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**UNITED STATES DISTRICT COURT**  
**EASTERN DISTRICT OF CALIFORNIA**

PAMELA FOX, ON BEHALF OF  
HERSELF AND AS NEXT FRIEND TO  
C.M.R., A MINOR,

Plaintiffs,

vs.

COUNTY OF TULARE, LETICIA  
CASTANEDA, ERICA SOTO, RON  
CASTANEDA, JULIA LANGLEY,  
CAROL HELDING, JOHN ROZUM,  
STEVEN ROGERS and DOES 1-100,

Defendants.

Case No. 1:11-cv-00520-AWI-SMS

**ORDER DENYING PLAINTIFFS' MOTION  
FOR DEFAULT JUDGMENT**

(Docs. 160, 182, 189)

Before the Court is Plaintiffs' motion for default judgment against Defendant Steven Rogers. The motion is considered by Magistrate Judge Sandra M. Snyder pursuant to 28 U.S.C. § 636(b)(1)(A) and LR 302 (c)(19). For the reasons below, the motion is DENIED.

**PROCEDURAL BACKGROUND**

On January 21, 2014, Plaintiffs filed a motion seeking default judgment against Defendant Steven Rogers under the First Amended Complaint. Doc. 160. The basis for this motion is that on July 13, 2011, a clerk's entry of default as to Rogers had been entered as to the original Complaint. Doc. 21. Plaintiffs' motion also includes a request for damages, as itemized in a supporting affidavit. Doc. 160-3. On January 30, 2014, Plaintiffs amended this affidavit, revising the amount of compensatory damages and attaching evidence of these expenses. Doc. 182.

1 On February 5, 2014, the other defendants opposed Plaintiffs' motion for default judgment  
2 against Rogers. Docs. 183, 184. The Court granted Plaintiffs an extension of time within which to  
3 reply, through February 21, 2014, and took the matter under submission, deeming it suitable for  
4 decision without oral argument. Doc. 187. Plaintiffs replied on that date. Docs. 190, 191.

5 In their replies, Plaintiffs concede several points: that any judgment against Rogers must be  
6 under the original Complaint; that Plaintiffs are not entitled to punitive damages against Rogers's  
7 estate; and that judgment as to most of the claims against Rogers was untimely, given that the  
8 District Court was concurrently considering Motions for Summary Judgment in favor of the other  
9 Defendants. Nevertheless, Plaintiffs adamantly insist that judgment should be entered against  
10 Rogers personally. Only "in the alternative" and as an afterthought do Plaintiffs request  
11 appointment of a personal representative for Rogers, and only "with a directive that the personal  
12 representative's role is only to allow Plaintiffs' the right to file a claim in Rogers' insolvent estate."  
13 Doc. 191 at 7 [sic].

14 Along with their replies, Plaintiffs filed a further amendment to their motion, showing that  
15 they in fact wish to proceed against Rogers under the original Complaint, not the FAC. Doc. 189.  
16 On February 25, 2014, the County Defendants requested that the Court disregard this amendment,  
17 since it was made after the matter had been taken under submission, leaving them unable to address  
18 it. Doc. 192.

19 The Court shares Defendants' concern. Plaintiffs' sudden shift in argument amounts to an  
20 admission that its original motion was improper. Nevertheless, the Court believes it can consider  
21 Plaintiff's new argument without undue prejudice to Defendants. Even with this amendment, the  
22 motion still lacks merit. And even if it had merit, the Court would have granted relief so as to not  
23 prejudice Defendants, considering only those claims that did not interfere with the ongoing Motions  
24 for Summary Judgment. Therefore, because prejudice to Defendants would be moderated under  
25 either outcome, the Court considers the amended motion here.

#### 26 **PLAINTIFFS MAY PROCEED ON ORIGINAL COMPLAINT**

27 Defendant Steven Rogers was served with the original complaint on May 17, 2011. On July  
28 8, 2011, Plaintiffs requested entry of default as to this Defendant only. Doc. 17. On July 13, 2011,

1 this was granted. Doc. 21. Rogers died on October 22, 2011. On November 15, 2011, Plaintiffs  
2 filed an FAC which acknowledged Rogers's death. Doc 46. Nevertheless, Plaintiffs did not seek to  
3 substitute and serve a representative for Rogers.

