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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 MANUEL M. SOARES,
12 CDCR # F-39579,

13 Plaintiff,

14 vs.

15 D. PARAMO, et al.,

16 Defendants.
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Case No.: 3:13-cv-2971-BTM-RBB

ORDER:

**1) DENYING PLAINTIFF'S
MOTION TO SUBSTITUTE
WITHOUT PREJUDICE
[ECF No. 92]**

AND

**2) DIRECTING DEFENDANTS'
COUNSEL TO SERVE STATEMENT
NOTING DEATH UPON
DEFENDANT JAN HANSSON'S
SUCCESSOR OR
REPRESENTATIVE PURSUANT
TO Fed. R. Civ. P. 4**

24 Manuel Soares (Plaintiff), a prisoner proceeding pro se and in forma pauperis in this
25 civil rights case pursuant 42 U.S.C. § 1983, in response to two Notifications of Death upon
26 the record as to Defendant J. Hansson (ECF Nos. 83, 86), has filed a Motion for
27 Substitution pursuant to FED. R. CIV. P. 25 (ECF No. 92).

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1 **I. Plaintiff’s Motion to Substitute**

2 Plaintiff seeks to substitute Defendant J. Hansson with the representative of his
3 estate, Dr. Laura Leard, as a “party-defendant to this civil action” as Defendants have
4 indicated in their Statement Regarding Appointment of Personal Representative (ECF No.
5 86 at 2), because she has been “named as the ‘personal representative’ of the estate of J[.]
6 Hansson.” (ECF No. 92 at 5.)

7 Neither Defendants’ August 16, 2016 Statement Noting Death (ECF No. 83), their
8 subsequent Statement Regarding Appointment of Personal Representative (ECF No. 86),
9 nor Plaintiff’s Motion to Substitute (ECF No. 92), however, include proof of personal
10 service on the non-party representative as required by FED. R. CIV. P. 25 and FED. R. CIV.
11 P. 4. *See* FED. R. CIV. P. 25(a)(3); *Barlow v. Ground*, 39 F.3d 231, 233-34 (9th Cir. 1994).

12 **II. Fed. R. Civ. P. 25 / Substitution of Parties**

13 A motion for substitution must be made within 90 days after service of a statement
14 of death.¹ FED. R. CIV. P. 25(a). Although Rule 25(a)(1) provides a 90-day window to file
15 a motion for substitution or the action will be dismissed, there are two requirements to
16 trigger the commencement of that period. “First, a party must formally suggest the death
17 of the party upon the record.” *Barlow*, 39 F.3d at 233. Second, while the suggestion of
18 death may be served on the parties to the action pursuant to Federal Rule of Civil Procedure
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21 ¹ Plaintiff has sued J. Hansson for damages in his individual capacity. *See* ECF No. 1 at 2,
22 15. Under California law, which determines whether § 1983 claims survive the death of a
23 party, Plaintiff’s claims against J. Hansson are not extinguished by his death. *See Robertson*
24 *v. Wegman*, 436 U.S. 590-91 (1978); *Hilao v. Estate of Marcos*, 103 F.3d 762, 766 (9th
25 Cir. 1996); *Ponce v. Gale*, 2014 WL 7381735 at *4 (C.D. Cal. Dec. 24, 2014) (unpub.);
26 CAL. CODE CIV. PROC. § 377.20(a) (“Except as otherwise provided by statute, a cause of
27 action for or against a person is not lost by reason of a person’s death, but survives subject
28 to the applicable limitations period.”); *Barnett v. Evans*, 384 F. App’x 679, 680 (9th Cir.
2010) (district court not authorized to sua sponte substitute a successor if defendant was
sued in his individual capacity). *Cf.* FED. R. CIV. P. 25(d)(1) (providing for automatic
substitution for public officials sued in their official capacity if they die, resign, or cease to
hold office while action is pending).

1 5(b), “non-party successors or representatives of the deceased party must be served the
2 suggestion of death in the manner provided by Rule 4 for the service of a summons.” *Id.*;
3 *Schalow v. San Bernardino Cnty.*, 191 F.3d 461 at *1 (9th Cir. 1999) (unpub.) (affirming
4 district court’s denial of FED. R. CIV. P. 25 motion to substitute where defendant’s formal
5 suggestion of death on the record was not served on decedent’s successors or
6 representatives); *see also Giles v. Campbell*, 698 F.3d 153, 158 (3d Cir. 2012) (finding
7 suggestion of death not served on the deceased party’s successors or representatives as
8 required by Rule 25(a) and Rule 4 deficient); *Allen v. Norum*, No. 14-CV-2570 LB, 2015
9 WL 5302617, at *2 (N.D. Cal. Sept. 10, 2015) (noting that *Barlow* “makes no distinction
10 between the requirement for a deceased defendant and a deceased plaintiff.”).

