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

**TIMOTHY WAYNE ARNETT,**

**Plaintiff,**

**v.**

**WALGREEN COMPANY, INC., aka  
("Walgreens") and UNKNOWN LICENSED  
PHARMACISTS AT WALGREENS STORE  
#02865**

**Defendants.**

**1:13-CV-02066-LJO-MJS**

**ORDER DENYING MOTION FOR  
RECONSIDERATION FOR LACK OF  
JURISDICTION (Doc. 26)**

15 On April 18, 2014, Plaintiff Timothy Wayne Arnett ("Plaintiff") brought a medical malpractice  
16 and wrongful death action on behalf of his son Timothy Arnett against Walgreen Company, Inc.  
17 ("Defendant"). Doc. 8. Defendant filed a motion to dismiss on statute of limitations grounds. Doc. 14.  
18 On January 15, 2015, this Court granted the motion to dismiss without leave to amend. Doc. 20.  
19 Judgment was entered against Plaintiff on January 15, 2015. Doc. 21. On February 5, 2015, Plaintiff  
20 filed a notice of appeal. Doc. 22. On February 9, 2015, the Court of Appeals referred the matter back to  
21 the district court for the limited purpose of determining whether in forma pauperis status should  
22 continue for this appeal or whether the appeal is frivolous or taken in bad faith. Doc. 25.<sup>1</sup> On February  
23 27, 2015, Plaintiff filed a motion for reconsideration pursuant to Federal Rule of Civil Procedure 60(b)

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<sup>1</sup> The Referral Notice indicates that if the district court elects to revoke in forma pauperis status, the district court should notify the Court of Appeals and the parties of such determination within 21 days; if the district court does not revoke in forma pauperis status, such status will continue automatically for the appeal. Doc. 25. The Court does not believe that this limited Referral Notice impacts in any way the jurisdictional analysis set forth herein.

1 of this Court’s order on the motion to dismiss. Doc. 26.<sup>2</sup>

2 Because Plaintiff filed a notice of appeal on February 5, 2015, the Court must first consider  
3 whether it has jurisdiction over Plaintiff’s motion for reconsideration. As a general rule, “[o]nce a notice  
4 of appeal is filed, the district court is divested of jurisdiction over the matters being appealed.” *See*  
5 *Natural Res. Defense Council, Inc. v. Sw. Marine Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001). Federal  
6 Rule of Appellate Procedure (“Appellate Rule”) 4(a)(4)(B)(i) allows a district court to amend a  
7 judgment, even when a notice of appeal has been filed, in certain situations. *See* Fed. R. App. P.  
8 4(a)(4)(B)(i). Appellate Rule 4(a)(4)(B)(i) provides:

9 If a party files a notice of appeal after the court announces or enters a  
10 judgment—but before it disposes of any motion listed in Rule  
11 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in  
12 whole or in part, when the order disposing of the last such remaining  
13 motion is entered.

12 Appellate Rule 4(a)(4)(A) identifies several types of motions including motions to alter or amend the  
13 judgment under Federal Rule of Civil Procedure 59 and motions for relief from a judgment or order  
14 under Federal Rule of Civil Procedure 60. *See* Fed. R. App. P. 4(a)(4)(A)(iv), (vi).

15 Appellate Rule 4(a)(4)(B)(i) does not specify whether it operates when the motion at issue is  
16 filed after the notice of appeal. *See* Fed. R. App. P. 4(a)(4)(B)(i). The Transmittal Note to the 1993  
17 Amendment to Appellate Rule 4(a)(4) states that a “notice [of appeal] filed before the filing of one of  
18 the specified motions or after the filing of a motion but before the disposition of the motion is, in effect,  
19 suspended until the motion is disposed of, whereupon, the previously filed notice effectively places  
20 jurisdiction in the court of appeals.” (Emphasis added). Although the Ninth Circuit has not expressly  
21 addressed this issue, “recent case law suggests that it would embrace the Advisory Committee’s  
22 interpretation of Appellate Rule 4(a)(4),” permitting suspension of a notice of appeal upon the  
23 subsequent, timely filing of one of the specified motions. *Yousefian v. City of Glendale*, No. CV 11–

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25 <sup>2</sup> The motion for reconsideration indicates that it was “executed” by Plaintiff, who is incarcerated, on February 23, 2015, but the motion was not filed with this Court until February 27, 2015.

1 03579, 2013 WL 948743, at \*1 (C.D. Cal. Mar.11, 2013) (citing *Crawford v. Kingdom of Saudi Arabia*,  
2 No. CV 11-05206, 2012 WL 3638628, at \*3 (N.D. Cal. Aug. 22, 2012) (explaining that Ninth Circuit  
3 held appeal in abeyance pending district court's resolution of a post-judgment motion filed after the  
4 notice of appeal but within Rule 4(a)(4)'s 28-day time period)); *Galyean v. I.R.S.*, No. C13-1570JLR,  
5 2013 WL 6230382, at \*3 (W.D. Wash. Dec. 2, 2013).

6           However, in order to get the benefit of Appellate Rule 4(a)(4), a Federal Rule of Civil Procedure  
7 60 motion must be “filed no later than 28 days after judgment is entered.” Fed. R. App. P. 4(a)(4)  
8 (A)(vi). The court entered judgment on January 15, 2015. Doc. 21. Accordingly, the 28-day window for  
9 the filing of a Federal Rule of Civil Procedure 60(b) motion expired on February 12, 2015. Even if the  
10 Court were to deem Plaintiff’s motion for reconsideration filed on the day it was “executed,” February  
11 23, 2015, the motion was not timely for purposes of Appellate Rule 4(a)(4). Therefore, the notice of  
12 appeal is not suspended pursuant to Appellate Rule 4(a)(4)(B)(i) and this Court lacks jurisdiction over  
13 the pending motion for reconsideration. Accordingly Plaintiff’s motion for reconsideration is DENIED  
14 for lack of jurisdiction.

15 IT IS SO ORDERED.

16 Dated: March 11, 2015

/s/ Lawrence J. O’Neill  
UNITED STATES DISTRICT JUDGE