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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 William Lanny Upton,  
10 Plaintiff,

11 v.

12 Corizon Health Care Incorporated, et al.,  
13 Defendants.  
14

No. CV-17-01502-PHX-JAT

**ORDER**

15 Pending before the Court is Plaintiff William Lanny Upton's ("Plaintiff") Motion  
16 to Amend Complaint (hereinafter, "Motion") (Doc. 36), to which Defendant Corizon  
17 Health Care Incorporated ("Defendant") filed a Response (Doc. 40), and Plaintiff filed a  
18 Reply (Doc. 54).

19 On August 21, 2017 the Court issued a Scheduling Order which set  
20 October 17, 2017 as the deadline for amendment of pleadings. (Doc. 10 at 1). "[O]nce the  
21 district court has filed a pretrial scheduling order pursuant to Rule 16 which establishes a  
22 timetable for amending pleadings, a motion seeking to amend pleadings is governed first  
23 by Rule 16(b), and only secondarily by Rule 15(a)." *Jackson v. Laureate, Inc.*, 186 F.R.D.  
24 605, 607 (E.D. Cal. 1999) (citing *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604,  
25 607–08 (9th Cir. 1992)). Therefore, a party seeking leave to amend their complaint after  
26 the deadline contained in a scheduling order has passed should first move the court to  
27 modify that scheduling order. *See Johnson*, 975 F.2d at 608–09 (explaining that the Ninth  
28 Circuit Court of Appeals does not view a motion to amend the complaint as a motion to

1 modify the scheduling order). Under Rule 16, a scheduling order “may be modified only  
2 for good cause and with the judge’s consent.” Fed. R. Civ. P. 16(b)(4).

3 Even though the Scheduling Order’s October 17, 2017 deadline for amendments  
4 had passed, Plaintiff’s Motion did not request that the Court modify the Scheduling Order,  
5 nor discuss whether Plaintiff has demonstrated “good cause” justifying the amendment  
6 pursuant to Rule 16(b). (*See* Doc. 36). Rather, Plaintiff solely moved to amend his  
7 Complaint pursuant to Rule 15(a)(2). (*See id.*). In its Response, Defendant also failed to  
8 raise the correct legal standard and, instead, argued that Plaintiff’s Motion should be denied  
9 as untimely and for its failure to comply with Rule 15(a)(2) and LRCiv 15.1(a). (*See* Doc.  
10 40). Only in his Reply does Plaintiff argue that he has “good cause” for the proposed  
11 amendment. (*See* Doc. 54). However, in arguing that Plaintiff has “good cause” for the  
12 proposed amendment to his Complaint, Plaintiff makes new arguments which it did not  
13 raise in its Motion and which Defendant has not had the opportunity to respond to.<sup>1</sup> For  
14 this reason, the Court will order Defendant to file a surreply responding to the new  
15 arguments which Plaintiff makes in its Reply.

16 If the Court grants Plaintiff leave to amend, the Court is, at present, disinclined to  
17 modify the deadlines respective to trial. Plaintiff’s proposed amendment alleges that  
18 Defendant “continued a pattern and practice of deliberate indifference through the time that  
19 this matter was pending before this Court.” (Doc. 36 at 2). In an attempt to demonstrate the  
20 ongoing nature of the violation, Plaintiff’s amendment covers the 267-day period from  
21 May 18, 2017,<sup>2</sup> the date of Plaintiff’s alleged last treatment with Dr. Rakkar, through  
22 Plaintiff’s alleged restarting of chemotherapy with Dr. Chang on February 9, 2018.  
23 (Docs. 36 at 2; 36-1 at 5). Although Defendant requests that the Court extend the deadlines  
24 respective to trial so that Defendant “may adequately prepare for its defense of this brand  
25 new claim[,]” (Doc. 40 at 10), it is unclear to the Court what further discovery or  
26 preparation Defendant could possibly need. As the contractor responsible for providing

27 <sup>1</sup> Arguments made for the first time in a reply are generally waived.  
28 *U.S. v. Romm*, 455 F.3d 990, 997 (9th Cir. 2006).

<sup>2</sup> Notably, Plaintiff filed his Complaint on May 17, 2017. (*See* Doc. 1).

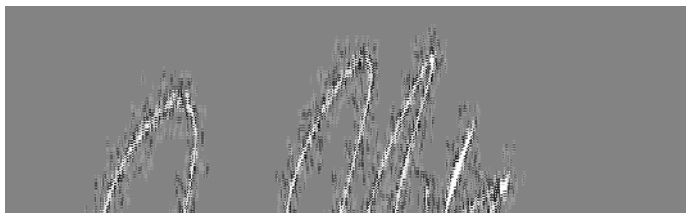
1 healthcare to inmates (including Plaintiff), Defendant clearly already has access to  
2 Plaintiff's medical records covering the 267-day time frame Plaintiff seeks to add to his  
3 Complaint. Indeed, Plaintiff's counsel received the medical records covering this time  
4 frame from counsel for Defendant, (Doc. 54-1 ¶¶ 4-5), and Defendant even previously  
5 submitted clinical records covering this time frame along with its Motion for Summary  
6 Judgment, (*see* Doc. 40 at 3 ("Out of an abundance of caution, because Plaintiff's requested  
7 relief was slightly ambiguous in terms of the declaratory relief sought, Corizon  
8 incorporated Plaintiff's clinical records from April 18, 2017 through April 5, 2018 to  
9 demonstrate Plaintiff's extensive, ongoing course of care.")). It further appears to the Court  
10 that this situation is not unlike that of a personal injury case where a plaintiff's medical  
11 needs, treatments, and suffering may continue well past the cut-off for discovery.  
12 Therefore, it is difficult for the Court to appreciate what possible prejudice Defendant  
13 might incur if the Court were to grant Plaintiff's Motion but not modify the deadlines  
14 respective to trial.

15 Accordingly,

16 **IT IS ORDERED** that Defendant file a surreply by **Monday, February 11, 2019**  
17 **at 8:00 a.m.** responding to the new arguments raised in Plaintiff's Reply (Doc. 54) and  
18 discussing specifically what further discovery or preparation Defendant will need if the  
19 Court were to grant Plaintiff's Motion to Amend Complaint (Doc. 36).<sup>3</sup>

20 **IT IS FURTHER ORDERED** that all deadlines respective to trial remain in force  
21 at this time.

22 Dated this 5th day of February, 2019.



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<sup>3</sup> The Court is not now granting Plaintiff's Motion to Amend Complaint (Doc. 36).