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MARK H. PIERCE, SOCRATES P. MANAOUKIAN
8 AND SANTA CLARA SUPERIOR COURT

9 UNITED STATES DISTRICT COURT

10 NORTHERN DISTRICT OF CALIFORNIA – SAN JOSE DIVISION

11 SALMA MERRITT AND DAVID MERRITT
12 and BEATRICE PACHECO-STARKS

13 Plaintiffs,

14 v.

15 KEVIN E. MCKENNEY, THOMAS W.
16 CAIN, MARK H. PIERCE, SOCRATES P.
17 MANOUKIAN, SANTA CLARA SUPERIOR
18 COURT, LYNN SEARLE, MICHAEL
19 DESMERAIS and DOES 1 – 20, inclusive,

20 Defendants.

Case No: 13-CV-01391 PSG

**DEFENDANTS KEVIN E. MCKENNEY,
THOMAS W. CAIN, MARK H. PIERCE,
SOCRATES P. MANAOUKIAN AND
SANTA CLARA SUPERIOR COURT’S
OPPOSITION TO PLAINTIFFS’
MOTION FOR LEAVE TO FILE
SECOND AMENDED COMPLAINT**

DATE: June 25, 2013
TIME: 10:00 a.m.
DEPT: 5
JUDGE: Hon. Paul Singh Grewal

1 **I. INTRODUCTION**

2 Plaintiffs Salma Merritt, David Merritt, and Beatrice Pacheco-Starks seek leave to amend
3 the First Amended Complaint (“FAC”). According to Plaintiffs, the proposed Second Amended
4 Complaint (“SAC”) contains the same causes of action and same allegations against the same
5 defendants, but clarifies (their belief) that the actions of Defendants Judges Pierce, Manoukian,
6 McKenney and Cain, and the Superior Court of California, County of Santa Clara (“Judicial
7 Defendants”) were administrative and non-judicial in nature. While the proposed SAC does add
8 additional facts, assertions and conclusions, the substantive allegations are the same and, like the
9 FAC, it fails to set forth a viable cause of action against Judicial Defendants.¹ Leave to amend
10 should be denied.

11 **II. DISCUSSION**

12 **A. Leave To Amend Should Be Denied Where Amendment Is Futile**

13 Leave to amend should freely be given when justice so requires. (Fed. R. Civ. P. 15(a)(2).)
14 However, leave to amend should be denied where it would cause prejudice to the opposing party, is
15 sought in bad faith, is futile, creates undue delay, or where there are repeated failures to cure the
16 deficiencies of the complaint. (*See, e.g., Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981,
17 1007 (9th Cir. 2009) (affirming order denying leave to amend where proposed amendment would be
18 futile).) Denial of leave to amend is proper where every iteration of the complaint fails to cure its
19 deficiencies. (*Metzler Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1072 (9th Cir.
20 2008).) Where it is clear that the plaintiffs cannot amend the complaint to plead a viable cause of
21 action, denial of leave to amend is appropriate. (*Janas v. McCracken*, 183 F.3d 970, 991 (9th Cir.
22 1999).)

23 As discussed below and in Judicial Defendants’ Reply in support of their Motion to Dismiss
24 Plaintiffs’ FAC, Plaintiffs cannot plead a viable cause of action against Judicial Defendants.
25 Amendment is futile, and leave to amend should be denied.

27 ¹ Plaintiffs also endeavor to name Superior Court ADA Coordinator Georgia Ku as a defendant in
28 the proposed SAC, but identify no wrongful conduct of any sort committed by Ms. Ku. Plaintiffs’
attempt to name Ms. Ku as a defendant should be rejected.

1 **B. Judicial Immunity Bars Plaintiffs' Claims Based On Purportedly**
2 **Administrative Acts**

3 As set forth in Judicial Defendants' Motion to Dismiss, judicial immunity bars claims
4 against judges for acts relating to the judicial process, including claims under the ADA that a judge
5 refused to accommodate a disabled person. (*Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1133 (9th
6 Cir. 2001); *see also Ervin v. Judicial Council of Cal.*, 307 Fed. Appx. 104, 105 (9th Cir. 2009).)