4 "In general," a pleading such as a first amended complaint must be served upon "every  
5 party." FRCP 5(a)(1)(B). No service is required "on a party who is in default for failing to appear.  
6 But a pleading that asserts a new claim for relief against such a party must be served on that party  
7 under Rule 4." FRCP 5(a)(2).

8 Along with their reply brief, Plaintiffs filed a further amendment to their motion for default  
9 judgment, purporting to show that the legal and factual claims against Rogers in the complaint and  
10 in the FAC were materially identical. Doc. 189. However, the claim for Conspiracy to Interfere  
11 with Civil Rights under 42 U.S.C. § 1985(3) bears further scrutiny. The District Court had  
12 dismissed the § 1985 claim from the original complaint, observing:

13 For the first time in the opposition, Plaintiffs state that their conspiracy claim under 42 U.S.C. §  
14 1985(3) claim is based on gender discrimination against Fox. Opposition at 24-32, Doc. 28 at 24-  
15 32. Plaintiffs have not set forth any allegations in the Complaint that raise an inference of gender  
16 discrimination. At the hearing, Plaintiffs requested that they be granted leave to amend this claim.  
Accordingly, Social Worker Defendants and Ron Castaneda's motion to dismiss Plaintiffs' third  
claim for relief is GRANTED. ... This Court's order with respect to this claim applies to all  
Defendants that Plaintiffs brought this claim against.

17 Order on Motion to Dismiss (Doc. 45) at 11.

18 To cure this shortcoming, the FAC added the following regarding that claim:

19 Under color of law and based on FOX's gender, Defendants ROGERS, Ron and Leticia  
20 CASTANEDA, Erica SOTO, Julia LANGLEY, and Carol HELDING failed to act on false  
21 allegations made by Defendant ROGERS, a male, while at the same time, discounted, ignored and  
moved to deprive Plaintiff FOX, a female, of custody when C.M.R. and FOX made valid reports  
of child abuse.

22 FAC at ¶216

23 Furthermore, specific allegations regarding Rogers differ between the complaint and the FAC. For  
24 example, compare Complaint at ¶¶36-39 with FAC at ¶¶73-77 (adding, for the first time, certain  
25 elements of conspiracy); Complaint at ¶41 with FAC at ¶¶81-85 (same); Complaint at ¶42 with  
26 FAC at ¶89 (adding that Rogers's allegation that CMR was raped lacked medical evidence);  
27 Complaint at ¶45 with FAC at ¶¶92-93, 95 (adding opinion of CWS critical of Rogers taking CMR  
28 for invasive evaluations); Complaint at ¶55 with FAC at ¶106-107 (alleging that no charges were

1 filed against Rogers because of the relationship between Castaneda and Rogers, and that they  
2 agreed to misdirect social workers and sheriff's investigators); Complaint at ¶70 with FAC at ¶120  
3 (alleging confidentiality of a report to show that Rogers violated confidentiality rules).

4 Although these new factual and legal allegations appear to invoke the terms of FRCP  
5 5(a)(2), the Court concludes that they do not prevent Plaintiffs from proceeding against Rogers on  
6 the original Complaint, to which he defaulted. *See W. Sur. Co. v. Leo Const., LLC*, 2013 WL  
7 144097 (D. Conn. Jan. 11, 2013) ("there is nothing improper about holding one defendant in default  
8 of one complaint and other defendants liable on later complaints"). The consequence for failure to  
9 comply with FRCP 5(a)(2) appears to be that default may still be pursued under the original  
10 complaint. *See, e.g., IBEW Local 595 Health & Welfare Trust Fund v. Givens Elec., Inc.*, C 09-  
11 06076 RS, 2011 WL 2414346 (N.D. Cal. June 15, 2011).

