complaint was filed).

17           Amendment may also be denied on the basis of futility if the amended pleading  
18 itself would be subject to dismissal. *Gentala v. City of Tucson*, 213 F.3d 1055, 1061 (9th  
19 Cir. 2000) (“[F]utility of amendment can, by itself, justify the denial of a motion for leave  
20 to amend.”) (citation and internal quotation marks omitted). “[A] proposed amendment is  
21 futile only if no set of facts can be proved under the amendment to the pleadings that  
22 would constitute a valid and sufficient claim or defense.” *Sweaney v. Ada County*, 119  
23 F.3d 1385, 1393 (9th Cir. 1997) (citation and internal quotation marks omitted); *see also*  
24 *Ortega Melendres v. Arpaio*, 2008 WL 4174918, at \*2-3 (D. Ariz. Sept. 5, 2008)  
25 (rejecting use of “[R]ule 15(a) as a vehicle for hearing arguments that are clearly more  
26 properly suited to a 12(b)(1), 12(b)(6) or Summary Judgment Motion.”)

### 27 **III. Discussion**

28           Because a “scheduling order controls the subsequent course of the action unless

1 modified by the court[.]” *Johnson*, 975 F.2d at 608 (citation omitted), Defendants offer  
2 no authority, and this Court has found none, that a timely motion to amend filed before  
3 expiration of the amendment deadline, which motion otherwise complies with a district  
4 court’s local rules, should result in a finding of untimeliness and be denied. *See Barker v.*  
5 *Hertz Corp.*, 2007 WL 4410253, at \*2 (D. Ariz. Dec. 13, 2007) (denying leave to amend  
6 where party failed to make motion to amend and attach proposed amended complaint),  
7 *affirmed* by 350 Fed. Appx. 176 (9th Cir. 2009).

8         Assuming *arguendo* the truthfulness of Plaintiffs’ wrongful seizure claims and  
9 proposed allegations, as the Court must, there is clear Ninth Circuit authority that an  
10 unreasonable detention of a witness solely for investigative purposes or other person  
11 without a founded suspicion of criminal activity is unconstitutional. *See, e.g., Maxwell v.*  
12 *County of San Diego*, \_\_\_ F.3d \_\_\_, 2013 WL 542756 (9th Cir. Feb. 14, 2013); *United*  
13 *States v. Ward*, 488 F.2d 162 (9th Cir. 1973) (*en banc*); *Walker v. City of Orem*, 451 F.3d  
14 1139, 1148 (10th Cir. 2006). At this pleading stage, Plaintiffs’ requested amendment is  
15 not futile and Defendants have not argued that it is.

16         Defendants have not made a strong showing of bad faith and prejudice, much less  
17 carried their burden of doing so. *DCD Programs*, 833 F.2d at 187. While the parties have  
18 engaged in substantial discovery to date, Defendants have only taken one deposition prior  
19 to receiving notice of Plaintiffs’ amendment motion. Like the District Judge noted in a  
20 recent Arizona federal case granting leave to amend, “the new allegations Plaintiffs seek  
21 to add in their amended complaint are based on evidence Defendant had in its possession,  
22 and arise under the same facts as the previous allegations. Thus, the prejudicial effect on  
23 Defendants prior discovery of granting leave to amend is negligible.” *Capuano v.*  
24 *Kenneth Eisen & Associates, Ltd.*, 2012 WL 2376675, at \*5 (D. Ariz. June 22, 2012).  
25 Moreover, discovery in the case *sub judice* has not closed and all parties, including the  
26 newly-added defendants, have over four months to complete all discovery by the July 31,  
27 2013 discovery deadline, which is likely if the parties maintain their due diligence and  
28 efforts to do so. *See Canal Properties, LLC v. Alliant Tax Credit V, Inc.*, 220 Fed. Appx.

1 699, 700–01 (9th Cir. 2007) (district court did not abuse discretion by denying leave to  
2 amend where discovery had closed, the time for dispositive motions had passed, and was  
3 made just a few weeks before trial). Finally, no dispositive motions have been filed and  
4 there is no trial date set at this time.

#### 5 **IV. Conclusion**

6 While “[a] litigant who ignores a case-management deadline does so at his peril[.]”  
7 *Chao v. Westside Drywall, Inc.*, 254 F.R.D. 651 (D. Or. Jan. 6, 2009) (citation omitted), a  
8 litigant who timely complies with a case-management deadline to amend pleadings, even  
9 when such motion is filed on the last authorized day to do so and is otherwise compliant  
10 with a district court’s local rules, the Ninth Circuit instructs the motion should be  
11 granted. The Court finds Defendants have not demonstrated prejudice, bad faith, or any  
12 other permissible ground to overcome the presumption that Plaintiffs’ amendment  
13 request should be allowed.

14 Based on the foregoing,

15 **IT IS ORDERED** that Plaintiff’s Motion to Amend Complaint, doc. 63, is  
16 **GRANTED**. Pursuant to LRCiv 15.1, as amended on December 1, 2012, Plaintiffs must  
17 1) remove all fictitious defendants named as John and Jane Does I-X and Black Entities  
18 I-V in the caption and body of the Second Amended Complaint; 2) remove all bolding in  
19 the caption of the Second Amended Complaint as such bolding is not authorized by the  
20 Local Rules; and 3) file the Second Amended Complaint, lodged at doc. 63-1 as modified  
21 by this Order, on all parties under Rule 5 of the Federal Rules of Civil Procedure **within**  
22 **seven (7) days** of the filing of this Order and promptly serve all Defendants. *See* LRCiv  
23 15.1. The Court encourages defense counsel and each newly-named defendant to consider  
24 voluntarily waiving service of the Second Amended Complaint pursuant to Rule 4(d),

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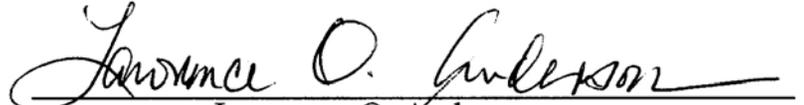
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1 Fed.R.Civ.P., to avoid unnecessary expenses and delay of serving the summons and  
2 Second Amended Complaint. Rule 4(d)(1), Fed.R.Civ.P.

3 Dated this 22<sup>nd</sup> day of March, 2013.

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6 Lawrence O. Anderson  
United States Magistrate Judge

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