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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Protective Life Insurance Company, a)
Tennessee Corporation,)

No. 2:10-CV-01728-PHX-JAT (Lead)
No. 2:10-CV-02341-PHX-ROS (Cons)

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Plaintiff,)

ORDER

11

vs.)

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Peter Mizioch, an Arizona resident; The
Estate of Phyllis A. Mizioch; Jimmy Ray
Montoya, an Arizona resident; Mark
Casey Montoya, an Arizona resident;
Russell Lynn Montoya, an Arizona
resident,)

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Defendants.)

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Peter Mizioch, an Arizona resident,)

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Cross-Claimant,)

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vs.)

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Jimmy Ray Montoya, an Arizona resident;
Mark Casey Montoya, an Arizona
resident; Russell Lynn Montoya, an
Arizona resident,)

22

Cross-Defendants.)

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Mark Casey Montoya, an Arizona
resident; Russell Lynn Montoya, an
Arizona resident,)

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Cross-Claimants,)

26

vs.)

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Peter Mizioch, an Arizona resident,)

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1 under the slayer statute as required by A.R.S. §14-2803(F) and 2) there is insufficient
2 evidence as a matter of law to disqualify Mr. Mizioch under the slayer statute.

3 On August 1, 2011, the Court granted Mr. Mizioch's Motion for Partial Summary
4 Judgment (Doc. 82) as to his claims for declaratory relief against the Montoyas. (Doc. 210.)
5 Because the Montoyas did not properly respond to Mr. Mizioch's Statement of Facts in
6 Support of his Motion for Partial Summary Judgment, the Court deemed his Statement of
7 Material Facts admitted for purposes of the Motion for Partial Summary Judgment. The
8 Court therefore accepted Mr. Mizioch's time line of events for the day of Phyllis's murder,
9 as well as his statement that he had nothing to do with her death. The Court consequently
10 found that for the purposes of the Motion for Partial Summary Judgment on claims for
11 declaratory relief, the Montoyas had not met their burden of demonstrating an issue of
12 material fact existed regarding Mr. Mizioch's responsibility for Phyllis's death. The Court
13 therefore granted partial summary judgment to Mr. Mizioch and vacated the Arizona slayer
14 statute hearing.

15 Finding no just reason for delay, the Court directed the Clerk to enter final judgment
16 for Mr. Mizioch on his cross-claims for declaratory relief against the Montoyas. (Doc. 214.)
17 The Clerk entered Judgment on August 8, 2011. (Doc. 215.)

18 Also on August 8, 2011, the Montoyas filed a Motion for Reconsideration of the
19 Court's Order granting partial summary judgment to Mr. Mizioch. The Court granted the
20 Motion for Reconsideration, but denied the Montoyas' requested relief from the August 12,
21 2011 Order. (Doc. 219.) The Montoyas filed a Notice of Appeal from the Judgment on
22 September 6, 2011. (Doc. 229.) The Montoyas then filed a Motion for Relief from the
23 Judgment in this Court on November 8, 2011. (Doc. 255.)

24 **ANALYSIS AND CONCLUSION**

25 Once a notice of appeal is filed, this Court is divested of jurisdiction over the matters
26 being appealed. *Nat'l Resources Defense Council v. Southwest Marine Inc.*, 242 F.3d 1163,
27 1166 (9th Cir. 2001). Divestiture of jurisdiction promotes judicial economy and avoids the
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1 confusion that could result from having the same issues before two courts simultaneously.

2 *Id.*¹

3 But the filing of certain motions tolls the effective date of a notice of appeal. Federal
4 Rule of Appellate Procedure 4(a)(4)(B)(1) provides that if a party files a notice of appeal
5 after entry of judgment, but before the Court disposes of any of the motions listed in Federal
6 Rule of Appellate Procedure 4(a)(4)(A), then the notice of appeal does not become effective
7 until the court disposes of the last of those remaining motions. The Rule 4(a)(4)(A) motions
8 are motions: for entry of judgment under Federal Rule of Civil Procedure 50(b); to amend
9 or make additional factual findings under Rule 52(b); for attorneys' fees under Rule 54, but
10 only if the district court specifically extends the time to appeal under Rule 58; to alter or
11 amend the judgment under Rule 59; for a new trial under Rule 59; or for relief under Rule
12 60 if the motion is filed no later than 28 days after the judgment is entered. Fed.R.App.P.
13 4(a)(4)(A).

14 In this case, the Court disposed of the Montoyas' motion for reconsideration before
15 the notice of appeal was filed and did not extend the time for an appeal pursuant to Rule 58
16 on Mr. Mizioch's motion for attorneys' fees. The Montoyas filed their notice of appeal from
17 the Judgment to Mr. Mizioch on the Arizona slayer statute issues on September 6, 2011.
18 They did not file their pending Rule 60(b) motion until November 8, 2011, which is more
19 than 28 days after the entry of Judgment on August 8, 2011. The Rule 60(b) motion
20 therefore did not toll the notice of appeal, which was effective on September 6, and the Court
21 lacks jurisdiction to dispose of the Rule 60(b) motion. *See Miller v. Marriott Int'l, Inc.*, 300
22 F.3d 1061, 1063-64 (9th Cir. 2002).

23 Because the Montoyas did not file the Motion for Relief from Judgment within
24 twenty-eight days of the entry of Judgment, the filing of their Notice of Appeal on September

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26 ¹There is an exception to this rule that allows a district court to suspend, modify,
27 restore, or grant an injunction during the pendency of an appeal in order to maintain the
28 status quo. *Nat'l Resources*, 242 F.3d at 1166. That exception is not applicable here.

1 6, 2011 divested this Court of jurisdiction to decide the Motion for Relief from Judgment.

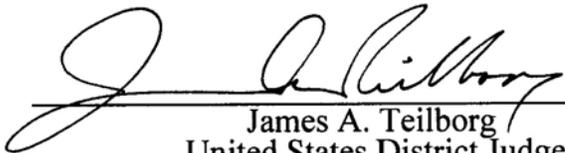
2 Accordingly,

3 **IT IS ORDERED** Denying the Montoyas' Motion for Relief From Judgment (Doc.
4 255).

5 **IT IS FURTHER ORDERED** that the Montoyas shall file a notice and copy of this
6 Order with the Ninth Circuit Court of Appeals in Case Number 11-17162.

7 DATED this 14th day of March, 2012.

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James A. Teilborg
United States District Judge