UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOHN ALAN SAKON,	:	
	:	
Plaintiff,	:	
	:	
v.	:	No. 3:22-cv-897 (AWT)
	:	
STATE OF CONNECTICUT,	:	
	:	
Defendant.	:	

RECOMMENDED RULING

This matter was referred to the undersigned for a review of the Complaint, Doc. No. 1, under the *in forma pauperis* statute, 28 U.S.C. § 1915. *See* Doc. No. 7. For the reasons set forth below, the undersigned recommends that the Complaint be dismissed for lack of subject-matter jurisdiction pursuant to the *Rooker-Feldman* doctrine and Fed. R. Civ. P. 12(h)(3), and for failure to state a claim on which relief may be granted.

A. STANDARD OF REVIEW

Pursuant to Rule 12(h)(3), "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Courts "have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006); *see also Bernstein v. Universal Pictures, Inc.*, 517 F.2d 976, 979 (2d Cir. 1975) ("[A] district court should be alert to terminate an action under Rule 12(h)(3) when lack of subject matter jurisdiction becomes apparent. Judicial resources are precious, particularly in view of the courts' steadily burgeoning caseload, and they should not be dissipated in futile proceedings.").

Additionally, an *in forma pauperis* action is subject to dismissal if it "(i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief

against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B). The term "frivolous" in § 1915 "embraces not only the inarguable legal conclusion, but also the fanciful factual allegation." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989) ("[A] complaint . . . is frivolous where it lacks an arguable basis either in law or in fact."), *cited in Montero v. Travis*, 171 F.3d 757, 760 (2d Cir. 1999). As for failure to state a claim, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In this case, after moving for leave to proceed *in forma pauperis*, plaintiff subsequently paid the full filing fee, so the undersigned denied the motion as moot. Doc. No. 2, 11. Nonetheless, "[a] district court has inherent authority to dismiss meritless claims *sua sponte*, even where a plaintiff has paid the filing fee." *Zahl v. Kosovsky*, 471 F. App'x 34 (2d Cir. 2012); *see also* 28 U.S.C. § 1915(e)(2)(B) ("Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time" if it is frivolous, fails to state a claim on which relief may be granted, or seeks monetary relief against an immune defendant); *Mallard v. United States District Court*, 490 U.S. 296, 307 (1989) (explaining that § 1915 codifies dismissal authority that exists even in the absence of the statute). For example, in *Fitzgerald v. First E. Seventh St. Tenants Corp.*, the Second Circuit held that district courts have "inherent authority" to "dismiss a frivolous complaint *sua sponte* even when the plaintiff has paid the required filing fee." 221 F.3d 362, 363-64 (2d Cir. 2000) (per curiam). Subsequently, the Second Circuit applied the same reasoning to complaints that fail to state a claim on which relief may be granted. *See Johnson v. James*, 364 F. App'x 704 (2d Cir. 2010) (affirming that

after granting a 12(b)(6) motion to dismiss filed by certain defendants, district court properly dismissed claims against non-moving co-defendants *sua sponte* on the same grounds); *Zahl v. Kosovsky*, No. 08-cv-8308 (LTS)(THK), 2011 WL 779784, at *14 (S.D.N.Y. Mar. 3, 2011) (after granting 12(b)(1) and (6) motions against certain defendants, district court dismissed claims against non-moving defendants *sua sponte* that were "plainly deficient to state any federal claim upon which relief can be granted"), *aff'd*, 471 F. App'x 34 (2d Cir. 2012). However, "[d]istrict courts should not dismiss a *pro se* complaint without giving the plaintiff an opportunity to be heard '[u]nless it is unmistakably clear that the court lacks jurisdiction, or that the complaint lacks merit or is otherwise defective.'" *Watley v. Katz*, 631 F. App'x 74, 75 (2d Cir. 2016) (quoting *Snider v. Melindez*, 199 F.3d 108, 113 (2d Cir. 1999)).