#### 12 **FAILURE TO STATE A CLAIM**

13 Before considering the issue of substitution, the Court notes as a preliminary matter that  
14 four of the claims against Rogers must be dismissed on their face. In considering a motion for  
15 default judgment, the Court must consider whether the plaintiff "state[s] a claim on which the  
16 [plaintiff] may recover." *Kloeping v. Fireman's Fund*, 1996 WL 75314, at \*2 (N.D. Cal. Feb. 13,  
17 1996) (citing *Danning v. Lavine*, 572 F.2d 1386, 1388 (9th Cir.1978)).

#### 18 Third Claim: Conspiracy to Interfere with Civil Rights

19 As mentioned above, the § 1985 claim in the original Complaint was dismissed against all  
20 parties, including Rogers. Plaintiffs have not served Rogers's representative with the amended  
21 FAC, so the claim remains dismissed.

#### 22 Seventh Claim: General Negligence

23 The seventh claim in the original complaint is for "General Negligence." Doc. 1 at 30. The  
24 elements of negligence are that the defendant had a duty to use due care, that he breached that duty,  
25 and that the breach was the proximate or legal cause of the resulting injury. *Nally v. Grace*  
26 *Community Church*, 47 Cal.3d 278, 292 (1988). The FAC identifies the duty of care in this case as  
27 "statutory and common law duties to properly effectuate the child protection laws of the State of  
28 California and not to interfere with the civil rights of plaintiffs." FAC ¶252.

1 The FAC thus identifies two separate duties: First, Rogers owed a duty to not interfere with  
2 Plaintiffs' "civil rights." And second, Rogers owed "statutory and common law duties to properly  
3 effectuate the child protection laws of the State of California." Rogers is a private person. Plaintiffs  
4 have identified no legal grounds why the above-mentioned duties would apply to him. The Court  
5 infers that Plaintiffs intended to include only County employees in this claim. Plaintiffs have failed  
6 to state a negligence claim as to Rogers.

7 Eleventh Claim: Civil Conspiracy

8 The eleventh claim in the original complaint is for "civil conspiracy."

9 Conspiracy alone is not a cause of action but a legal doctrine for imposing liability. *Applied*  
10 *Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4th 503, 510-511 (1994). The elements of civil  
11 conspiracy are: 1) formation and operation of the conspiracy; and, 2) damage resulting to plaintiff  
12 from a wrongful act done in furtherance of a common design. *Rusheen v. Cohen*, 37 Cal.4th 1048,  
13 1062 (2006). "[T]he major significance of the conspiracy lies in the fact that it renders each  
14 participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from the  
15 wrong, irrespective of whether or not he was a direct actor and regardless of the degree of his  
16 activity." *Doctors' Co. v. Superior Court*, 49 Cal. 3d 39, 44, 775 P.2d 508, 510-11 (1989).

17 This cause of action alleges: "In doing the acts describe [sic] herein, [Defendants Tulare  
18 County, Leticia Castaneda, Erica Soto, Ron Castaneda, and Steven Rogers]" acted in concert,  
19 consulting and conferring with one-another, jointly engaging in said acts, thereby conspiring to  
20 commit the civil wrongs alleged herein." Complaint at ¶198. The "civil wrongs alleged herein" are  
21 not identified.

22 As noted above, Plaintiffs amended the FAC to identify an agreement between Rogers and  
23 Castaneda. However, for purposes of this motion the operative pleading is the original complaint.  
24 The Complaint alleges no agreement made between Rogers and anybody. *See, e.g.*, ¶¶35-40.

25 Twelfth Claim: Negligence Per Se

26 The twelfth claim in the original complaint is for "negligence per se" against Rogers. Doc. 1  
27 at 34. "Negligence per se" is an evidentiary doctrine codified at California Evidence Code section  
28 669. Subdivision (a) creates a presumption of negligence if four elements are established: (1) the

1 defendant violated a statute, ordinance, or regulation of a public entity; (2) the violation  
2 proximately caused death or injury to person or property; (3) the death or injury resulted from an  
3 occurrence the nature of which the statute, ordinance, or regulation was designed to prevent; and  
4 (4) the person suffering the death or the injury to his person or property was one of the class of  
5 persons for whose protection the statute, ordinance, or regulation was adopted. The presumption  
6 may be rebutted. *Quiroz v. Seventh Ave. Ctr.*, 140 Cal. App. 4th 1256, 1285 (2006).