7 Plaintiffs seek leave to amend the FAC to re-label the judicial acts they complain of as
8 "administrative" in nature, and therefore not protected by judicial immunity. As outlined in Judicial
9 Defendants' Motion to Dismiss, the acts complained of are ruling on a request for an extension of
10 time to oppose a sanctions motion, a request to limit the time of a deposition session, a motion to
11 amend a complaint and continue trial and, in the case of Judge Cain, refusing Mr. Merritt's requests
12 to be appointed Ms. Pacheco-Starks' representative and to terminate Ms. Pacheco-Starks' attorney
13 in her conservatorship proceedings. Plaintiffs claim that anything labeled an "ADA request" is
14 administrative, citing California Rule of Court 1.100, but that Rule does not provide that all "ADA
15 requests" are administrative in nature, nor does that Rule have any application to determining the
16 scope of judicial immunity. In any case, the "requests" in issue are clearly not administrative, but
17 the exercise of core judicial functions.

18 Ruling on a motion and controlling the courtroom are judicial functions protected from
19 liability under the ADA by absolute judicial immunity. (*Duvall, supra*, 260 F.3d at 1133 (rejecting
20 ADA claim against judge based on refusal to provide videotext display and finding that "ruling on a
21 motion" is a normal judicial function protected by judicial immunity); *see also Brown v. Cowlitz*
22 *Cnty.*, Case No. C09-5090 FDB, 2009 U.S. Dist. LEXIS 90918, at *7-9 (W.D. Wa. Sept. 29, 2009)
23 (controlling use of service dog in courtroom is judicial in nature and protected by judicial
24 immunity); *Badillo Santiago v. Garcia*, 70 F. Supp. 2d 84, 91 (D.P.R. 1999) (judicial immunity bars
25 ADA claim against judge for failure to provide hearing aid).) Decisions regarding accommodations
26 made by a judge in the course of handling a litigant's case are protected by judicial immunity.
27 (*Palacios v. Fresno Cnty. Sup. Ct.*, Case No. 1:09cv0554 OWW DLB, 2009 U.S. Dist. LEXIS
28 97662, at *7-10 (E.D. Cal. Oct. 21, 2009) ("any such decisions [regarding accommodations] were

1 made in the course of Plaintiff’s case(s) and Plaintiff presents no facts to remove the actions from
2 the realm of judicial functions.”.)

3 Ruling on a motion or “request” for extension of time to oppose a motion, a request to limit
4 the time of a deposition session, or a motion to amend a complaint and continue trial are acts that
5 are clearly judicial in nature. Judges across the country routinely handle such motions and
6 “requests” in the course of managing the litigation before them. If a judge cannot be held liable
7 under the ADA for requests relating to service animals, videotext displays, and hearing aids, by
8 greater force of logic a judge cannot be held liable for ruling on a motion requesting a continuance
9 or leave to amend a complaint. In the case of Judge Cain, there can be no liability under the ADA
10 where the judge refused to appoint a non-attorney in place of the existing attorney for a conservator:
11 the determination of representation of a conservator in conservatorship proceedings is a core
12 judicial function.

13 Despite Plaintiffs’ attempt – in their opposition and proposed SAC – to categorize the
14 challenged actions as “administrative,” the acts complained of are clearly judicial functions
15 pertaining to cases pending before these judges. The purpose of judicial immunity is to permit
16 judges to freely rule on the matters before them without fear of personal liability, and that purpose
17 is properly served by applying judicial immunity to the acts complained of here. Plaintiffs’
18 proposed SAC fails to state any viable claim not barred by judicial immunity, and amendment
19 would be futile.² Plaintiffs’ Motion should be denied.

20 C. The *Rooker-Feldman* and *Younger* Doctrines Preclude Plaintiffs’ Claims

21 Like the FAC, the Prayer of the SAC asks this Court to “undo any and all orders” entered in
22 state court proceedings. (Proposed SAC, Prayer ¶ 6.) This sort of horizontal appeal, asking a
23 federal district court to review and reverse state court decisions, is precluded by the *Rooker-*
24 *Feldman* doctrine as to final state court decisions and by the *Younger* doctrine as to pending state
25 court decisions. (*See, e.g., Carmona v. Carmona*, 603 F.3d 1041, 1050 (9th Cir. 2010) (describing

26
27 ² Plaintiffs name the Superior Court of California, County of Santa Clara as a defendant, but
28 identify no purportedly wrongful actions taken by the Superior Court. For this reason, Plaintiffs fail
to state any viable claim under the ADA against the Superior Court. To the extent the Superior
Court’s liability is premised on the conduct of its judges, judicial immunity bars any such claim.

1 the *Rooker-Feldman* doctrine); *Potrero Hills Landfill, Inc. v. Cnty. of Solano*, 657 F.3d 876, 882
2 (9th Cir. 2011) (describing the *Younger* doctrine.) It is established that “the ADA does not
3 authorize federal appellate review of final state court decisions.” (*Dale v. Moore*, 121 F.3d 624,
4 628 (11th Cir. 1997) (cited with approval in *Doe v. Mann*, 415 F.3d 1038, 1043 n.7 (9th Cir.
5 2005)).)

