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**IN THE UNITED STATES DISTRICT COURT**

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**FOR THE DISTRICT OF ARIZONA**

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Gary John Emerson,

No. CV-15-00093-PHX-ROS (ESW)

10

Plaintiff,

**ORDER**

11

v.

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Corizon Health Services, et al.,

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Defendants.

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By separate Order, the Court granted Plaintiff’s Motion (Doc. 42) requesting leave to file a Second Amended Complaint (Doc. 47). In accordance with the Court’s continuing obligation to screen prisoners’ complaints, 28 U.S.C. § 1915A(a), the Court screens the Second Amended Complaint (Doc. 48) as follows.

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**I. DISCUSSION**

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The Court has a continuing obligation to screen complaints brought by prisoners seeking relief against an officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof that is legally frivolous, fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from suit. 28 U.S.C. § 1915(A)(b)(1), (2).

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“Failure to state a claim under § 1915A incorporates the familiar standard applied in the context of failure to state a claim under Federal Rule of Civil Procedure

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1 12(b)(6).” *Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th Cir. 2012). “The Rule  
2 12(b)(6) standard requires a complaint to ‘contain sufficient factual matter, accepted as  
3 true, to state a claim to relief that is plausible on its face.’” *Id.* (quoting *Ashcroft v. Iqbal*,  
4 556 U.S. 662, 678 (2009)). Thus, in reviewing Plaintiff’s Second Amended Complaint,  
5 the Court must accept as true all well-pled factual allegations and draw all reasonable  
6 inferences therefrom. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007);  
7 *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1296-98 (9th Cir. 1998). “A claim has  
8 facial plausibility when the plaintiff pleads factual content that allows the Court to draw  
9 the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*,  
10 556 U.S. at 678. In addition, the Court must liberally construe the Second Amended  
11 Complaint. *See Wilhelm*, 680 F.3d at 1121 (“We construe pro se complaints liberally and  
12 may only dismiss a pro se complaint for failure to state a claim if it appears beyond doubt  
13 that the plaintiff can prove no set of facts in support of his claim which would entitle him  
14 to relief.”) (internal quotation marks and citation omitted).

15 Plaintiff’s First Amended Complaint raises an Eighth Amendment medical care  
16 claim against a number of Defendants. In its January 11, 2018 Order, the Court found  
17 that Plaintiff adequately stated a claim against only Defendant Corizon. (Doc. 36 at 9-  
18 11). The Court dismissed Defendants Lavoy, Horwitz, Lasac, Peretra, Ryan, Robertson,  
19 Shuman, Fizer, Smith-Whitson, Grafton, and Johnson from the First Amended Complaint  
20 without prejudice.<sup>1</sup> (*Id.* at 12). The proposed Second Amended Complaint contains  
21 additional factual allegations against Defendants Lavoy, Horwitz, Lasac, Grafton,  
22 Johnson, Ryan, Robertson, Shuman, Fizer, and Smith-Whitson. As discussed below, the  
23 Court finds that Plaintiff has corrected the deficiencies identified in the Court’s January  
24 11, 2018 Order with respect to the claim against these Defendants.<sup>2</sup> Because the Second

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26 <sup>1</sup> The names of the Defendants referenced in this Order are in accordance with  
27 how the names are spelled in the Second Amended Complaint. Defendants Horwitz and  
Peretra’s names have also been spelled “Horowitz” and “Pereira” in prior Court filings.

28 <sup>2</sup> The Court dismissed Defendant Peretra from the First Amended Complaint for

1 Amended Complaint does not amend the allegations against Defendant Corizon, the  
2 Court will order Defendant Corizon to answer the Second Amended Complaint for the  
3 reasons explained in the Court’s prior Order (Doc. 36 at 9-11).