The court liberally construes pleadings and briefs submitted by self-represented plaintiffs, "reading such submissions to raise the strongest arguments they suggest." *McLeod v. Jewish Guild for the Blind*, 864 F.3d 154, 156-57 (2d Cir. 2017). If a *pro se* complaint is dismissed upon initial review, the court should grant leave to amend "unless the court can rule out any possibility, however unlikely it might be, that an amended complaint would succeed in stating a claim." *Gomez v. USAA Fed. Sav. Bank*, 171 F.3d 794, 796 (2d Cir. 1999).

B. BACKGROUND

1. Procedural history

The Complaint addresses events that were the subject of a prior action that Sakon commenced on April 11, 2022 against Judge Tammy Nguyen-O'Dowd of the Family Division of the Connecticut Superior Court. *See Sakon v. Nguyen-Odowd*, No. 3:22-cv-528 (AWT) (hereinafter "April Action"). The prior complaint asserted claims under 42 U.S.C. § 1983 and

the Americans with Disabilities Act ("ADA") alleging violations of Sakon's civil rights relating to the scheduling of a trial on parental custody issues. *Id.*, at ECF No. 1.

On July 5, 2022, the undersigned issued a Recommended Ruling that the April Action be dismissed pursuant to § 1915(e)(2)(B) based, *inter alia*, on judicial immunity, sovereign immunity, and failure to state a viable claim under the ADA. *Id.*, at ECF No. 9. Notably, the Recommended Ruling also analyzed the *Rooker-Feldman* doctrine[1] but concluded that it did not bar the April Action because Sakon commenced it before the state court issued a final custody determination. *Id.*, at 18-19. Based on the conclusion that the Court did not lack jurisdiction under *Rooker-Feldman*, and in light of Sakon's *pro se* status, the undersigned recommended that he be granted leave to amend his ADA claims. *Id.* The Recommended Ruling left two potential avenues for Sakon to potentially cure the identified pleading deficiencies: he could allege sufficient factual matter to state a plausible ADA against Judge Nguyen-O'Dowd in her official capacity, and/or he could add a public entity as a defendant and allege sufficient factual matter to state a plausible ADA claim for relief against that entity. *See id.*

However, Sakon neither filed an objection to the Recommended Ruling pursuant to Rule 72 nor amended his complaint. Instead, Sakon withdrew the entire April Action on Friday, July 15, 2022. *Id.*, at ECF No. 16. Additionally, two other significant events occurred that same day: (1) the family court issued its final custody determination,[2] and (2) Sakon commenced the

[1] The *Rooker-Feldman* doctrine provides that the lower federal courts lack subject-matter jurisdiction to review "cases brought by state-court losers complaining of injuries caused by state court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). *See* discussion below.

[2] *See* Mem. of Decision, *Sakon v. Sakon*, No. HHD-FA-16-6071228-S, Dkt. # 884.50 (Conn. Super. Ct. July 15, 2022), which is docketed herewith. The undersigned has directed that the

present action by filing a new Complaint and a new Motion for Leave to Proceed *in forma pauperis*. Doc. No. 1, 2. Subsequently, on August 4, 2022, Sakon filed a direct appeal from the final custody determination, which is currently pending in the state appellate court. *See F.S. v. J.S.*, No. AC 45698 (Conn. App.).

2. Factual history

a. Allegations in the Complaint

In the Complaint in this new action, Sakon has abandoned all claims against Judge Nguyen-O'Dowd and has not raised any claims under 42 U.S.C. § 1983. Instead, the Complaint solely asserts claims under the ADA against the State of Connecticut. Doc. No. 1. The allegations in the Complaint are summarized as follows, and the undersigned assumes the truth of all non-conclusory factual allegations for purposes of this review. *See Hutchinson v. Watson*, 607 F. App'x 116 (2d Cir. 2015) (reviewing *pro se* complaint under § 1915(e)(2), and citing *Iqbal*, 556 U.S. at 662).

In May 2018, Sakon was struck by a truck while riding his bicycle and suffered "permanent injuries and disability," *id.* at 4; however, the Complaint does not describe those injuries or disabilities. In March 2019, Sakon suffered a heart attack. *Id.* In November 2019, Sakon almost died due to a surgical site infection that damaged his organs. *Id.* at 5. The Complaint alleges that these "conditions" limit his ability to engage in major life activities but does not describe those activities or limitations. *Id.* at 4-5.