7 A finding that negligence per se applies does not state an independent cause of action.  
8 Instead, it operates to establish a presumption of negligence in service of a preexisting common law  
9 cause of action. *Id.* This cause of action simply alleges that Rogers violated various Penal Code  
10 provisions by committing sexual battery, taking naked photos of C.M.R., and possessing child  
11 pornography—all intentional acts. Plaintiffs have failed to state a claim for negligence.

12 **INAPPLICABILITY OF 90-DAY PERIOD UNDER FRCP 25**

13 Although Plaintiffs alleged in the FAC that Rogers was killed in a motor vehicle accident,  
14 Plaintiffs did not substitute a personal representative or the estate of Steven Rogers as a defendant,  
15 and the FAC was never served on any representative of Steven Rogers. Defendants argue that  
16 Plaintiffs’ claims against Rogers “must be dismissed” pursuant to FRCP 25(a), which states as  
17 follows:

18 (1) *Substitution if the Claim Is Not Extinguished.* If a party dies and the claim is not extinguished,  
19 the court may order substitution of the proper party. A motion for substitution may be made by  
20 any party or by the decedent’s successor or representative. If the motion is not made within 90  
21 days after service of a statement noting the death, the action by or against the decedent must be  
22 dismissed.

21 ...  
22 (3) *Service.* A motion to substitute, together with a notice of hearing, must be served on the parties  
23 as provided in Rule 5 and on nonparties as provided in Rule 4. A statement noting death must be  
24 served in the same manner. Service may be made in any judicial district.

25 “Although Rule 25(a)(1) could be clearer, a careful reading of the rule coupled with an  
26 understanding of its function leads to the conclusion that the rule requires two affirmative steps in  
27 order to trigger the running of the 90 day period. First, a party must formally suggest the death of  
28 the party upon the record. Second, the suggesting party must serve other parties and nonparty  
successors or representatives of the deceased with a suggestion of death in the same manner as

1 required for service of the motion to substitute.” *Barlow v. Ground*, 39 F.3d 231, 233-34 (9th Cir.  
2 1994) (citations omitted).

3         These requirements for mandatory dismissal do not apply here. This can be shown with  
4 reference to the requirement of “service of a statement noting the death.” The Ninth Circuit requires  
5 that “a formal suggestion of death is made on the record, regardless of whether the parties have  
6 knowledge of a party’s death.” *Braden v. Plumbing & Pipefitting Indus. Local 38 Convalescent*  
7 *Trust Fund*, 967 F.2d 584 (9th Cir. 1992). In *Braden*, the Ninth Circuit “adopt[ed]” this rule from  
8 the Tenth Circuit decision in *Grandbouche v. Lovell*, 913 F.2d 835 (10th Cir.1990) (per curiam), in  
9 which the Court explained:

10             Mere reference to a party’s death in court proceedings or pleadings is not sufficient to trigger the  
11 limitations period for filing a motion for substitution. *See, e.g., Kaldaw v. Gold Serv. Movers,*  
12 *Inc.*, 129 F.R.D. 475, 477 (S.D.N.Y.1990) (court’s order noting plaintiff’s death and placing case  
13 on suspended calendar, which was mailed to counsel for all parties, including decedent’s counsel,  
14 insufficient to trigger the ninety-day limitations period); *Tolliver v. Leach*, 126 F.R.D. 529, 530-31  
(W.D.Mich.1989) (defense counsel’s statement concerning defendant’s death, made on record  
during discovery conference, insufficient to trigger limitations period); *Gronowicz v. Leonard*, 109  
F.R.D. 624, 626-27 (S.D.N.Y.1986) (letter from party’s attorney to court notifying court of party’s  
death insufficient suggestion of death to trigger limitations period).

15 *Grandbouche*, 913 F.2d at 836; *cf. Miles, Inc. v. Scripps Clinic & Research Found.*, 810 F. Supp.  
16 1091, 1102 (S.D. Cal. 1993) (ninety-day period triggered by pretrial memorandum that set forth an  
17 intention to substitute the wife of the decedent as the executrix of the estate for plaintiff). Thus,  
18 although Plaintiffs clearly were aware of Rogers’s death and indicated as much upon the record,  
19 their filing was of insufficient formality to initiate the 90-day period.

