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3 **E-Filed 1/26/2011**
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7 NOT FOR CITATION
8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
10 SAN JOSE DIVISION
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12 HERMINIA LORENZO CRUZ,
13 Plaintiff,
14 v.
15 INTERNATIONAL COLLECTION
CORPORATION, et al.,
16 Defendants.
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Case Number C 08-00991 JF
ORDER RE PLAINTIFF'S REQUEST
FOR SUBSTITUTION OF
SUCCESSOR AND AMENDMENT
OF JUDGMENT *NUNC PRO TUNC*
FILED ON DECEMBER 12, 2010
[re: docket nos. 89, 91]

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19 On September 30, 2009, the Court granted summary judgment in favor of Plaintiff
20 Herminia Cruz on a claim alleging violation of the Fair Debt Collection Practices Act
21 ("FDCPA"). It later came to the Court's attention that Ms. Cruz had passed away while
22 convalescing in the Philippines on July 2, 2009. Subsequently, on November 22, 2010,
23 Defendants filed a motion to vacate the judgment and dismiss the instant action, arguing that
24 under Fed. R. Civ. P. 25, the time with which to substitute a proper plaintiff in the action had
25 lapsed.

26 The Court concludes that the ninety-day time limit to substitute a plaintiff under Rule
27 25(a) had not expired. Defendants point out that a reference to Ms. Cruz's possible death in an
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1 unrelated motion was sufficient to trigger the ninety-day time limit. However, Defendants cite
2 no authority to support this proposition. In fact, the weight of the authority as well as the plain
3 language of the rule supports the opposite conclusion. Rule 25(a) “requires two affirmative steps
4 to trigger the running of the 90 day period.” *Barlow v. Ground*, 39 F. 3d. 231, 233 (9th Cir.
5 1994). First, a “suggesting party must formally suggest the death of a party on the record.” *Id.*
6 Second, the “suggesting party must serve other parties and nonparty successors or representatives
7 of the deceased with a suggestion of death in the same manner as required for service of the
8 motion to substitute.” *Id.* Defendants failed to fulfill either requirement. The ninety-day time
9 limit thus was never triggered, and substitution at this time of decedent’s son, Leonides Cruz, is
10 not prohibited by Rule 25(a).

11 The Court presently lacks jurisdiction to amend the judgment *nunc pro tunc*, as the
12 judgment is presently on appeal. However, Fed. R. App. P. 12.1(a) does permit the court to issue
13 an indicative ruling. Upon receipt and review of the indicative ruling, the court of appeals may
14 remand for further proceedings while retaining jurisdiction, or it may expressly dismiss the
15 appeal. Fed. R. App. P 12.1(b). “If the court of appeals remands but retains jurisdiction, the
16 parties must promptly notify the circuit clerk when the district court has decided the motion on
17 remand.” *Id.*

18 Accordingly, the Court directs Plaintiff’s counsel to transmit the instant order to the
19 Ninth Circuit Court of Appeals so that the appellate court may determine whether to remand the
20 action for the purpose of permitting the proposed substitution of Leonides Cruz and amending
21 the judgment *nunc pro tunc*.

22 IT IS SO ORDERED.

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25 DATED: 1/18/11

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JEREMY FOGEL
United States District Judge