In December 2019, Judge Nguyen-O'Dowd was assigned to adjudicate child custody proceedings in family court to which Sakon was a party. *Id.* at 5. The opposing party in the

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Custody Decision be filed under seal due to its extended discussion of sensitive medical and personal matters concerning Sakon and his minor child.

custody trial rested her case "after 23 days of marathon all-day sessions" between May 2021 and March 2022. *Id.* at 5-6. Thereafter, on December 18, 2021, "the 67-year old disabled [Mr. Sakon] filed for an American with Disabilities Act Medical Accommodation due to his age, exhaustion, disability and compromised health." *Id.* at 6. "[T]he Hartford Family court Presiding Judge [3] (Hon. Leo Vincent Diana) ordered an American[s] with Disabilities Act ('ADA') Medical Accommodation for John Sakon as follows: 'the remaining days of trial shall continue in half day morning sessions.'" [4] *Id.* However, Judge Nguyen-O'Dowd "ignored" the accommodation and ordered Sakon to attend multiple all-day sessions "or she would conclude his case[.]" *Id.*

On January 29, 2022, Sakon filed an ADA grievance with the Connecticut Judicial Branch. [5] The Complaint does not include a copy of the grievance or response but alleges that

[3] In the Connecticut Superior Court, the judge responsible for expediting court business and apportioning court business among the judges in a particular courthouse is referred to as the "Presiding Judge." *See* https://jud.ct.gov/external/media/faq.htm. Other individual judges are assigned to, and directly preside over, proceedings in particular cases. As alleged in the Complaint in this action, Judge Nguyen-O'Dowd was assigned to adjudicate Sakon's family court case under the administrative supervision of Judge Leo Diana. *See also Sakon v. Sakon*, HHD-FA-16-6071228-S (Conn. Super. Ct.).

[4] The full text of the family court's December 8, 2021 order (*see* Doc. No. 1, at 12) states:

> The court has reconsidered the defendant's oral motion for continuance after being provided medical documentation. The court makes the following ruling. The court grants the defendant's oral motion for continuance and shall make accommodations as follows: the remaining days of trial shall continue in half day morning sessions. If the defendant's health status changes, he must inform the court. The court hereby seals the Court's Exhibit A: Defendant's Medical Letter.

[5] The Connecticut Judicial Branch has established a process "to meet the requirements of the Americans With Disabilities Act (ADA) to address complaints concerning the services, programs and activities of the Judicial Branch. Any person who believes that he/she has been discriminated against, or that a reasonable accommodation has not been provided to him/her that would permit the person to fully participate in, or receive the benefits of, the services, programs

the grievance was denied on the ground that "the resolution you are requesting fall[s] outside the scope of the ADA Grievance complaint procedures as it is a matter for the Court." *Id.* at 9.

On February 14 and February 16, 2022, Sakon advised Judge Nguyen-O'Dowd that "he did not feel well, had a diminished capacity and sought to exercise his rights under the ADA." *Id.* at 7. However, she "ordered Sakon to proceed or to conclude his case." *Id.* "Given no choice," he proceeded on those afternoons "with a diminished capacity." *Id.* On February 18, Sakon visited an urgent care clinic at 8:00 a.m. where an EKG returned abnormal results, and he was advised to take immediate rest. *Id.* At 10:00 a.m., Sakon submitted the EKG results to Judge Nguyen-O'Dowd and requested a continuance. *Id.* However, she stated that if Sakon did not proceed, his case would be concluded. *Id.* "[U]pon the written medical advice of his doctors which was supplied to the court," Sakon went home at 10:30 a.m. *Id.* at 7-8. The custody trial resumed on March 9. *Id.* at 8. Sakon attended the morning session and then "sought to exercise his rights under the ADA to limit the hearing to a half-day morning session." *Id.* Judge Nguyen-O'Dowd denied the request and ordered Sakon to appear at 2:00 p.m or conclude his case. *Id.* "Fearing for his health and relying upon the granted ADA medical accommodation, Sakon did not attend the afternoon session." *Id.* Again on March 15, Sakon attended trial in the morning, requested that the afternoon session be canceled and, although Judge Nguyen-O'Dowd denied the request, he did not appear for the afternoon session "[f]earing for his health and relying upon the granted ADA medical accommodation[.]" *Id.*

