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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

William W. Castle,
Plaintiff,

vs.

Eurofresh, Inc., et al.,
Defendants.

) No. CV 09-8114-PCT-MHM (DKD)

) **ORDER**

Plaintiff William W. Castle filed this civil rights action under the Americans with Disabilities Act (ADA) and the Rehabilitation Act (RA) against Eurofresh Farms, Inc. (Eurofresh); the State of Arizona; the Arizona Department of Corrections (ADC); Dora Schriro, former Director of ADC; and Charles Ryan, current Director of ADC (State Defendants). (Doc. #1.) Eurofresh and the State Defendants separately moved to dismiss. (Doc. ##20, 27.) On March 8, 2010, the Court granted the motions and dismissed some claims with prejudice and others with leave to amend. (Doc. #38.) The Court gave Plaintiff 30 days to file an amended complaint or the case would be dismissed; the Court also provided Plaintiff with the Court-approved complaint form. (Id. at 21.)

Plaintiff now moves for a stay of the proceedings and entry of judgment pending appeal to the United States Court of Appeals for the Ninth Circuit. (Doc. #43.) Plaintiff filed a notice of appeal on April 1, 2010. (Doc. #44.)

1 The Court will deny the motion to stay the proceedings and give Plaintiff an additional
2 15 days to file an amended complaint.

3 **I. Analysis**

4 Although the filing of a notice of appeal generally divests the district court of
5 jurisdiction over those aspects of the case involved in the appeal, the district court's
6 jurisdiction is not affected when a litigant files a notice of appeal from an unappealable order.
7 Estate of Connors v. O'Connor, 6 F.3d 656, 658 (9th Cir. 1993). "When a Notice of Appeal
8 is defective in that it refers to a non-appealable interlocutory order, it does not transfer
9 jurisdiction to the appellate court, and so the ordinary rule that the district court cannot act
10 until the mandate has issued on the appeal does not apply." Nascimento v. Dummer, 508
11 F.3d 905, 908 (9th Cir. 2007). In such a case, the district court "may disregard the purported
12 notice of appeal and proceed with the case, knowing that it has not been deprived of
13 jurisdiction." Ruby v. Secretary of the United States Navy, 365 F.2d 385, 389 (9th Cir.
14 1966).

15 Plaintiff asserted in his notice of appeal that he is appealing from "the final judgment
16 and order entered in this action on the 8th day of March, 2010." (Doc. #44.) But, in fact, no
17 final judgment has been entered, and the Court's Order dismissing the complaint also
18 granted Plaintiff leave to amend. The March 8 Order is not an appealable final order under
19 28 U.S.C. § 1291; the Order is not an interlocutory order generally appealable under 28
20 U.S.C. § 1292(a); and the Court did not provide the statement necessary to make the Order
21 an interlocutory order appealable under 28 U.S.C. § 1292(b). Thus, Plaintiff's April 1, 2010
22 notice of appeal refers to a non-appealable interlocutory order and, therefore, Plaintiff's
23 notice of appeal did not divest the Court of jurisdiction.

24 The Court will not stay proceedings but will give Plaintiff an additional 15 days to file
25 an amended complaint.

26 **IT IS ORDERED:**

27 (1) The reference to the Magistrate Judge is withdrawn as to Plaintiff's Motion to
28 Stay Proceedings and Entry of Judgment Pending Appeal (Doc. #43.)

1 (2) Plaintiff's Motion to Stay Proceedings and Entry of Judgment Pending Appeal
2 (Doc. #43) is denied.

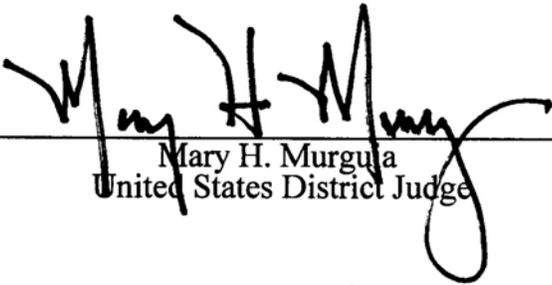
3 (3) Plaintiff has **15 days** from the date this Order is filed to file a first amended
4 complaint in compliance with this Order.

5 (4) If Plaintiff fails to file an amended complaint within 15 days, the Clerk of Court
6 must, without further notice, enter a judgment of dismissal of this action, with prejudice, that
7 states that the dismissal may count as a "strike" under 28 U.S.C. § 1915(g).

8 (5) **If Plaintiff files an amended complaint within 15 days, the Court will issue**
9 **a screening order pursuant to 28 U.S.C. § 1915A; Defendants must NOT answer the**
10 **Amended Complaint or otherwise respond by appropriate motion pursuant to Rule**
11 **12(a) of the Federal Rules of Civil Procedure until after the Court issues its screening**
12 **order.**

13 (6) The Clerk of Court must mail Plaintiff a court-approved form for filing a civil
14 rights complaint by a prisoner.

15 DATED this 16th day of April, 2010.

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20 Mary H. Murgula
21 United States District Judge
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