

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA

3 LARRY LEWIS HIGHTOWER, JR.,
4 Plaintiff,
5 v.
6 DR. EDWARD BIRDSONG,
7 Defendant.
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Case No. [15-cv-03966-YGR](#) (PR)

ORDER (1) DENYING PLAINTIFF'S MOTION TO SUBSTITUTE DEFENDANT AND AMEND COMPLAINT WITHOUT PREJUDICE TO REILING; (2) DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT WITHOUT PREJUDICE TO REILING; (3) STAYING PROCEEDINGS; AND (4) ADMINISTRATIVELY CLOSE CASE

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10 **I. INTRODUCTION**

11 This action is now before the Court to address issues arising from the death of Defendant
12 Dr. Edward Birdsong. Pending before the Court is the deceased defendant's motion for summary
13 judgment. Dkt. 24. Also pending is Plaintiff's motion entitled, "Motion for Amendment, and
14 Substitution, and [Request for] Defendant's Counsel to Comply With Rule 25." Dkt. 41.

15 For the reasons explained below, the Court will: (1) deny Plaintiff's "Motion for
16 Amendment, and Substitution, and [Request for] Defendant's Counsel to Comply With Rule 25,"
17 without prejudice to refile upon following the proper procedure to substitute in a proper
18 defendant in place of the deceased defendant; (2) deny the pending motion for summary judgment
19 without prejudice to refile; and (3) stay the proceedings and administratively close the case, and
20 do nothing further until (a) Plaintiff uses the correct procedure to move to substitute in a proper
21 defendant in place of the deceased defendant, or (b) the deceased defendant's representative either
22 (i) files a proper document that triggers the 90-day deadline in Federal Rule of Civil Procedure
23 25(a) (for Plaintiff to file a motion for substitution) or (ii) moves to substitute in as the proper
24 defendant.

25 **II. BACKGROUND**

26 Plaintiff, a state prisoner incarcerated at Salinas Valley State Prison ("SVSP"), filed a civil
27 rights complaint pursuant to 42 U.S.C. § 1983. Dkt. 1. Plaintiff named Defendant as well as the
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1 California Department of Corrections and Rehabilitation (“CDCR”).¹ *Id.* at 1-2.

2 Upon screening the complaint, the Court dismissed all claims against the CDCR—state
3 and federal—because the Eleventh Amendment prevents the CDCR, which is a state agency, from
4 being sued in federal court. Dkt. 9 at 2. The Court found that Plaintiff had alleged a cognizable
5 claim under 42 U.S.C. § 1983 against Defendant for deliberate indifference to medical needs in
6 violation of Plaintiff’s Eighth Amendment rights, stemming from severe complications from
7 treatment he received from February and April 2013. *Id.* at 2-3. Defendant was then served with
8 process. As mentioned above, Defendant moved for summary judgment, contending that he was
9 not deliberately indifferent to Plaintiff’s serious medical needs, and that Defendant is entitled to
10 qualified immunity. *See* Dkt. 24.

11 On March 9, 2017, Plaintiff filed a document entitled, “Letter of Intent and Amendment.”
12 Dkt. 34. In that filing, Plaintiff informed the Court that Defendant Birdsong has passed away. *Id.*
13 at 1. Plaintiff then advised the Court that he intended to seek leave to amend his complaint to:
14 (1) name the SVSP Warden and CDCR Secretary as Defendants; and (2) to substitute the Estate of
15 Defendant Birdsong as a Defendant. *See id.*

16 On April 17, 2017, counsel for Defendant, Lynne G. Stocker, Esq., filed a document
17 confirming that Defendant had indeed passed away on February 9, 2017. Dkt. 35 at 1. Defense
18 counsel stated that she had “no contact with Dr. Birdsong’s family, successors or representatives.”
19 *Id.* at 2. Defense counsel further added that she “reviewed online records for Monterey County
20 Superior Court but has located no probate proceedings for Dr. Birdsong’s estate.” *Id.*

21 Due to the issues presented by Defendant’s death, the Court, in an Order dated May 15,
22 2017, directed defense counsel to comply with the requirements of Federal Rule of Civil
23 Procedure 25 by: (1) filing a formal notice of suggestion of death on the record; and (2) serving
24 nonparty successors or representatives of Defendant with a suggestion of death in the manner
25 required by Rule 25(a)(3). Dkt. 36 at 3. The Court further instructed defense counsel to conduct a
26 more reasonable investigation into the status of Defendant’s estate, stating as follows:

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¹ The Court notes that Plaintiff did not name any other Defendants or any Doe Defendants.

