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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
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11 JAMISI JERMAINE CALLOWAY,

12 Plaintiff,

13 vs.

14 RANGEL, et al.,

15 Defendants.
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USCD CASE NO. 1:12-cv-00193-GSA-PC

USCA CASE NO. 14-16294

ORDER REQUESTING REMAND
AFTER AN INDICATIVE RULING
PURSUANT TO FEDERAL RULE OF
APPELLATE PROCEDURE 12.1

(Docs. 18, 19, 20.)

ORDER DIRECTING CLERK'S OFFICE
TO SERVE THIS ORDER ON NINTH
CIRCUIT COURT OF APPEALS

20 **I. RELEVANT PROCEDURAL HISTORY**

21 Jamisi Jermaine Calloway ("Plaintiff") is a state prisoner proceeding pro se and in forma
22 pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed this case on
23 February 10, 2012. (Doc. 1.)

24 On April 10, 2012, Plaintiff consented to the jurisdiction of a Magistrate Judge, and no
25 other parties have made an appearance. (Doc. 8.) Therefore, pursuant to Appendix A(k)(4) of
26 the Local Rules of the Eastern District of California, the undersigned shall conduct any and all
27 proceedings in the case until such time as reassignment to a District Judge is required. Local
28 Rule Appendix A(k)(3).

1 On June 3, 2014, the Court issued an order dismissing this action, without prejudice, as
2 improperly filed, and entered judgment. (Docs. 18, 19.) On July 7, 2014, Plaintiff filed a
3 notice of appeal to the Ninth Circuit and a request for reconsideration by the district court.
4 (Doc. 20.)

5 **II. REQUEST FOR REMAND AFTER INDICATIVE RULING BY DISTRICT**
6 **COURT – FED. R. APP. P. 12.1**

7 It is well settled that the “filing of a notice of appeal divests the district court of
8 jurisdiction.” Gould v. Mutual Life Ins. Co., 790 F.2d 769, 772 (9th Cir. 1986). When a Rule
9 60(b) motion is filed in district court after a notice of appeal has been filed, the district court
10 lacks jurisdiction to entertain the motion. Katzir Floor & Designs, Inc. v. M-MLS.com, 394
11 F.3d 1143, 1148 (9th Cir. 2004).

12 Under Federal Rule of Appellate Procedure 12.1, “[i]f a timely motion is made in the
13 district court for relief that it lacks authority to grant because of an appeal that has been
14 docketed and is pending . . . [and i]f the district court states that it would grant the motion or
15 that the motion raises a substantial issue, the court of appeals may remand for further
16 proceedings but retains jurisdiction unless it expressly dismisses the appeal. Fed. R. App. P.
17 12.1. Thus, if the district court issues an indicative ruling – either that it would grant the
18 motion or that there is a substantial issue – the appellate court then decides whether to remand
19 the case for a ruling by the district court.

20 On June 3, 2014, this Court issued an order dismissing this action as improperly filed,
21 and entered judgment.¹ (Doc. 18.) On July 7, 2014, Plaintiff appealed from the order
22 dismissing the action, and in addition, requested reconsideration by the district court pursuant
23 to Rule 60(b). (Doc. 20.) The appeal is currently pending before the United States Court of
24 Appeals for the Ninth Circuit as case 14-16294. (Doc. 22.)

25 The Court finds that reconsideration of the order dismissing Plaintiff’s case as
26 improperly filed is appropriate and should be granted as the Plaintiff in his motion for
27

28 ¹ The court found that the complaint for this action had been improperly filed as a new case,
instead of as an amended complaint in another case as Plaintiff had intended.

1 reconsideration has further clarified the circumstances under which he filed the complaint. He
2 has provided evidence that the case was not improperly filed as a new case and therefore should
3 not have been dismissed as such. Accordingly, this Court shall request dismissal of Plaintiff's
4 current appeal, without retaining jurisdiction, and request remand of the case to the district
5 court under Federal Rule of Appellate Procedure 12.1.

6 **III. CONCLUSION**

7 Based on the foregoing, the Court HEREBY REQUESTS the Ninth Circuit Court of
8 Appeals to dismiss Plaintiff's current appeal, without retaining jurisdiction, and remand this
9 case to the district court under Federal Rule of Civil Procedure 12.1(b), and to grant leave to
10 the district court to grant relief from the judgment entered, pursuant to Federal Rule of Civil
11 Procedure 60, for further proceedings to be conducted in this case.

12 Further, the court HEREBY DIRECTS the Clerk of the Court to serve a copy of this
13 order on the Ninth Circuit Court of Appeals.

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15 IT IS SO ORDERED.

16 Dated: July 18, 2014

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE