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AND SANTA CLARA SUPERIOR COURT
8

9 UNITED STATES DISTRICT COURT

10 NORTHERN DISTRICT OF CALIFORNIA – SAN JOSE DIVISION
11

12 SALMA MERRITT AND DAVID MERRIT
and BEATRICE PACHECO-STARKS

13
14 Plaintiffs,

15 v.

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

19
20 Defendants.
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Case No: 13-CV-01391 PSG

**DEFENDANTS KEVIN E. MCKENNEY,
THOMAS W. CAIN, MARK H. PIERCE,
SOCRATES P. MANAOUKIAN AND
SANTA CLARA SUPERIOR COURT
NOTICE OF MOTION AND MOTION TO
DISMISS; MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT**

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

Action Filed: March 28, 2013
Trial Date: None Set

NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on June 25, 2013 at 10:00 a.m. in Courtroom 5 of the above-referenced Court, Defendants JUDGE KEVIN E. MCKENNEY, JUDGE THOMAS W. CAIN, JUDGE MARK H. PIERCE, JUDGE SOCRATES P. MANAOUKIAN and THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA (hereinafter “Judicial Defendants”) will move this Court for an Order granting Judicial Defendants’ Motion to Dismiss Plaintiffs’ First Amended Complaint without leave to amend. Said Motion will be based on Plaintiffs’ failure to plead facts sufficient to constitute a cause of action against the Judicial Defendants and will submit the following legal issues for adjudication:

1. Are Plaintiffs’ claims against the Judicial Defendants barred by judicial immunity because they arise from the conducting of judicial proceedings? (See Mireles v. Waco, 502 U.S. 9, 9-12 (1991); Duvall v. Cnty. of Kitsap, 260 F.3d 1124, 1133 (9th Cir. 2001).)

2. Are Plaintiffs’ claims against the Judicial Defendants precluded by the Rooker-Feldman and Younger abstention doctrines? (See Allah v. Sup. Ct., 871 F.2d 887, 890-91 (9th Cir. 1989); Potrero Hills Landfill, Inc. v. Cnty. of Solano, 657 F.3d 876, 882 (9th Cir. 2011).)

3. Have Plaintiffs stated a claim against the Judicial Defendants under the Americans With Disabilities Act or state disability laws?

This Motion will be based upon this Notice, the Memorandum of Points and Authorities in support thereof, oral argument, and the complete files and records of this proceeding.

Dated: May 7, 2013

Respectfully submitted,

MEYERS, NAVE, RIBACK, SILVER & WILSON

By: /s/ Kevin P. McLaughlin

Kevin P. McLaughlin
Attorney for Defendants
KEVIN E. MCKENNEY, THOMAS W. CAIN,
MARK H. PIERCE, SOCRATES P. MANAOUKIAN
AND SANTA CLARA SUPERIOR COURT

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Along with other parties, Plaintiffs sue four state court judges and the Superior Court of
 4 California, County of Santa Clara (“Superior Court”) (collectively “Judicial Defendants”).
 5 Although Plaintiffs have captioned this matter as one involving the American with Disabilities Act
 6 (“ADA”), this is simply a case of disgruntled (and vexatious) litigants¹ attempting to sue the
 7 Superior Court and its judges for certain decisions rendered against them in state court. Among
 8 other allegations, Plaintiffs claim the Judicial Defendants violated the ADA by dismissing various
 9 lawsuits, declaring the Merritts to be vexatious litigants and failing to protect Ms. Merritt “from
 10 clearly abusive defense counsel practices.” (First Amended Complaint (“FAC”) ¶ 164.)

11 Plaintiffs attempt to bring claims under Title II and Title V of the ADA and state disability
 12 laws, seeking a variety of injunctive relief and statutory penalties. Title II of the ADA applies to
 13 public entities; individuals, including judges, are not proper defendants. Further, judicial immunity
 14 bars liability for acts performed in the course of judicial proceedings, and the *Rooker-Feldman* and
 15 *Younger* abstention doctrines preclude Plaintiffs’ attempts to re-litigate matters determined in
 16 concluded or pending state court cases. Finally, Plaintiffs cannot state a claim under the ADA or
 17 state-law equivalents: one plaintiff does not allege any disability, another does not sign the FAC,
 18 and Plaintiffs fail to allege sufficient facts demonstrating the denial of a reasonable accommodation
 19 or any other form of discrimination by a public entity. The FAC should be dismissed without leave
 20 to amend.

21 **II. ISSUES TO BE DECIDED**

22 1. Are Plaintiffs’ claims against the Judicial Defendants barred by judicial immunity
 23 because they arise from the conducting of judicial proceedings? (*See Mireles v. Waco*, 502 U.S. 9,
 24 9-12 (1991); *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1133 (9th Cir. 2001).)