20         This outcome may seem incongruous in a situation where, as here, Plaintiffs have made no  
21 effort to substitute a party despite admitting knowledge of Rogers’s death for more than two years.  
22 But given that Rule 25 creates a harsh 90-day condition under which claims “must” be dismissed, it  
23 makes sense to apply the same strict definition of “suggestion of death” in all circumstances, if only  
24 for the purpose of giving clear notice to Plaintiffs of when the time window has begun. As the  
25 Advisory Committee Note indicates, Defendants could have availed themselves of this same  
26 mechanism by filing the suggestion of death themselves. (“If a party or the representative of the  
27 deceased party desires to limit the time within which another may make the motion, he may do so  
28 by suggesting the death upon the record.”)

1 This does not prevent the Court from considering Plaintiffs’ extreme delay in exercising its  
2 discretion whether to grant a motion to substitute, an inquiry which the Court makes next.

3 **SUBSTITUTION FOR ROGERS IS IMPROPER**

4 Plaintiffs’ two remaining claims against Rogers (for Intentional Infliction of Emotional  
5 Distress and for Sexual Battery) are under California law. While Rule 25 provides the procedure for  
6 substitution of a “proper party,” “[t]he question of who is a proper party is a substantive issue, for  
7 which we must rely upon state law.” *In re Baycol Products Litig.*, 616 F.3d 778, 787-88 (8th Cir.  
8 2010). Sections 377.40-41 of the California Code of Civil Procedure indicate that the proper party  
9 is the decedent’s personal representative<sup>1</sup> or, to the extent provided by statute, the decedent’s  
10 successor in interest,<sup>2</sup> subject to exceptions governing creditor claims. “[T]rial cannot proceed and  
11 judgment cannot be given for or against the decedent, nor for or against the decedent’s personal  
12 representative until the latter has been made a party by substitution.” *Johnson v. Simonelli*, 231  
13 Cal.App.3d 105, 107 n.1 (3d Dist.1991); *Estate of Edwards*, 82 Cal.App.3d 885, 893, 147 Cal.Rptr.  
14 458, 463 (3d Dist.1978) (if personal representative is not substituted any judgment purporting to be  
15 in favor of decedent is void).

16 Plaintiffs spend the lion’s share of their reply briefs arguing against substitution. *See*  
17 Plaintiff’s Reply to Objections by Castaneda *et al.*, Doc. 190:

18 There was no need to substitute a personal representative for the estate of Steven Rogers as a  
19 defendant because his default had been entered and the First Amended Complaint did not affect  
20 any of the claims made against him. ... In this case, there is no personal representative and the  
21 decedent, Rogers’ successor in interest is the minor Plaintiff and his other minor child who is not a  
22 party to this action. It would be a conflict of interest for either plaintiff to seek appointment as  
23 personal representative of Rogers’ estate because their respective interest would be in conflict ...  
24 Plaintiff, a minor, does not have the capacity to file a probate proceeding and clearly, codefendants  
25 are not going to file for appointment as the personal representative of Roger’s estate because it  
26 would obligate them to defend against the minor Plaintiff’s claims.

24 \_\_\_\_\_  
25 <sup>1</sup> “Personal representative” means executor, administrator, administrator with the will annexed, special administrator,  
26 successor personal representative, public administrator acting pursuant to Section 7660, or a person who performs  
27 substantially the same function under the law of another jurisdiction governing the person’s status. Cal. Prob. Code § 58  
(West). *See* California Code of Civil Procedure Section 336.2 and Probate Code section 9370 (requirements for action  
28 against personal representative).

27 <sup>2</sup> “Successor in interest” means the beneficiary of the decedent’s estate or other successor in interest who succeeds to a  
28 cause of action or to a particular item of the property that is the subject of a cause of action. Cal. Civ. Proc. Code § 377.11  
(West).



1 Plaintiffs further note (as an argument against substituting a party for Rogers) that to their  
2 knowledge, Rogers was insolvent when he died. This is consistent with the fact that Plaintiffs have  
3 waited two-and-half years before seeking this default judgment.

