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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

FRANCOIS P. GIVENS,  
  
  Plaintiff,  
  
  v.  
  
CALIFORNIA DEPARTMENT OF  
CORRECTIONS AND  
REHABILITATION, et al.,  
  
  Defendants.

No. 2:19-cv-0017 JAM KJN P

FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner, proceeding pro se. Plaintiff filed a motion to compel defendants to file a suggestion of death on the record for defendant Dr. Harry Newman and provide information to enable plaintiff to file a motion to substitute decedent’s successor or representative under Rule 25(a) of the Federal Rules of Civil Procedure. (ECF No. 49.) Plaintiff also filed a motion to stay these proceedings pending the filing and resolution of such motion for substitution. (ECF No. 50.) Defendants Chapnick, DeHerrera and Palagummi opposed the motions; plaintiff filed a reply. As discussed below, the undersigned recommends that plaintiff’s motions be denied.

Death of Dr. Newman

On December 10, 2020, a notice was filed advising the intent not to waive service on defendant Dr. Harry Newman because he is deceased. (ECF Nos. 33-34.) Defense counsel

1 declared that while preparing the opposition, counsel asked the DVI litigation coordinator to  
2 provide Dr. Newman’s date of death. (ECF No. 45 at 4.) The litigation coordinator responded  
3 via email that the date was July 14, 2018. (Id.) Defendants also provided a copy of the litigation  
4 coordinator’s emailed response. (ECF No. 45-2 at 2.)<sup>1</sup>

5 Plaintiff’s Motions

6 Plaintiff asks the court to compel defendants to determine whether the DVI litigation  
7 coordinator has any continuing authority to act on behalf of the decedent, Dr. Harry Newman;  
8 provide the name and contact information for any possible successor or legal representative for  
9 decedent, if known; provide a copy of the death certificate of Dr. Newman or name the county  
10 and state where Dr. Newman died; or, in the alternative, file and serve a proper suggestion of  
11 death on the record in this case. Plaintiff’s motion is based on Rule 25(a) of the Federal Rules of  
12 Civil Procedure. (ECF No. 42 at 5.) In his motion for stay, plaintiff asks the court to stay this  
13 action for 90 days to allow plaintiff to file a creditor’s claim against decedent’s estate, and then  
14 seek substitution of defendant Dr. Newman’s successor, and if there is no surviving spouse,  
15 plaintiff will have to petition for probate. (ECF No. 43.) Plaintiff provided a copy of a letter  
16 from the San Joaquin County Superior Court, dated February 17, 2021, returning plaintiff’s  
17 creditor’s claim and advising that “no record found for this individual.” (ECF No. 43 at 5.)

18 Defendants oppose plaintiff’s motions because counsel for responding defendants does  
19 not represent Dr. Harry Newman, and argue that Rule 25(a) does not apply. (ECF No. 45.)  
20 Defendants urge the court to follow Lacy v. Tyson, 2012 WL 4343837, \*2 (E.D. Cal. Sept. 20,  
21 2012), adopted, 2012 WL 5421230 (E.D. Cal. Nov. 5, 2012). In Lacy, the plaintiff was a pro se  
22 state prisoner raising a § 1983 complaint against correctional officers and medical staff. The

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23 <sup>1</sup> California Medical Board records confirm that Dr. Harry Charles Newman, physician and  
24 surgeon, License No. G 25552, who practiced in San Joaquin County, where DVI is located, is  
25 deceased. The California Medical Board provides on-line license verification.  
26 <[https://www.mbc.ca.gov/Breeze/License\\_Verification.aspx](https://www.mbc.ca.gov/Breeze/License_Verification.aspx)> accessed May 7, 2021. This Court  
27 may take judicial notice of facts that are capable of accurate determination by sources whose  
28 accuracy cannot reasonably be questioned. Fed. R. Evid. 201; see City of Sausalito v. O’Neill,  
386 F.3d 1186, 1224 n.2 (9th Cir. 2004) (“We may take judicial notice of a record of a state  
agency not subject to reasonable dispute.”).

1 district court held that because decedent R. Reyna died before the lawsuit was filed, the motion  
2 for substitution under Rule 25 was denied, and decedent Reyna was dismissed with prejudice.  
3 Lacy, 2012 WL 4343837 at \*2. Defendants contend that because defendant Dr. Newman died  
4 before this action commenced, substitution under Rule 25 does not apply and is not available to  
5 any party. (ECF No. 45 at 7.) For the same reason, defendants contend the motion for stay  
6 should be denied as moot.