That same day, on March 15, 2022, Judge Nguyen-O'Dowd entered an order stating: "[Mr. Sakon] did not return for trial after the lunch recess at 2 pm. [His] case is concluded. He

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or activities of the Judicial Branch, may file a complaint under this process." *Available at* https://jud.ct.gov/ada/Grievance_Proc_SuperiorCourt.pdf (last accessed Nov. 1, 2022).

has failed to present his testimony and evidence as set forth in the court's scheduling order." *Id.* at 14. The order, which is attached to the Complaint, also denied Sakon's motions for contempt and motions to disqualify for failure to prosecute and set a deadline for post-trial briefs. *Id.*

Regarding damages, the Complaint alleges that "Defendant's actions caused significant emotional distress, fear of being stripped of his right as a father to his child, intimidation, humiliation and personal indignity, emotional pain, embarrassment, fear for his health, physical pain, physical discomfort, and anguish to [Sakon] and sense of isolation from being singled out on the basis of his disability." *Id.* at 9. Sakon seeks (1) "a cease and desist order for future violations" of the ADA; (2) a new custody trial; (3) compensatory damages, including for emotional and physical distress, medical costs, and costs and fees for family court proceedings; (4) and costs and fees incurred in this action. *Id.* at 11-12.

b. Family court's final custody determination

The final custody determination issued by the family court on July 15, 2022 (hereinafter "Custody Decision"), which is docketed herewith, contains additional information relevant to the Court's review of its jurisdiction and the claims in the Complaint. [6] *See* Mem. of Decision, *Sakon v. Sakon*, No. HHD-FA-16-6071228-S, Dkt. # 884.50 (Conn. Super. Ct. July 15, 2022). The Custody Decision includes six pages of final orders, including an award of sole legal and

[6] The Court may "take judicial notice of documents filed in other courts, . . . not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings." *Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991). Accordingly, the Court may properly notice the fact that certain issues were raised and that the other court made certain factual findings and legal conclusions, so long as they are not relied upon for their truth. *See Watley v. Dep't of Child. & Fams.*, No. 3:13-cv-1858 (RNC) (taking judicial notice of state court proceedings for their preclusive effect in *Rooker-Feldman* and collateral estoppel analyses), 2019 WL 7067043, at *1 n.2 (D. Conn. Dec. 23, 2019), *aff'd*, 991 F.3d 418 (2d Cir. 2021); *see also Dixon v. von Blanckensee*, 994 F.3d 95, 103 (2d Cir. 2021) (where complaint made allegations concerning state court orders, Second Circuit reviewed the actual orders and found that the allegations were inaccurate and therefore implausible).

physical custody to the other parent (not Mr. Sakon). *Id.* at 47-52. The Custody Decision also describes the family court's findings and conclusions regarding accommodations for Sakon's asserted physical impairments during the custody trial, as follows. On May 24-27, 2021, full-day sessions were conducted remotely. *Id.* at 10. On June 2-3, November 29-30, and December 1-2, 2021, full-day sessions were conducted in person. *Id.* On December 3, Sakon failed to appear despite the court's denial of his two motions for continuance. *Id.* On December 6-8, full-day sessions were conducted in person. *Id.* On December 8, the presiding judge (Diana, J.) ruled: "The court grants [Sakon]'s oral motion for continuance and shall make accommodations as follows: the remaining days of trial shall continue in half day morning sessions." *Id.* at 10-11. The next seven trial dates – December 9-10 and 20-22, 2021 and January 3-6, 2022 – were conducted in half-day morning sessions in person. *Id.* at 11. "Thereafter, the court scheduled the hearing to proceed on alternating full days on February 14, 16 and 18, 2022, and March 9 and 15, 2022." *Id.*