4 Nevertheless, Plaintiffs acknowledge (perhaps unintentionally) that some substitution is  
5 necessary when they admit that they do not seek punitive damages, citing California Code of Civil  
6 Procedure Section 377.42, which forbids such a reward in actions against a decedent's personal  
7 representative or successor in interest. Entirely as an afterthought, they then request that the Court,  
8 "[i]n the alternative, permit Plaintiffs seek appointment of a personal representative for Rogers'  
9 with a directive that the personal representative's role is only to allow Plaintiffs' the right to file a  
10 claim Rogers' insolvent estate." Doc. 191 at 7 [sic]. Despite claiming detailed knowledge of  
11 Rogers's property and heirs, they make no effort to identify who this person should be.

12 FRCP 25 states that: "If a party dies and the claim is not extinguished, the court may order  
13 substitution of the proper party." As the Advisory Committee Note to the 1963 Amendment  
14 observes, this language is discretionary. "A motion to substitute made within the prescribed time  
15 [i.e., 90 days] will ordinarily be granted," but it "may be denied by the court in the exercise of a  
16 sound discretion if made long after the death—as can occur if the suggestion of death is not made  
17 or is delayed—and circumstances have arisen rendering it unfair to allow substitution. ...  
18 Accordingly, a party interested in securing substitution under the amended rule should not assume  
19 that he can rest indefinitely awaiting the suggestion of death before he makes his motion to  
20 substitute."

21 Plaintiffs' request is confounding. If, as Goldstein declares, Rogers's estate in fact was  
22 insolvent, the need for this long-delayed default judgment is dubious. But even that declaration of  
23 insolvency is uncertain. Conspicuously, it is made without attribution to personal knowledge ("it  
24 was confirmed that there was no Will, no probate action and that Defendant Rogers died intestate."  
25 Doc. 191-1).

26 If Rogers did not die insolvent, his heirs may in fact have a material interest to defend. As  
27 Plaintiffs acknowledge, these include two likely heirs whose interests "would be in conflict":  
28 Plaintiff C.M.R. herself, and Rogers's other daughter who is not a party to this action. Yet,

1 Plaintiffs cite this fact of conflict as the very reason why they declined to give that other daughter  
2 an opportunity to substitute. Instead, and without citing any legal authority, Plaintiffs insist that any  
3 personal representative must be a sinecure, operating under a limited “directive” to allow Plaintiffs  
4 to pursue their claim against Rogers’s “insolvent estate.”

5 The Court cannot grant this motion. The appointment of a purely *pro forma* personal  
6 representative, as Plaintiffs request, would not be consistent with the potential rights of these  
7 successors. “Because the purpose of Rule 25(a)(1) is to protect the estate of the decedent, district  
8 courts must ensure only those individuals who can adequately represent the interests of the  
9 deceased party are substituted under the Rule.” *In re Baycol Products Litig.*, 616 F.3d at 788  
10 (quotation omitted).

11 Furthermore, Plaintiffs have delayed two-and-a-half years in seeking substitution for  
12 Rogers. This delay is entirely without justification. To the extent that Rogers had any assets worth  
13 pursuing—that is, to the extent that this motion was not entirely futile—this delay worked prejudice  
14 upon Rogers’s heirs. *Cf. Ashley v. Illinois Cent. Gulf R. Co.*, 98 F.R.D. 722, 724 (S.D. Miss. 1983)  
15 (dismissal under Rule 25 supported “in view of the lack of diligence of Plaintiff’s counsel  
16 throughout these pleadings”—including delay totaling eight months before and after filing of  
17 Suggestion of Death). Plaintiffs’ request “in the alternative” for substitution is denied.

#### 18 CONCLUSION

19 Because, as stated above, California law does not permit judgment against a deceased  
20 defendant as to Plaintiffs’ two remaining claims, the motion for default judgment (Docs. 160, 182,  
21 189) against Rogers is DENIED.

22  
23  
24 IT IS SO ORDERED.

25 Dated: March 5, 2014

/s/ Sandra M. Snyder  
UNITED STATES MAGISTRATE JUDGE