4 **A. Defendants Lavoy, Horwitz, and Lasac**

5 In dismissing Defendants Lavoy, Horwitz, and Lasac from the First Amended  
6 Complaint, the Court explained that Plaintiff did not allege facts suggesting that  
7 Defendants Lavoy, Horwitz, and Lasac knew Plaintiff was continuing to experience pain  
8 or that they deliberately delayed Plaintiff’s treatment. (Doc. 36 at 6). In his Second  
9 Amended Complaint, Plaintiff asserts that Defendants Lavoy, Horwitz, and Lasac “failed  
10 to prescribe medications that Corizon would authorize as a direct consequence of their  
11 actions I did not have medication to relieve the pains of my medical conditions.” (Doc.  
12 48 at 22). The Court finds that for screening purposes, the Second Amended Complaint  
13 adequately states an Eighth Amendment medical care claim against Defendants Lavoy,  
14 Horwitz, and Lasac. The Court will require Defendants Lavoy, Horwitz, and Lasac to  
15 answer the Second Amended Complaint.

16 **B. Defendant Ryan**

17 The Court found that the First Amended Complaint failed to state an Eighth  
18 Amendment medical care claim against Defendant Ryan because it does not allege facts  
19 suggesting that Defendant Ryan knew of a significant risk to Plaintiff’s health and acted  
20 with deliberate indifference to that risk. (Doc. 36 at 7). The Second Amended Complaint  
21 contains the additional allegation against Defendant Ryan, which asserts that Defendant  
22 Ryan

23 is aware that Corizon is not providing inmates with

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25 failure to state a claim. (Doc. 36 at 6). Although the Second Amended Complaint lists  
26 Defendant Peretra as a Defendant, no new allegations against Defendant Peretra have  
27 been added. In a separately issued Report and Recommendation, the undersigned will  
28 recommend that the Court dismiss Defendant Peretra from the Second Amended  
Complaint. The Second Amended Complaint also names Defendant Townsend, who has  
been dismissed from this action for failure to timely serve. The undersigned will also  
recommend that the Court dismiss Defendant Townsend from the Second Amended  
Complaint.

1 medication that is helping out our conditions. Ryan  
2 nevertheless refuses to acting with deliberate indifference  
3 direct Corizon to provide us these meds that help. In fact  
4 Corizon staff in East Unit advised me that he has directed not  
to give us medications that are effective for our pain.

5 (Doc. 48 at 22). Liberally construed, the Court finds that the Second Amended  
6 Complaint adequately states a claim against Defendant Ryan. Defendant Ryan will be  
7 required to answer the Second Amended Complaint.

### 8 **C. Defendants Grafton and Johnson**

9 The Court dismissed Defendants Grafton and Johnson from the First Amended  
10 Complaint because Plaintiff did not allege that they were aware of Plaintiff's medical  
11 need. (Doc. 36 at 8). The Second Amended Complaint corrects this deficiency by  
12 alleging that Defendants Grafton and Johnson "[b]y my visits and communications to  
13 them and through HNRs were aware the pain meds were not helping. [T]hey  
14 nevertheless refused to give me meds that helped." (Doc. 48 at 23). The Court will  
15 require Defendants Grafton and Johnson to answer the Second Amended Complaint.

### 16 **D. Defendants Robertson, Shuman, Fizer, and Smith-Whitson**

17 Similar to the reasons for dismissing the above Defendants, the Court dismissed  
18 Robertson, Shuman, Fizer, and Smith-Whitson from the First Amended Complaint  
19 because Plaintiff did not allege any facts suggesting that those Defendants were aware of  
20 a significant risk to Plaintiff's health or acted with deliberate indifference to that risk.

21 (Doc. 36 at 7). The Second Amended Complaint includes the additional allegation that  
22 through inmate complaints and [Plaintiff's] complaints,  
23 Robertson, Shuman, Fizer, Smith-Whitson though they have  
delegated duty to ensure we inmates get effective care from  
Corizon have refused to ensure this is done.

24 Robertson as the Cheif [sic] Medical Officer to ASPC has  
25 taken affirmative actions to ensure that the treatment we  
recieve [sic] is ineffective.

26 (Doc. 48 at 23). Liberally construed, the Court finds that the Second Amended  
27 Complaint corrects the deficiencies in the Eighth Amendment claim against Defendants  
28 Robertson, Shuman, Fizer, and Smith-Whitson. As such, Robertson, Shuman, Fizer, and

1 Smith-Whitson will be required to answer the Second Amended Complaint.

2 **II. CONCLUSION**

3 Based on the foregoing,

4 **IT IS ORDERED** that Defendants Corizon, Lavoy, Horwitz, Lasac, Ryan,  
5 Grafton, Johnson, Robertson, Shuman, Fizer, and Smith-Whitson must answer the  
6 Second Amended Complaint.