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If counsel is able to obtain the name and address of the representative of Defendant’s estate, the Court orders counsel to serve nonparty successors or representatives of Defendant with a suggestion of death in the manner required by Rule 25(a)(3), and to notify the Court by filing a proof of service reflecting of the name and address of the individual so notified, as well as the date of compliance

Id. at 3 (citing Fed. R. Civ. P. 25(a)(3)). Finally, because Plaintiff had not yet filed a motion for substitution, the Court granted him an extension of time to do so. *Id.* at 3-4.

On June 12, 2017, defense counsel filed a declaration (in response to the Court’s May 15, 2017 Order) on behalf of the specially appearing CDCR. Dkt. 37. Counsel stated that a “petition in probate had been filed by a John Birdsong under Case No. 17PR000131.” *Id.* at 2. Counsel further explained that John Birdsong was represented by Linda Takahashi, Esq., and counsel stated as follows:

On May 30, 2017 and June 7, 2017, I spoke by telephone with Ms. Takahashi. We discussed the status of this case and the Court’s Order. Ms. Takahashi stated that she does not have authorization from her client to release his personal contact information to me.

Stocker Decl. ¶ 7.

Also on June 12, 2017, defense counsel filed a “Suggestion of Death of Defendant Dr. Edward Birdsong,” which indicates that Defendant “is deceased as of February 9, 2017.” Dkt. 38.

As mentioned above, Plaintiff has filed a motion entitled, “Motion for Amendment, and Substitution, and [Request for] Defendant’s Counsel to Comply With Rule 25,” in which he requests to substitute Defendant with the “Dr. Edward Birdsong Estate,” and to add the following as named Defendants: CDCR Secretary Scott Kernan, SVSP Warden W. L. Muniz, and Dr. Kumar. Dkt. 41 at 1-3. Plaintiff also requests that the Court issue an order directing defense counsel to share information regarding counsel’s investigation into Defendant’s probate estate. *Id.* at 2. In the opposition to Plaintiff’s motion, defense counsel indicated that said information was provided to Plaintiff on June 12, 2017. Dkt. 44 at 2 (citing Dkt. 37 (Attorney Stocker’s Declaration)). Defense counsel also requests that the court deny Plaintiff’s motion to amend the complaint as “unduly prejudicial, as futile, as legally insufficient, and as barred by the applicable statute of limitations.” *Id.* at 3-7.

1 **III. ANALYSIS**

2 Defendant’s death raises three issues. First, the death of Defendant during the litigation
3 does not automatically end this action but does require that Plaintiff take certain specific action to
4 file a claim with the decedent’s estate if he wishes to pursue his complaint. The law of the forum
5 state determines whether a section 1983 action survives or is extinguished upon the death of a
6 party. *See* 42 U.S.C. § 1988(a); *Robertson v. Wegmann*, 436 U.S. 584, 592-95 (1978). Under
7 California law, “[e]xcept as otherwise provided by statute, a cause of action for or against a person
8 is not lost by reason of the person’s death, but survives subject to the applicable limitations
9 period.” Cal. Civ. Proc. Code § 377.20(a). “Subject to Part 4 (commencing with Section 9000) of
10 Division 7 of the Probate Code governing creditor claims, a cause of action against a decedent that
11 survives may be asserted against the decedent’s personal representative or, to the extent provided
12 by statute, against the decedent’s successor in interest.” Cal. Civ. Proc. Code § 377.40. That
13 introductory phrase in California Code of Civil Procedure § 377.40 is critical—the plaintiff must
14 comply with the claims presentation requirements of California Probate Code § 9000 et seq., or he
15 will be unable to pursue his cause of action against the decedent’s personal representative. *See*
16 Cal. Prob. Code § 9370(a). According to California Probate Code § 9370:

17 (a) An action or proceeding pending against the decedent at the time
18 of death may not be continued against the decedent’s personal
19 representative unless all of the following conditions are satisfied:

20 (1) A claim is first filed as provided in this part.