11 In this case, neither Defendants nor Plaintiff have complied with Rule 25(a)(3) and
12 Rule 4’s service requirements. Both Defendants’ Statements Noting Death were properly
13 served upon *Plaintiff* as a party by mail pursuant to FED. R. CIV. P. 5(b) (*see* ECF No. 83
14 at 4; Doc. No. 86 at 3), but neither include proof of personal service as required by Rule 4
15 upon Dr. Laura Leard, who has been identified as decedent Defendant J. Hansson’s “non-
16 party successor or representative” as is required by FED. R. CIV. P. 25(a)(3). *See Barlow*,
17 39 F.3d at 233-34. Plaintiff’s Motion to Substitute also includes a proof of service by mail
18 upon Terrence Sheehy, the Deputy Attorney General representing the remaining
19 Defendants as provided by FED. R. CIV. P. 5(b) (*see* ECF No. 92 at 9), as well as proof of
20 service *by mail* upon the attorney identified by Mr. Sheehy as the person to whom
21 “inquiries relative to th[e] appointment” of Dr. Laura Leard, the personal representative of
22 the estate of J. Hansson, “may be referred.” (*Id.*; *see also* ECF No. 86 at 2). However,
23 Plaintiff has not provided proof of having *personally* served Dr. Laura Leard as the non-
24 party successor or representative as required by Rule 4 and FED. R. CIV. P. 25(a)(3).
25 *Barlow*. 39 F.3d at 233-34.²

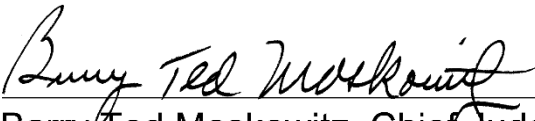
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28 ² Because Plaintiff is proceeding in forma pauperis in this matter, *see* ECF No. 9, he may request U.S. Marshal Service for purposes of serving any subsequent motion to substitute

1 **III. Conclusion and Order**

2 Accordingly, Plaintiff’s Motion to Substitute (ECF No. 92) is DENIED without
3 prejudice, and Defendants are ORDERED to file a renewed statement noting the death of
4 Defendant J. Hansson, accompanied by proof of service upon Dr. Laura Leard, the personal
5 representative of the estate of J. Hansson, pursuant to Rule 4 and FED. R. CIV. P. 25(a)(3)
6 within 30 days.³

7 IT IS SO ORDERED.

8 Dated: November 10, 2016

9 
10 Barry Ted Moskowitz, Chief Judge
11 United States District Court
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14 pursuant to FED. R. CIV. P. 25 he may wish to file upon Dr. Laura Leard as a nonparty
15 successor or representative pursuant to 28 U.S.C. § 1915(d) and FED. R. CIV. P. 4(c)(3).
16 However, Defendants must first file a renewed Notice of Death, together with proof of
17 personal service upon Dr. Laura Leard, as required by FED. R. CIV. P. 4, 25(a)(3) and this
18 Order, before the 90-day clock for filing a motion for substitution will be triggered. *Barlow*,
19 39 F.3d at 233-34. Until a properly supported and served Motion for Substitution is granted,
20 the Attorney General who represented J. Hansson throughout the course of these
21 proceedings up until his death on February 23, 2016, (*see* ECF No. 83-1 at 2), shall remain
attorney of record for Defendant J. Hansson in this matter. *See* S.D. CAL. CIVLR 83.3(f)(2)
("Until [a] substitution is approved by the court, the authority of the attorney of record will
continue for all proper purposes.").

22 ³ If Defendants’ renewed Statement of Death does not include a record of the address where
23 Dr. Laura Leard was personally served, Defendants’ counsel may be ordered to provide
24 that information in a confidential memorandum to the U.S. Marshal in the event Plaintiff
25 requests U.S. Marshal service for any subsequent Rule 25 Motion to Substitute he chooses
26 to file. *See Walker v. Sumner*, 14 F.3d 1415, 1422 (9th Cir. 1994) (noting incarcerated pro
27 se litigants are entitled to rely on the U.S. Marshal, so long as the prisoner “furnishe[s] the
28 information necessary to identify the defendant.”); *see also Graham v. Satkoski*, 51 F.3d
710, 713 (7th Cir. 1995) (while a “state prison official may be justifiably reluctant to
provide employee addresses to a prisoner due to security concerns, it can hardly claim the
same reluctance in providing the information to a federal law enforcement agency.”).