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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

VICTOR M. CORREA,

Plaintiff,

No. CIV S-10-603 GGH P

vs.

R.L. GOWER, et al.,

Defendants.

ORDER

_____ /

Plaintiff, a state prisoner proceeding pro se, seeks relief pursuant to 42 U.S.C. § 1983. Plaintiff has consented to the jurisdiction of the undersigned. See docket # 4, filed on March 26, 2010. Plaintiff’s original complaint was dismissed by order, filed on June 2, 2010 (docket # 6), with leave to amend. Plaintiff’s amended complaint was thereafter dismissed by order, filed on August 23, 2010, with leave to file a second amended complaint within twenty-eight days.

Plaintiff did not file a second amended complaint. Rather, plaintiff filed an appeal to the Ninth Circuit, on October 1, 2010 (docket # 13). That appeal was “dismissed for lack of jurisdiction” on December 9, 2010 because the order appealed from was “not final or appealable” (docket # 16). Despite the purported interlocutory appeal, the district court retained jurisdiction because this circuit has long “recognized an exception to the general rule that a valid

1 notice of appeal divests the district court of jurisdiction over all but tangential matters,” when the
2 appeal is patently frivolous. Marks v. Clarke, 102 F.3d 1012, 1018 n. 8 (9th Cir. 1996), citing
3 Chuman v. Wright, 960 F.2d 104, 105 (9th Cir. F.2d 104, 105 (9th Cir. 1992) (“frivolous or
4 forfeited appeal does not automatically divest the district court of jurisdiction.”). See also, U. S.
5 v. Powell, 24 F.3d 28 (9th Cir. 1994); U.S. v. LaMere, 951 F.2d 1106, 1108 (9th Cir. 1991); U.S.
6 v. Claiborne, 727 F.2d 842 (9th Cir. 1984). As the appeal, based on an unappealable order, was
7 without merit, plaintiff was not relieved of his obligation to file a proposed second amended
8 complaint timely. Plaintiff has failed to do so and the time for doing so has long since expired.

9 Plaintiff shall file the second amended complaint within twenty days; no
10 extensions shall be granted.

11 Accordingly, IT IS ORDERED that a second amended complaint shall be filed.

12 DATED: December 17, 2010

/s/ Gregory G. Hollows

13 _____
14 GREGORY G. HOLLOWES
15 UNITED STATES MAGISTRATE JUDGE

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