

1 representative. If the motion is not made within 90 days after service of a
2 statement noting the death, the action by or against the decedent must be
dismissed.

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4 (3) *Service*. A motion to substitute, together with a notice of hearing, must be
5 served on the parties as provided in Rule 5 and on nonparties as provided in Rule
6 4. A statement noting death must be served in the same manner. Service may be
made in any judicial district.

7 Fed. R. Civ. P. 25(a). In *Robertson v. Wegmann*, 436 U.S. 584 (1978), the Supreme Court held
8 that the law of the forum state is “the principle reference point in determining survival of civil
9 rights actions” under section 1983. *Id.* at 590; *see also Moor v. Alameda County*, 411 U.S. 693,
10 703 n.14 (1973) (noting that pursuant to 42 U.S.C. § 1988, state survivorship statutes may allow
11 the survival of actions brought under § 1983). Under California law, a cause of action against a
12 person is generally not lost by reason of the person’s death. Cal. Civ. Proc. Code § 377.20(a).
13 The decedent’s personal representative or, if there is none, the decedent’s successor in interest
14 may continue to litigate the action. *Id.* § 377.31.

15 Here, defendants have not served the notice on plaintiff’s successor or representative.
16 Accordingly, defendants’ notice of plaintiff’s death does not comply with Rule 25(a) and has not
17 started the 90-day clock under that rule.

18 The Ninth Circuit has held that Rule 25(a) requires two affirmative steps to trigger the 90-
19 day period:

20 First, a party must formally suggest the death of the party upon the record.
21 Second, the suggesting party must serve other parties and nonparty successors or
22 representatives of the deceased with a suggestion of death in the same manner as
23 required for service of the motion to substitute. Thus, a party may be served the
suggestion of death by service on his or her attorney, while nonparty successors or
representatives of the deceased party must be served the suggestion of death in the
manner provided by Rule 4 for the service of a summons.

24 *Barlow v. Ground*, 39 F.3d 231, 233 (9th Cir. 1994) (internal citations omitted). Under *Barlow*,
25 defendants have some obligation to identify plaintiff’s representative or successor and serve the
26 notice of death on that party. Defendants have not done so, nor have they provided the court with

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1 any information indicating that such an individual could not be located.² *See Gruenberg v.*
2 *Maricopa County Sheriff's Office*, No. CV 06-0397-PHX-SMM (DKD), 2008 U.S. Dist. LEXIS
3 40342 (D. Az. May 7, 2008) (dismissing action without prejudice after plaintiff died and
4 defendants could not locate a successor).

5 Accordingly, it is hereby ORDERED that, within 30 days of the date of this order,
6 defendants shall:

- 7 1. File a formal notice of plaintiff's death with the court and serve that notice on
8 plaintiff's personal representative or successor in interest; or
- 9 2. Inform the court of the steps defendants have taken to locate plaintiff's personal
10 representative or successor in interest and explain why such person could not be
11 located.

12 DATED: April 13, 2015.


EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE

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² The death certificate provided by defendants indicates that plaintiff was survived by his mother and provides her address.