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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

STEPHEN J. BARRETT,	)	Civil No. 02-CV-2210-L (CAB)
	)	
Plaintiff,	)	<b>ORDER DENYING WITHOUT</b>
	)	<b>PREJUDICE EX PARTE MOTION</b>
v.	)	<b>TO SUBSTITUTE ESTATE OF</b>
	)	<b>HULDA CLARK AS DEFENDANT</b>
CARLOS F. NEGRETE, HULDA	)	<b>[doc. #146]</b>
CLARK, dba NEW CENTURY PRESS,	)	
	)	
Defendants.	)	
_____	)	

On September 3, 2009, defendant Hulda Clark died. Plaintiff provided a notice of her death on October 28, 2009. On October 30, 2009, plaintiff filed an *ex parte* motion to substitute the Estate of Hulda Clark in place of Hulda Clark dba New Century Press contending that he will be irreparably harmed if Hulda Clark’s estate is not substituted as a defendant in this action. [doc. #146] The Court ordered a response to the *ex parte* motion which Negrete filed. On November 12, 2009, a telephonic status conference was held with respect to the *ex parte* motion and the trial date of December 8, 2009.

When a party dies and the claim is not extinguished by applicable substantive law, the court may order substitution of the deceased party with the proper legal representative. FED. R. Civ. P. 25(a)(1); *Hilao v. Estate of Marcos*, 103 F.3d 762, 766 (9th Cir. 1996). Any party to the action or the deceased party's successors must file a “statement noting death” and must serve it in the same manner as a motion to substitute parties. FED. R. CIV. P. 25(a) (3); *see Barlow v.*

1 *Ground*, 39 F.3d 231, 233 (9th Cir. 1994). The filing of the “statement noting death”  
2 commences the running of a 90 day limitations period for substitution of the deceased party.  
3 FED. R. CIV. P. 25(a)(1); *see Barlow*, 39 F.3d at 233-34. If the motion for substitution is not  
4 made within the 90 day limitation period, the action by or against the decedent “must be  
5 dismissed.” FED. R. CIV. P. 25(a)(1).

6 Here, plaintiff filed a notice of Clark’s death that triggered the 90 day period for the filing  
7 of a motion to substitute. Plaintiff has timely filed a motion for substitution but notes that no  
8 probate appears to have been opened. In order to litigate his claims against Hulda Clark, her  
9 legal representative or successor in interest must be named and substituted in this action.  
10 Plaintiff suggests that Hulda Clark is survived by her son, Geoff Clark, and the Court should  
11 name him as her legal representative because he is her closest living relative and heir to her  
12 estate.

13 Negrete states in his opposition that neither an estate representative nor a successor has  
14 been appointed by a probate court in the United States or in Mexico where Hulda Clark was a  
15 resident. (Opp. at 2.) Negrete states that “it is likely that the estate could be probated in  
16 Mexico.” *Id.*

17 Finally, Negrete correctly argues that the federal court cannot appoint Geoff Clark or  
18 anyone else as a personal representative. Only a state probate court is empowered to make such  
19 an appointment. CAL. PRO. CODE §§ 8400, 8405, 8420, 8440, 8460.

20 Because the Court cannot appoint a legal representative for Hulda Clark and probate has  
21 not been initiated whereby an estate representative or successor would be appointed, the Court  
22 **DENIES WITHOUT PREJUDICE** plaintiff’s *ex parte* motion to substitute the estate of Hulda  
23 Clark in place of defendant Hulda Clark, dba New Century Press.

24 **IT IS SO ORDERED.**

25 DATED: November 16, 2009

26   
27 M. James Lorenz  
28 United States District Court Judge

28 ///

1 COPY TO:  
2 HON. CATHY ANN BENCIVENGO  
3 UNITED STATES MAGISTRATE JUDGE

4 ALL COUNSEL/PARTIES  
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