The Custody Decision continues: "On February 18, 2022, this court denied the [Sakon]'s oral motion for a continuance without prejudice to provide the court with documentation from his physician as to his health status. [Sakon] informed the court that ·he was not proceeding with his case and abruptly left the courthouse and did not return." *Id.* Notably, this description of the events of February 18 differs from the allegations in the Complaint. *Id.* However, the Custody Decision and the Complaint both indicate that Sakon's decision not to return after the lunch recess on March 9 and March 15 was not based on physical or mental incapacity at that point in time. *Compare* Custody Decision, at 11, *with* Complaint, Doc. No. 1, at 8. The Custody Decision further states that Sakon did not file a motion for continuance on the March dates. *See* Custody Decision, at 11.

C. *ROOKER-FELDMAN* DOCTRINE

Pursuant to Rule 12(h)(3), the undersigned recommends that the Complaint be dismissed for lack of federal subject-matter jurisdiction in accordance with the *Rooker-Feldman* doctrine, which provides that "federal district courts lack jurisdiction over suits that are, in substance, appeals from state-court judgments." *Hoblock v. Albany Cnty. Bd. of Elections*, 422 F.3d 77, 84 (2d Cir. 2005). "Underlying the *Rooker-Feldman* doctrine is the principle, expressed by Congress in 28 U.S.C. § 1257, that within the federal judicial system, only the Supreme Court may review state-court decisions." *Id.* at 85. As explained by the Supreme Court, the lower federal courts lack subject-matter jurisdiction to review "cases brought by state-court losers complaining of injuries caused by state court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005).

A plaintiff has the burden of demonstrating that subject-matter jurisdiction exists by a preponderance of the evidence. *Mantena v. Johnson*, 809 F.3d 721, 727 (2d Cir. 2015). For *Rooker-Feldman* purposes, this requires the plaintiff to identify any facts at issue that could conceivably make the doctrine inapplicable to his or her case. *Walsh v. Ocwen Loan Servicing*, No. 3:16-cv-146 (JAM), 2016 WL 2743493, at *2 (D. Conn. May 10, 2016). "*Rooker-Feldman* directs federal courts to abstain from considering claims when four requirements are met: (1) the plaintiff lost in state court, (2) the plaintiff complains of injuries caused by the state court judgment, (3) the plaintiff invites district court review of that judgment, and (4) the state court judgment was entered before the plaintiff's federal suit commenced." *McKithen v. Brown*, 626 F.3d 143, 154 (2d Cir. 2010) (citing *Hoblock*, at 85). A final custody determination is

considered a state court judgment for purposes of the *Rooker-Feldman* requirements. [7] Courts in the Second Circuit apply *Rooker-Feldman* to state court judgments regardless of whether state court appeals are pending or have been exhausted. [8]

All four *Rooker-Feldman* requirements are met in this case. First, the family court's final custody determination awarded sole custody to the other parent and so was adverse to Sakon. Next, although the Complaint does not clarify whether Sakon's alleged injury is loss of custody or simply the termination of his opportunity to continue litigating (of which he has made prolific use),[9] the redress Sakon seeks is to declare the custody trial invalid and order a new trial, along with compensation for trial costs, emotional and physical distress, and medical costs. And not only does Sakon expressly ask this Court to nullify the results of the custody trial, but the family court already addressed his theories of disability discrimination in reaching the final custody determination, such that this Court would have to reassess the family court's factual findings and legal conclusions in order to resolve questions of liability. In other words, although the

[7] *See, e.g.*, *Stumpf v. Maywalt*, No. 21-cv-6248 (EAW), 2022 WL 2062613, at *4 n.4 (W.D.N.Y. June 6, 2022); *Watley v. Dep't of Child. & Fams.*, No. 3:13-cv-1858 (RNC), 2019 WL 7067043, at *9 n.15 (D. Conn. Dec. 23, 2019) (citing examples); *cf. Davis v. Baldwin*, 594 F. App'x 49 (2d Cir. 2015) (holding that *Rooker-Feldman* did not apply to "temporary" orders of removal and protection, as opposed to "a final custody order").