21 (2) The claim is rejected in whole or in part.

22 (3) Within three months after the notice of rejection is given,
23 the plaintiff applies to the court in which the action or
24 proceeding is pending for an order to substitute the personal
25 representative in the action or proceeding. This paragraph
26 applies only if the notice of rejection contains a statement
27 that the plaintiff has three months within which to apply for
28 an order for substitution.

 (b) No recovery shall be allowed in the action against property in the
 decedent’s estate unless proof is made of compliance with this
 section.

Cal. Prob. Code § 9370. Here, Plaintiff’s section 1983 claim can survive the death of Defendant,
but Plaintiff must comply with the claims presentation requirements of the California Probate

1 Code if he wants to pursue this action against Defendant’s personal representative. This Court
2 will not relieve him of those obligations or assist him in satisfying those obligations.

3 Second, a proper defendant will need to be substituted in place of Defendant. Here,
4 Plaintiff has filed a motion to substitute *without* complying with the California Probate Code claim
5 presentation requirements. Therefore, Plaintiff’s motion for substitution is DENIED as premature.
6 *See* Dkt. 41. After Plaintiff complies with such requirements, he may refile a motion to substitute
7 in a proper defendant in place of Defendant. Plaintiff should also review Federal Rule of Civil
8 Procedure 25(a)(1), which states as follows:

9 If a party dies and the claim is not thereby extinguished, the court
10 may order substitution of the proper party. A motion for
11 substitution may be made by any party or by the decedent’s
12 successor or representative. If the motion is not made within 90
13 days after service of a statement noting the death, the action by or
14 against the decedent must be dismissed.

15 Fed. R. Civ. P. 25(a)(1). Rule 25(a) “describes the manner in which parties are to be substituted in
16 federal court once it is determined that the applicable substantive law allows the action to survive
17 a party’s death.” *Robertson v. Wegmann*, 436 U.S. 584, 587 n.3 (1978) (internal quotation marks
18 and citation omitted); *see also First Idaho Corp. v. Davis*, 867 F.2d 1241, 1242 (9th Cir. 1989)
19 (“Rule 25(a) dictates the method of substitution of parties in the federal courts and is purely
20 procedural”). A proper party under Rule 25(a)(1) is the legal representative of the decedent, e.g.,
21 the executor of the decedent’s Will or the administrator of his Estate. *See Mallonee v. Fahey*, 200
22 F.2d 918, 919-20 (9th Cir. 1953). Here, the Court notes that Plaintiff has requested to substitute
23 “Dr. Edward Birdsong Estate” as Defendant. *See* Dkt. 41 at 2. Such a request is not acceptable.
24 Plaintiff needs to use the correct name of the legal representative of Defendant and needs to file a
25 motion to substitute him or her in as a defendant. This also is something Plaintiff needs to do, and
26 the Court will not do it on his behalf. Furthermore, the Court DENIES Plaintiff’s request to
27 amend the complaint to add three new defendants. Federal Rule of Civil Procedure 15(a) is to be
28 applied liberally in favor of amendments and, in general, leave shall be freely given when justice
so requires. *Janicki Logging Co. v. Mateer*, 42 F.3d 561, 566 (9th Cir. 1994). However, a motion
to amend must be based upon good cause. *See id.* (attempt to amend complaint requiring

1 amendment of scheduling order under Federal Rule of Civil Procedure 16 must be based upon
2 good cause). The Court notes that Plaintiff did not name any Doe Defendants in his original
3 complaint, and he did not elaborate on how each of these new defendants is linked to his Eighth
4 Amendment claim. Not only is Plaintiff’s proposed amendment conclusory, but it could
5 significantly widen the scope of the complaint. Plaintiff could have moved to amend at any time
6 prior to the filing of the motion for summary judgment but did not. Defense counsel argues that
7 the defense would be substantially prejudiced by such amendment coming at the eleventh hour,
8 when there is a pending motion for summary judgment.² See Dkt. 44 at 5. Moreover, Plaintiff has
9 not demonstrated any good cause for his late amendment, other than possibly the fact that the only
10 named defendant is deceased. However, as explained above, Plaintiff has not filed a proper
11 motion to substitute in a proper defendant in place of the deceased defendant. Accordingly,
12 Plaintiff’s motion for leave to amend his complaint to add new defendants is DENIED at this time,
13 and the original complaint remains the operative complaint. (The Court notes that Plaintiff is not
14 barred from filing any further amendments *after* he complies with the California Probate Code
15 claim presentation requirements and refiles a motion for substitution. Plaintiff is reminded that he
16 must demonstrate good cause for his late amendment and link each newly named defendant to his
17 Eighth Amendment claim.)