7 In reply, plaintiff contends that defendants are better situated than plaintiff to identify Dr.  
8 Newman's successor in interest or legal representative, and argues that Rule 25 substitution is  
9 appropriate. Plaintiff now also argues, apparently in the alternative, that Rule 15(c) amendment,  
10 or joinder under Rules 19 or 20, are available for this action. (ECF No. 49 at 2, 6.) He further  
11 contends a stay of these proceedings is necessary so that plaintiff can file a creditor's claim  
12 against the decedent's successor in interest. (ECF No. 49.)

13 Rule 25

14 Rule 25 of the Federal Rules of Civil Procedure governs the substitution of parties.

15 If a party dies and the claim is not extinguished, the court may  
16 order substitution of the proper party. A motion for substitution  
17 may be made by any party or by the decedent's successor or  
18 representative. If the motion is not made within 90 days after  
service of a statement noting the death, the action by or against the  
decedent must be dismissed.

19 Fed. R. Civ. P. 25(a)(1). Such provision authorizes the substitution of a proper party when an  
20 existing party dies after the suit is commenced. Id.; see also History and Application of Rule, 7C  
21 Fed. Prac. & Proc. Civ. § 1951 (3d ed.) ("The rule presupposes that substitution is for someone  
22 who was a party to a pending action.[] Substitution is not possible if one who was named as a  
23 party in fact died before the commencement of the action.[]" (footnotes omitted)).

24 Last year, the Ninth Circuit held that a dead person may not sue, be sued, or be joined as a  
25 party to a lawsuit. LN Mgmt., LLC v. JPMorgan Chase Bank, N.A., 957 F.3d 943, 951 (9th Cir.  
26 2020). The Ninth Circuit declined to decide whether Rule 25(a) permits the substitution of a  
27 party "dead *ab initio*," but did discuss cases from the Fourth, Fifth and Tenth Circuits addressing  
28 such issue in several contexts. LN Mgmt., LLC, 957 F.3d at 955-56. Of relevance here, the Fifth

1 Circuit held that because defendant Buras died after he had hit and killed the victim with his  
2 truck, but before the relatives of the victim filed the lawsuit, Rule 25(a) was unavailable because  
3 Buras “predeceased the filing of the action.” Mizukami v. Buras, 419 F.2d 1319, 1320 (5th Cir.  
4 1969). Several district courts in California agree, holding “that Rule 25 substitutions are  
5 unavailable when the defendant for whom substitution is sought was dead before the  
6 commencement of the action, which was therefore a nullity.” LN Mgmt., LLC, 957 F.3d at 954  
7 (collecting cases).

### 8 Discussion

9 The undersigned is persuaded that Rule 25 does not apply to this action, and that  
10 plaintiff’s complaint against decedent Dr. Newman is a nullity. Lacy, 2012 WL 4343837 at \*2  
11 (Rule 25 “does not address situations where the death occurred before the suit was filed.”)  
12 “While the Ninth Circuit has not addressed this issue, courts have held, as a rule, that the  
13 substitution of parties cannot be ordered in conformance with Rule 25(a)(1) where the person for  
14 whom substitution is sought died prior to being named a party.” Lacy, 2012 WL 4343837 at \*2.

15 Here, Dr. Harry Newman died before the instant action was filed. Thus, there is no  
16 procedure in place for the court to substitute his presence in this action for that of a personal  
17 representative of his estate. See Moul v. Pace, 261 F. Supp. 616, 617-18 (D. Md. 1966) (“no  
18 procedural mechanism exists for the Court to substitute [decedent’s] presence in this case for that  
19 of a personal representative of his estate.”); Chorney v. Callahan, 135 F.Supp. 35, 36 (D. Mass.  
20 1955) (where a suit is filed against an individual who died before the complaint was filed, “at that  
21 point the purported action was a nullity, for a dead man obviously cannot be named party  
22 defendant in an action.”)