[8] *See Gabriele v. Am. Home Mortg. Servicing, Inc.*, 503 F. App'x 89, 92 (2d Cir. 2012) ("[W]e assume without deciding that *Rooker-Feldman* applies when a state trial court renders its judgment prior to the plaintiff filing suit in federal court – irrespective of the status of the plaintiff's appeals in the state court system."); *see also Osuagwu v. Home Point Fin. Corp.*, No. 7:22-cv-3830 (CS), 2022 WL 1645305, at *8 n.9 (S.D.N.Y. May 24, 2022) (collecting cases); *Deraffele v. City of New Rochelle*, No. 15-cv-282 (KMK), 2016 WL 1274590, at *7 (S.D.N.Y. Mar. 30, 2016) (collecting cases and contrasting with approach in other circuits).

[9] Between the judgment of dissolution entered on April 3, 2018 and the final custody determination on July 15, 2022, there were more than 1,057 entries on the family court docket *See Sakon v. Sakon*, No. HHD-FA16-6071228-S (Conn. Super. Ct.), available at https://civilinquiry.jud.ct.gov/CaseDetail/PublicCaseDetail.aspx?DocketNo=HHDFA166071228S.

Complaint does not explicitly challenge the final custody determination itself, focusing instead on allegedly discriminatory scheduling orders, Sakon still fundamentally complains of injuries resulting from the judgment and invites the Court to review it, which are the second and third *Rooker-Feldman* requirements. *See Hoblock*, at 88 ("[I]n some circumstances, federal suits that purport to complain of injury by individuals in reality complain of injury by state-court judgments.").

The Second Circuit has affirmed the application of *Rooker-Feldman* in similar circumstances where a family court litigant alleged that:

> (1) the Judicial Branch failed to provide her with reasonable accommodations for her stress and anxiety; (2) she thus had difficulty comprehending and participating in court proceedings, which deprived her of meaningful access to the courts; and (3) the adverse judgments resulting from those proceedings are thus invalid and should be overturned.

Richter v. Connecticut Jud. Branch, 600 F. App'x 804, 805 (2d Cir. 2015). As the Second Circuit cogently reasoned,

> Reaching the merits on these claims would necessarily have required the District Court to reassess the State Court's judgments. The District Court therefore properly concluded that it lacked subject matter jurisdiction over these claims.

Id. Several district courts have similarly reasoned that claims of civil rights violations during custody proceedings that resulted in a final custody determination are a challenge to the judgment itself, and are therefore barred by *Rooker-Feldman*. *See Gribbin v. New York State Unified Ct. Sys.*, No. 18-cv-6100 (PKC)(AKT), 2020 WL 3414663, at *4 (E.D.N.Y. June 22, 2020) (concluding that *Rooker-Feldman* applied to due process challenge to family court judgment, even if not raised in underlying proceedings), *aff'd*, 838 F. App'x 646 (2d Cir. 2021); *Voltaire v. Westchester Cty. Dep't of Soc. Servs.*, No. 11-cv-8876 (CS), 2016 WL 4540837, at *9-10 (S.D.N.Y. Aug. 29, 2016) ("*Rooker-Feldman* bars both Plaintiff's request to vacate the

termination order as well as any due process claims related to Defendant's conduct during or after the termination proceeding.") (collecting decisions). As these cases explain, a plaintiff cannot avoid the application of *Rooker-Feldman* by attempting to portray the claims as something other than a challenge to the judgment. *See, e.g.*, *Voltaire*, at *11 (rejecting plaintiff's attempt to circumvent *Rooker-Feldman* by arguing she sought only monetary damages, rather than review of the state court's determination); *Lomnicki v. Cardinal McCloskey Servs.*, No. 04-cv-4548 (KMK), 2007 WL 2176059, at *5 (S.D.N.Y. July 26, 2007) ("The fact that Plaintiff is alleging a new claim – discrimination – does not change the injury about which she complains.").