6 The relief Plaintiffs seek is precluded by the *Rooker-Feldman* and *Younger* doctrines, and
7 leave to amend should be denied.

8 **D. Plaintiffs Continue To Fail To State A Claim Under The ADA**

9 Plaintiffs’ Motion to Amend was filed to address the arguments raised in Defendants’
10 Motions to Dismiss. (Mtn. to Amend (Docket 22) at 1:24-26, 2:10-18.) Plaintiffs’ Motion to
11 Amend fails to address a number of significant issues raised in Judicial Defendants’ Motion to
12 Dismiss. Plaintiffs’ failure to address these issues indicates that Plaintiffs cannot successfully
13 allege claims against Judicial Defendants.

14 As described in Judicial Defendants’ Motion to Dismiss, Plaintiffs’ ADA claims fail for
15 several reasons, aside from the bar of judicial immunity:

16 1. Title II of the ADA applies to public entities, not to individuals. (42 U.S.C. § 12132;
17 *Ervin v. Judicial Council of Cal.*, 307 Fed. App’x 104, 105 (9th Cir. 2009).) Plaintiffs cannot sue
18 judges as defendants under the ADA.

19 2. Plaintiff David Merritt does not allege that he has a disability of any sort. He has no
20 standing as an ADA plaintiff. (*See* 42 U.S.C. § 12132 (prohibiting discrimination against a
21 qualified individual with a disability).)

22 3. “Plaintiff” Pacheco-Starks is not a proper party to this litigation, and cannot allege an
23 ADA claim on that basis. Ms. Pacheco-Starks did not sign the FAC or proposed SAC, as required
24 by Federal Rule of Civil Procedure 11(a). Mr. Merritt is not an attorney, and appears to be
25 engaging in the unauthorized practice of law by representing Ms. Pacheco-Starks, who is alleged to
26 be the subject of a conservatorship. (*See generally* Cal. Bus. & Prof. Code § 6125; Civ. L. R. 11-1.)
27 Having not appeared in propria persona or through an attorney, Ms. Pacheco-Starks is not a plaintiff
28 to this litigation, and cannot state an ADA violation against the Judicial Defendants.

1 4. Plaintiffs' allegations of retaliation are conclusory in nature and fail to identify any
2 harm caused by any alleged retaliation. (*See Arocho-Castro v. Figueroa-Sancha*, Civil No. 10-1223
3 (GAG), 2010 U.S. Dist. LEXIS 104145 (D.P.R. Sept. 29, 2010) (dismissing Title V retaliation
4 allegation for failure to adequately allege retaliation or resulting harm).)

5 5. Plaintiffs' allegations that motions or other "requests" decided against them in
6 litigation constitute discrimination do not amount to an allegation that Plaintiffs were "excluded
7 from participation" or "denied the benefits" of any service, program or activity. (42 U.S.C. §
8 12132.)

9 6. Plaintiffs fail to allege any wrongful conduct on the part of the Superior Court of
10 California, County of Santa Clara, or Superior Court ADA Coordinator Georgia Ku. Amendment
11 of any purported claims against these defendants would be futile.

12 Plaintiffs' proposed SAC does nothing to cure these defects. The Motion to Amend should
13 be denied.

14 **III. CONCLUSION**

15 Plaintiffs would have the ADA swallow California procedural law and the long standing
16 doctrine of judicial immunity, leaving judges unable to manage litigation (and subjecting them to
17 civil liability for ruling on any and all matters before them involving allegedly disabled litigants).
18 No case has ever held that the ADA governs how state court judges may manage their dockets; the
19 ADA does not provide for such fundamental alterations in the state court system. (28 C.F.R. §
20 35.130(b)(7).) Plaintiffs' claims are barred by judicial immunity, and Plaintiffs fail to state a claim
21 under the ADA. Plaintiffs' repeated attempts to amend the Complaint support a finding that further
22 amendment would be futile, and the instant Motion to Amend should be denied.

23 Dated: June 13, 2013

Respectfully submitted,

24 MEYERS, NAVE, RIBACK, SILVER & WILSON

25
26 By: /s/ Kevin P. McLaughlin

Kevin P. McLaughlin

Attorney for Defendants

27 KEVIN E. MCKENNEY, THOMAS W. CAIN,
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