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 26
 27
 28 ¹ Both David and Salma Merritt are vexatious litigants in state court. (Defendants’ Request for Judicial Notice, Ex. A.)

1 2. Are Plaintiffs' claims against the Judicial Defendants precluded by the *Rooker-*
2 *Feldman* and *Younger* abstention doctrines? (See *Allah v. Sup. Ct.*, 871 F.2d 887, 890-91 (9th Cir.
3 1989); *Potrero Hills Landfill, Inc. v. Cnty. of Solano*, 657 F.3d 876, 882 (9th Cir. 2011).)

4 3. Have Plaintiffs stated a claim against the Judicial Defendants under the Americans
5 With Disabilities Act or state disability laws?

6 **III. FACTUAL BACKGROUND**

7 Plaintiff Salma Merritt alleges that she has fibromyalgia and other diagnosed disabilities,
8 and that through her husband she presented "ADA requests" to Superior Court Judges Pierce,
9 Manoukian, and McKenney in connection with various state court actions plaintiffs initiated against
10 Countrywide Home Loans and others.² (FAC ¶¶ 19, 23, 44-45, 50, 62.) These "ADA requests"
11 appear to involve a request for an extension of time to oppose a sanctions motion, a request to limit
12 the time of a deposition session, and a motion to amend a complaint and continue trial. Plaintiff
13 contends that in deciding these "requests," Judges Pierce, Manoukian, and McKenney denied
14 Plaintiff a reasonable accommodation, and that "defendants have a policy of not accepting or
15 discrediting or not believing the evidence provided by Plaintiffs precisely because of being disabled
16 pro se Plaintiffs" and "believing lawyers evidence[.]" (FAC ¶¶ 71-72, 134.) Plaintiff further
17 contends that "defendants" have a policy of "not recognizing ADA accommodations" from one
18 judge to the next, and that this violates the ADA. (FAC ¶ 138.)

19 "Plaintiff" Beatrice Pacheco-Starks is alleged to have a severe vision impairment and
20 weakness from general aging. (FAC ¶ 78.) She is allegedly the subject of a conservatorship and
21 represented therein by Defendant Desmerais. (FAC ¶¶ 74, 81.) Ms. Pacheco-Starks allegedly asked
22 Plaintiff David Merritt to draft and file a petition to remove and replace her conservator, to
23 terminate Defendant Desmerais as her lawyer, and to disqualify Defendant Judge Cain from hearing
24 these petitions. (FAC ¶ 97.) Mr. Merritt filed a petition for removal of Ms. Pacheco-Starks'
25 conservatorship and attempted to file other "ADA Requests" which were allegedly rejected by
26 Judge Cain. (FAC ¶¶ 110, 122.) Mr. Merritt is not a lawyer. (FAC ¶ 28.)

27
28 ² The online docket for the Superior Court of California, County of Santa Clara reflects six suits involving Plaintiff Salma Merritt, with Ms. Merritt a plaintiff in each. (Def. Req. Jud. Not., Ex. B.)

1 **IV. ARGUMENT**

2 **A. Legal Standard for Motion to Dismiss**

3 Federal Rule of Civil Procedure 12(b)(6) provides for dismissal of a complaint for failure to
 4 state a claim upon which relief can be granted.³ “Dismissal [pursuant to Rule 12(b)(6)] is
 5 appropriate only when the plaintiff can prove no set of facts in support of his claims that would
 6 entitle him or her to relief. All allegations of material fact are taken as true and construed in the
 7 light most favorable to the nonmoving party.” (*Guerrero v. Gates*, 357 F.3d 911, 916 (9th Cir.
 8 2004) (footnotes omitted).)

9 Plaintiffs’ First Amended Complaint must contain a short, plain statement showing they are
 10 entitled to relief. (Fed. R. Civ. P. 8(a)(1).) Civil rights complaints must include clear factual
 11 allegations supporting each cause of action, and not allegations that are vague or based on mere
 12 conclusions. (*Ivey v. Board of Regents*, 673 F.2d 266, 268 (9th Cir. 1982); *see also Chapman v.*
 13 *Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 954 (9th Cir. 2011).) Claims may be dismissed because
 14 they fail to allege sufficient facts to support any cognizable legal claim. (*See, e.g., SmileCare*
 15 *Dental Group v. Delta Dental Plan of Cal., Inc.*, 88 F.3d 780, 783 (9th Cir. 1996).) “Leave to
 16 amend may be denied if a court determines that allegation of other facts consistent with the
 17 challenged pleading could not possibly cure the deficiency.” (*Abagninin v. AMVAC Chem. Corp.*,
 18 545 F.3d 733, 742 (9th Cir. 2008) (citation and quotation omitted).)