7 **IT IS FURTHER ORDERED** that:

8 1. The Clerk of Court shall send Plaintiff a service packet including the Second  
9 Amended Complaint, this Order and the Court's January 11, 2018 Order (Doc. 36), and a  
10 copy of the Marshal's Process Receipt & Return form (USM-285) and Notice of Lawsuit  
11 & Request for Waiver of Service of Summons form for Defendants Lavoy, Horwitz,  
12 Lasac, Ryan, Grafton, Johnson, Robertson, Shuman, Fizer, and Smith-Whitson.

13 2. Plaintiff shall complete<sup>3</sup> and return the service packet to the Clerk of Court  
14 within 21 days of the date of filing of this Order. The United States Marshal will not  
15 provide service of process if Plaintiff fails to comply with this Order.

16 3. If Plaintiff does not either obtain a waiver of service of the summons or  
17 complete service of the Summons and Second Amended Complaint on a Defendant  
18 within 90 days of the filing of the Second Amended Complaint or within 60 days of the  
19 filing of this Order, whichever is later, the action may be dismissed as to each Defendant  
20 not served. Fed. R. Civ. P. 4(m); LRCiv 16.2(b)(2)(B)(i).

21 4. The United States Marshal shall retain the Summons, a copy of the Second  
22 Amended Complaint, and a copy of this Order and the Court's January 11, 2018 Order

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23 <sup>3</sup> If a Defendant is an officer or employee of the Arizona Department of  
24 Corrections, Plaintiff shall list the address of the specific institution where the officer or  
25 employee works. Service cannot be effected on an officer or employee at the Central  
26 Office of the Arizona Department of Corrections unless the officer or employee works  
there.

1 (Doc. 36) for future use.

2 5. The United States Marshal must notify unserved Defendants of the  
3 commencement of this action and request waiver of service of the summons pursuant to  
4 Fed. R. Civ. P. 4(d). The notice to Defendants must include a copy of this Order and the  
5 Court's January 11, 2018 Order (Doc. 36). The Marshal must immediately file signed  
6 waivers of service of the summons. If a waiver of service of summons is returned as  
7 undeliverable or is not returned by a Defendant within 30 days from the date the request  
8 for waiver was sent by the Marshal, the Marshal must:

9 (a) Personally serve copies of the Summons, Second Amended Complaint,  
10 this Order, and the Court's January 11, 2018 Order (Doc. 36), upon Defendants pursuant  
11 to Fed. R. Civ. P. 4(e)(2); and

12 (b) Within 10 days after personal service is effected, file the return of service  
13 for Defendants, along with evidence of the attempt to secure a waiver of service of the  
14 summons and of the costs subsequently incurred in effecting service upon Defendants.  
15 The costs of service must be enumerated on the return of service form (USM-285) and  
16 must include the costs incurred by the Marshal for photocopying additional copies of  
17 the Summons, Second Amended Complaint, this Order, and the Court's January 11,  
18 2018 Order (Doc. 36) and for preparing new process receipt and return forms (USM-  
19 285), if required. Costs of service will be taxed against the personally served  
20 Defendants pursuant to Fed. R. Civ. P. 4(d)(2), unless otherwise ordered by the Court.

21 **6. A Defendant who agrees to waive service of the Summons and Second**  
22 **Amended Complaint must return the signed waiver forms to the United States**  
23 **Marshal, not the Plaintiff.**

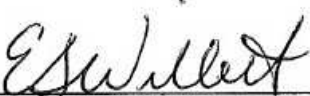
24 7. Defendants must answer the Second Amended Complaint or otherwise respond  
25 by appropriate motion within the time provided by the applicable provisions of Fed.  
26 R. Civ. P. 12(a).

27 8. Any answer or response must state the specific Defendant by name on whose  
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behalf it is filed. The Court may strike any answer, response, or other motion or paper that does not identify the specific Defendant by name on whose behalf it is filed.

Dated this 7th day of May, 2018.

  
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Eileen S. Willett  
United States Magistrate Judge