23 Plaintiff relies on Gilmore v. Lockard, 936 F.3d 857 (9th Cir. 2019). However, in  
24 Gilmore, the unserved defendant died after the lawsuit was filed but before service of process was  
25 accomplished. Id. at 864. “The purpose behind Rule 25(a) suggests that substitution remains  
26 available after filing and prior to service.” Gilmore, 936 F.3d at 864 (emphasis added). Here,  
27 defendant Dr. Newman died on July 14, 2018, before plaintiff filed the instant lawsuit on January  
28 2, 2019. Indeed, the Ninth Circuit later confirmed such distinction:

1 In overturning the denial of Gilmore’s motion to substitute the  
2 prison guard’s “successor or representative,” Fed. R. Civ. P. 25(a),  
3 we noted in passing that Mizukami was “inapposite since that suit  
4 was filed after the defendant’s death, and Rule 25(a) presupposes  
5 that the deceased was already a party in the action prior to death.”

6 LN Mgmt., LLC, 957 F.3d at 951, quoting Gilmore, 936 F.3d at 864 n.4. Thus, the Ninth Circuit  
7 concluded that a party cannot bring a federal lawsuit against a dead person. LN Mgmt., LLC, 957  
8 F.3d at 955. While plaintiff attempts to compare the instant circumstances with Gilmore because  
9 the decedent in Gilmore died prior to service of process, the fact remains that the Gilmore lawsuit  
10 was filed before the decedent in Gilmore died.

11 Plaintiff also cites Zochlinski v. Regents of the Univ. of Cal., No. 2:10-cv-1824 KJM KJN  
12 PS (E.D. Cal. Nov. 4, 2015). (ECF No. 49 at 7.) However, Zochlinski is also inapposite because  
13 the decedent in that case, defendant Jones, also died during the pendency of the action, not before  
14 the action was filed. (Id.) (Nov. 12, 2015 Statement Noting a Party’s Death).

15 Following LN Mgmt., LLC, plaintiff is not allowed to name or join a dead person as a  
16 defendant. As argued by defendants, the instant case is very similar to Lacy, and the undersigned  
17 is persuaded by, and adopts, its reasoning. See also Cavanaugh v. County of San Diego, 2020  
18 WL 8838234 (S.D. Cal. Aug. 24, 2020) (“This Court is persuaded to follow the several federal  
19 courts which hold that a party cannot maintain suit against a dead person, or in any other way  
20 make a dead person (in that person’s own right, and not through a properly-represented estate or  
21 successor) a party to a federal lawsuit.”) Because Dr. Newman died before this action was  
22 commenced, Rule 25(a) does not apply, plaintiff’s claims against the doctor are a nullity, and  
23 defendant Dr. Newman should be dismissed from this action with prejudice. Plaintiff’s motions  
24 should be denied.

#### 25 Plaintiff’s New Grounds for Relief

26 In his reply, plaintiff argues, for the first time, that he should be entitled to relief under  
27 Rules 15(c), 19 or 20 of the Federal Rules of Civil Procedure. (ECF No. 49 at 1, 5, 6.) However,  
28 plaintiff did not make such arguments in his motions, depriving defendants of an opportunity to  
address such claims. See In re Yahoo Mail Litig., 7 F. Supp. 3d 1016, 1035 (N.D. Cal. 2014)  
 (“arguments raised for the first time in reply briefs are waived”); Zamani v. Carnes, 491 F.3d 990,

1 997 (9th Cir. 2007) (court “need not consider arguments raised for the first time in reply brief.”).


2 Accordingly, IT IS HEREBY RECOMMENDED that:

3 1. Plaintiff’s motion to compel defendants to comply with Rule 25(a) of the Federal Rules  
4 of Civil Procedure (ECF No. 42) and motion for stay (ECF No. 43) be denied; and

5 2. Defendant Dr. Harry Newman should be dismissed from this action with prejudice.

6 These findings and recommendations are submitted to the United States District Judge  
7 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
8 after being served with these findings and recommendations, any party may file written  
9 objections with the court and serve a copy on all parties. Such a document should be captioned  
10 “Objections to Magistrate Judge’s Findings and Recommendations.” Any response to the  
11 objections shall be filed and served within fourteen days after service of the objections. The  
12 parties are advised that failure to file objections within the specified time may waive the right to  
13 appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

14 Dated: May 17, 2021

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KENDALL J. NEWMAN  
UNITED STATES MAGISTRATE JUDGE

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