19 **B. Judicial Immunity Bars Plaintiffs’ Claims**

20 Although Plaintiffs claim that they are suing the four judges in their “individual and official
 21 capacities,” the entirety of Plaintiffs’ claims arise out of judicial proceedings. Accordingly,
 22 Plaintiffs’ claims are barred by the doctrine of absolute judicial immunity.

23 Judges are absolutely immune from civil liability for acts which relate to the judicial
 24 process. (*See generally Stump v. Sparkman*, 435 U.S. 349, 355-57 (1978).) Judicial immunity
 25 applies to claims that a judge, while acting in a judicial capacity, refused to accommodate a disabled
 26

27 ³ Judicial Defendants move to dismiss the FAC, although none of them have been served with the FAC.
 28 Because Judicial Defendants have not been served with the FAC, Judicial Defendants are not obligated to file
 a responsive pleading to the FAC while this Motion is pending. (*See generally Gen. Mills, Inc. v. Kraft*
Foods Global, Inc., 495 F.3d 1378 (Fed. Cir. 2007).)

1 person under the ADA. (*Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1133 (9th Cir. 2001); *see also*
2 *Ervin v. Judicial Council of Cal.*, 307 Fed. Appx. 104, 105 (9th Cir. 2009).) To further the policy of
3 ensuring an independent and disinterested judiciary, the scope of judicial immunity is broadly
4 construed. (*Ashelman v. Pope*, 793 F.2d 1072, 1078 (9th Cir. 1986) (en banc).) California courts
5 are in accord and uniformly grant immunity from civil suit to judges exercising their judicial
6 functions. (*See, e.g., Soliz v. Williams*, 74 Cal.App.4th 577, 586-87 (1999).)

7 Plaintiffs contend that Judges Pierce, Manoukian, and McKenney violated the ADA by
8 deciding Plaintiffs' request for an extension of time to oppose a sanctions motion, a request to limit
9 the time of a deposition session, and a motion to amend a complaint and continue trial, and that
10 Judge Cain violated the ADA by rejecting a petition for removal of Ms. Pacheco-Starks'
11 conservatorship. These acts are core judicial functions: the determination of motions and handling
12 of proceedings in Santa Clara Superior Court. Under controlling Ninth Circuit precedent, judicial
13 immunity bars ADA claims against judges based upon acts that are judicial in nature. (*Duvall*,
14 *supra*, 260 F.3d at 1133.)

15 The FAC does not identify any allegedly wrongful conduct by Defendant Superior Court of
16 California, County of Santa Clara. For this reason alone Plaintiffs' claims against the Court should
17 be dismissed. To the extent Plaintiffs' claims against the Court arise out of the conduct of the four
18 judges, those claims are barred by judicial immunity. Judicial Defendants are immune from
19 Plaintiffs' claims, and the FAC should be dismissed with prejudice.

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

21 Plaintiffs ask this Court to review and void a number of orders of the Superior Court which
22 were entered by the Judicial Defendants. (FAC, Prayer ¶ 6.) Review of the online docket of the
23 Superior Court shows six cases involving Ms. Merritt, some of which are open and some of which
24 have reached disposition. (Def. Req. Jud. Not., Ex. B.)

25 Resort to federal district courts for de facto appeals of state court orders is precluded by the
26 *Rooker-Feldman* doctrine. (*Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923) (federal
27 district court lacks jurisdiction to review allegations that state judgment was rendered in violation of
28 due process, equal protection and the Contract Clause of the federal constitution); *D.C. Ct. of*

1 *Appeals v. Feldman*, 460 U.S. 462, 486-87 (1983) (federal district court lacks jurisdiction to review
 2 claim that Court of Appeals acted arbitrarily, capriciously, unreasonably or discriminatorily in
 3 denying petitions for waiver of bar admission rule.) “Stated simply, the *Rooker-Feldman* doctrine
 4 bars suits brought by state-court losers complaining of injuries caused by state-court judgments
 5 rendered before the district court proceedings commenced and inviting district court review and
 6 rejection of those judgments.” (*Carmona v. Carmona*, 603 F.3d 1041, 1050 (9th Cir. 2010)
 7 (citation and quotation omitted).) Pursuant to the *Rooker-Feldman* doctrine, “the ADA does not
 8 authorize federal appellate review of final state court decisions.” (*Dale v. Moore*, 121 F.3d 624,
 9 628 (11th Cir. 1997) (cited with approval in *Doe v. Mann*, 415 F.3d 1038, 1043 n.7 (9th Cir.
 10 2005)).)

11 The *Younger* abstention doctrine provides that federal courts may not interfere with pending
 12 state court proceedings that implicate important state interests and provide an adequate opportunity
 13 to raise federal questions. (*See, e.g., Potrero Hills Landfill, Inc. v. Cnty. of Solano*, 657 F.3d 876,
 14 882 (9th Cir. 2011).) Interference with basic judicial functions is precisely the sort of important
 15 state interest addressed by the *Younger* abstention doctrine. (*Id.* at 883.)