18 Third, although Rule 25(a)(1) provides a 90-day window to file a motion for substitution
19 or the action will be dismissed, there are two requirements to trigger the commencement of that
20 period, and neither requirement has been met in this action. The first requirement is that “a party
21 must formally suggest the death of the party upon the record.” *Barlow v. Ground*, 39 F.3d 231,
22 233 (9th Cir. 1994). The advisory committee also recognized that a “representative of the
23 deceased party [who] desires to limit the time within which another may make the motion” may
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25 ² While mere delay in seeking to amend is not grounds to deny amendment, leave need not
26 be granted, where the amendment of the complaint would cause the opposing party undue
27 prejudice, is sought in bad faith, constitutes an exercise in futility, or creates undue delay. *Janicki*
28 *Logging Co.*, 42 F.3d at 566; see also *Roberts v. Arizona Bd. of Regents*, 661 F.2d 796, 798 (9th
Cir. 1981) (district court’s finding of prejudice to defendants sufficient to deny amendment,
because motion to amend came at eleventh hour, when summary judgment pending and discovery
period had closed, affirmed as proper exercise of district court’s discretion).

1 suggest the death upon the record. Fed. R. Civ. P. 25 advisory committee’s note. The second
2 requirement is that the suggestion of death must be served on the parties to the action pursuant to
3 Federal Rule of Civil Procedure 5(b), “while non-party successors or representatives of the
4 deceased party must be served the suggestion of death in the manner provided by Rule 4 for the
5 service of a summons.” *Barlow*, 39 F.3d at 233. As mentioned, this Court finds that neither of
6 Rule 25(a)’s requirements has been satisfied in this action. First, a “party” has not formally
7 suggested the death of the party upon the record. *See id.* Defense counsel who filed the
8 “Suggestion of Death of Defendant Dr. Edward Birdsong” had no continuing authority to
9 represent the now-deceased client, is not a party to this action and is not the legal representative of
10 Defendant’s Estate. Therefore, the statement of death filed by defense counsel did not satisfy Rule
11 25(a). *See Woodson v. City of Richmond*, No. 3:13cv134, 2014 WL 7462509, at *2 (E.D. Va. Dec.
12 31, 2014) (deceased party’s counsel is not allowed to file a statement noting a party’s death under
13 Rule 25(a) because the lawyer is neither a party nor a representative or successor of the deceased
14 party); *id.* (“any notice of death filed by decedent’s counsel is of no effect under Rule 25(a)(1) and
15 does not trigger the 90-day time period”); *cf. Fariss v. Lynchburg Foundry*, 769 F.2d 958 (4th Cir.
16 1985) (deceased party’s counsel could not file a Rule 25(a) motion to substitute parties because his
17 authority to act ended with the death of his client). Even if defense counsel had the authority to
18 file the suggestion of death, she did not serve that statement in the manner required by Rule 25(a)
19 and therefore did not trigger the 90-day period within which Plaintiff must file a motion to
20 substitute a proper party. Defense counsel did not serve the statement of death on the “nonparty
21 successors or representatives of the deceased party. . . in the manner provided by Rule 4 for the
22 service of a summons.” *See Barlow*, 39 F.3d at 233; *accord Giles v. Campbell*, 698 F.3d 153, 158
23 (3d Cir. 2012) (suggestion of death not served on the deceased party’s successors or
24 representatives as required by Rule 25(a) and Rule 4 is deficient).