16 Here, Plaintiffs ask this Court to review and void prior state court rulings. As to final
 17 judgments, the *Rooker-Feldman* doctrine routinely precludes such claims, rendering the District
 18 Court without jurisdiction. As to pending litigation, interference with ongoing state court
 19 proceedings runs afoul of the *Younger* abstention doctrine. Plaintiffs ask this Court to review and
 20 overturn the decisions of state court judges, and these claims are precluded by the *Rooker-Feldman*
 21 and *Younger* abstention doctrines.

22 **D. Plaintiffs Fail To State A Claim Under The ADA⁴**

23
 24 An ADA violation is established where a plaintiff proves that: (1) he is a qualified
 25 individual with a disability; (2) he was either excluded from participation in or
 26 denied the benefits of a public entity’s services, programs, or activities, or was
 27 otherwise discriminated against by the public entity; and (3) such exclusion, denial
 28 of benefits, or discrimination was by reason of his disability.

⁴ Plaintiffs’ state law claims succeed or fail based on the viability of their ADA claims. (FAC ¶¶ 146-153.)

1 (*Wilkins-Jones v. Cnty. of Alameda*, 859 F. Supp. 2d 1039, 1044 (N.D. Cal. 2012) (citations and
2 internal quotations omitted).)

3 Plaintiffs' allegations fall short in several important respects. First, Plaintiff David Merritt
4 does not allege that he has a disability of any sort. He has no standing as an ADA plaintiff. (*See* 42
5 U.S.C. § 12132 (prohibiting discrimination against a qualified individual with a disability).)
6 Second, Title II of the ADA applies to public entities, not to individuals. (42 U.S.C. § 12132; *Ervin*
7 *v. Judicial Council of Cal.*, 307 Fed. App'x 104, 105 (9th Cir. 2009).) Plaintiffs cannot sue judges
8 as defendants under the ADA. Plaintiffs allege no wrongful conduct by the Superior Court and fail
9 to allege any ADA violation by a public entity. Third, Plaintiffs' allegations that motions or other
10 "requests" decided against them in litigation constitute discrimination does not amount to an
11 allegation that Plaintiffs were "excluded from participation" or "denied the benefits" of any service,
12 program or activity. (42 U.S.C. § 12132.) Fourth, Plaintiffs' allegations of retaliation are
13 conclusory in nature and fail to identify any harm caused by any alleged retaliation. (*See Arocho-*
14 *Castro v. Figueroa-Sancha*, Civil No. 10-1223 (GAG), 2010 U.S. Dist. LEXIS 104145 (D.P.R.
15 Sept. 29, 2010) (dismissing Title V retaliation allegation for failure to adequately allege retaliation
16 or resulting harm).)

17 In addition, "Plaintiff" Pacheco-Starks is not a proper party to this litigation, and cannot
18 allege an ADA claim on that basis. Ms. Pacheco-Starks did not sign the FAC, as required by
19 Federal Rule of Civil Procedure 11(a). Only Plaintiffs Salma and David Merritt signed the FAC.
20 The FAC is filled with allegations recounting Mr. Merritt's attempts to act as an attorney on Ms.
21 Pacheco-Starks' behalf, but Mr. Merritt is not an attorney, and appears to be engaging in the
22 unauthorized practice of law. (*See generally* Cal. Bus. & Prof. Code § 6125; Civ. L. R. 11-1.)
23 Indeed, based on the allegations in the FAC, it does not appear that Ms. Pacheco-Starks has the
24 capacity to represent herself in this litigation. Having not appeared in propria persona or through an
25 attorney, Ms. Pacheco-Starks is not a plaintiff to this litigation, and cannot state an ADA violation
26 against the Judicial Defendants.

27 For all of these reasons, Plaintiffs fail to state a claim under the ADA or state law.

28 ///

1 **V. CONCLUSION**

2 Plaintiffs' claims are barred completely by the doctrine of judicial immunity and their claims
3 seeking review of state court decisions are barred by the *Rooker-Feldman* and *Younger* abstention
4 doctrines. Plaintiffs fail to allege any cause of action under the ADA. For the foregoing reasons,
5 Defendants Judges Pierce, Manoukian, McKenney and Cain and the Superior Court of California,
6 County of Santa Clara respectfully request that Plaintiffs' First Amended Complaint be dismissed
7 without leave to amend.

8
9 Dated: May 7, 2013

Respectfully submitted,

10 MEYERS, NAVE, RIBACK, SILVER & WILSON

11
12 By: /s/ Kevin P. McLaughlin

13 Kevin P. McLaughlin
14 Attorneys for Defendants
15 KEVIN E. MCKENNEY, THOMAS W. CAIN,
16 MARK H. PIERCE, SOCRATES P. MANAOUKIAN
17 AND SANTA CLARA SUPERIOR COURT

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