25 In sum, the Court DENIES Plaintiff’s motion for substitution as premature because he
26 must first comply with the claims presentation requirements of the California Probate Code if he
27 wants to pursue this action against Defendant’s personal representative. Dkt. 41. Plaintiff’s
28 motion for leave to amend his complaint to add new defendants is also DENIED at this time, and

1 the original complaint remains the operative complaint. Plaintiff is not barred from filing any
2 further amendments *after* he complies with the California Probate Code claim presentation
3 requirements and refiles a motion to substitute Defendant. Plaintiff is reminded that he must
4 demonstrate good cause for his late amendment and link each newly named defendant to his
5 Eighth Amendment claim. The 90-day period in Rule 25(a) for Plaintiff to file a motion to
6 substitute in a proper party in place of the deceased defendant has not yet been triggered because
7 the suggestion of death has not been filed and served properly. It also is not clear whether or when
8 that 90-day period ever will start. This action will remain at a standstill until Plaintiff files a
9 proper motion to substitute the legal representative in place of Defendant or until Defendant’s
10 legal representative takes action. Because neither of these has occurred, this action could remain
11 on the Court’s docket without any resolution. Instead of allowing the action to linger on the
12 Court’s docket, the preferable approach is to stay these proceedings and administratively close the
13 case until Plaintiff or Defendant’s successor takes action to resolve the substitution standstill. This
14 is not a suggestion that Plaintiff can wait for his opponent to act; to the contrary, Plaintiff must act
15 diligently to comply with the claims presentation requirement of the California Probate Code and
16 the deadlines therein to avoid losing forever his ability to pursue a claim against Defendant’s legal
17 representative.

18 Because the Court is staying these proceedings, the pending motion for summary judgment
19 is DENIED without prejudice to refile after the case has been reopened. Dkt. 24.

20 **IV. CONCLUSION**

21 For the reasons outlined above, the Court orders as follows:

22 1. Plaintiff’s “Motion for Amendment, and Substitution, and [Request for]
23 Defendant’s Counsel to Comply With Rule 25” is DENIED without prejudice to refile. Dkt. 41.
24 Specifically, the Court DENIES Plaintiff’s motion for substitution as premature because he must
25 first comply with the claims presentation requirements of the California Probate Code if he wants
26 to pursue this action against Defendant’s personal representative. Plaintiff’s motion for leave to
27 amend his complaint to add new defendants is also DENIED at this time, and the original
28 complaint remains the operative complaint. Such a denial is without prejudice to refile *after* he

1 complies with the California Probate Code claim presentation requirements and refiles his motion
2 for substitution. Plaintiff is reminded that he must demonstrate good cause for his late amendment
3 and link each newly named defendant to his Eighth Amendment claim. Finally, Plaintiff's request
4 that the Court issue an order directing defense counsel to share information regarding counsel's
5 investigation into Defendant's probate estate is DENIED as moot because the record shows that
6 said information was provided to Plaintiff on June 12, 2017. See Dkt. 44 at 2 (citing Dkt. 37
7 (Attorney Stocker's Declaration)).

8 2. This action is STAYED, and the Clerk of the Court shall ADMINISTRATIVELY
9 CLOSE the case pending the stay of this action. Nothing further will take place in this action until
10 the stay is lifted and the action reopened.

11 3. If and when Plaintiff is ready to file his motion to substitute a proper defendant in
12 place the deceased defendant, Plaintiff should move to lift the stay and reopen the action at the
13 same time he files his motion for substitution. Plaintiff must file quarterly status reports
14 describing the progress of his compliance with the claims presentation requirements of the
15 California Probate Code, commencing **forty (45) days** from the date of this Order and continuing
16 every **ninety (90) days** thereafter until he has fully complied with the claims presentation
17 requirements.

18 4. If defense counsel wishes to trigger the 90-day period in Rule 25(a), she should
19 move to lift the stay and reopen the action at the same time she files and properly serves a
20 suggestion of death. If defense counsel wishes to substitute in as the proper defendant, she should
21 move to lift the stay and reopen the action at the same time she files a motion to substitute in as a
22 defendant.


23 5. Because the Court is staying these proceedings, the pending motion for summary
24 judgment is DENIED without prejudice to refile after the case has been reopened. Dkt. 24.

25 6. This Order terminates Docket Nos. 24 and 41.

26 IT IS SO ORDERED.

27 Dated: August 31, 2017

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YVONNE GONZALEZ ROGERS
United States District Judge