Here, Sakon's primary claim for relief is not for access to pending state court proceedings or for a declaration that a general state-court policy or procedure is unconstitutional but, rather, to nullify the judgment of the state court in a specific case and obtain a new trial. Nor could Sakon amend the Complaint to avoid the application of *Rooker-Feldman* by abandoning the effort to vacate the state court judgment and, instead, seeking only monetary damages for emotional distress. Although the Complaint alleges that the allegedly discriminatory scheduling orders caused contemporaneous injuries prior to the judgment – such as "fear of being stripped of his right as a father to his child, intimidation, humiliation and personal indignity, emotional pain, embarrassment, fear for his health, physical pain, physical discomfort, and anguish," ECF 1, at 9 – reaching the merits of these claims would still require this Court to "reassess the State Court's judgments" and determine whether Sakon was deprived of a fair hearing. *See Richter*, 600 F. App'x at 805. Such a review is not within this Court's purview but, rather, must be pursued through the state court appeals process, of which Sakon is already availing himself. For these reasons, the second and third requirements of *Rooker-Feldman* are satisfied.

The fourth *Rooker-Feldman* requirement is that the state court judgment entered before Sakon's federal suit commenced. The current record does not satisfy Sakon's burden of demonstrating that this action was commenced prior to the issuance of the Custody Order that same day. *See Walsh v. Ocwen Loan Servicing*, 2016 WL 2743493 (plaintiff has burden of demonstrating that *Rooker-Feldman* is inapplicable). A clerical notation shows that the family court's Custody Decision issued and was mailed to the parties on July 15, 2022. *See* Custody Decision, at 1. Although there is no timestamp on the Custody Decision, there are timestamps on the Complaint and Motion to Proceed *in forma pauperis* in this case indicating that this federal action was commenced late that same day at 4:11 p.m. [10] *See* Doc. No. 1, at 1 and Doc. No. 2, at 2. Not only does this record fail to conclusively demonstrate that this action commenced before the state court judgment issued, but it does not even support a reasonable inference of that essential fact. Moreover, there is precedent indicating that *Rooker-Feldman* may apply to an action commenced the same day as the state court judgment issued, regardless of which occurred earlier in the day. *See Fendon v. Bank of Am., N.A.*, 877 F.3d 714, 716 (7th Cir. 2017) (ignoring trial court's conclusion that *Rooker-Feldman* did not apply where plaintiff allegedly commenced federal action several hours before state housing court judgment issued later that afternoon, and concluding that federal court lacked jurisdiction to rescind foreclosure sale pursuant to *Rooker-Feldman*).

Of further note, while recommending that this action be dismissed for lack of subject-matter jurisdiction under *Rooker-Feldman,* the undersigned is mindful of Second Circuit's admonition that "[d]istrict courts should not dismiss a *pro se* complaint without giving the

[10] Although Sakon failed to sign the initial Complaint, that is not material to determining when the action was commenced. *See Kalican v. Dzurenda*, 583 F. App'x 21, 23 (2d Cir. 2014) (for statute of limitations analysis, action deemed filed when plaintiff submitted unsigned complaint).

plaintiff an opportunity to be heard '[u]nless it is unmistakably clear that the court lacks jurisdiction, or that the complaint lacks merit or is otherwise defective.'" *Watley v. Katz*, 631 F. App'x 74, 75 (2d Cir. 2016) (citation omitted) (remanding where district court failed to provide *pro se* plaintiff with opportunity to respond prior to dismissing complaint *sua sponte* under *Rooker-Feldman*). [11] The present case is distinguishable from *Watley* in three material respects. First, Sakon was notified of the ADA and *Rooker-Feldman* issues via the undersigned's Recommended Ruling of dismissal in the April Action. *See Sakon v. Nguyen-Odowd*, No. 3:22-cv-528 (AWT), at ECF No. 9. Second, the undersigned recommended that Sakon be given leave to amend the complaint in the April Action, which ostensibly would have preserved his filing date and avoided the *Rooker-Feldman* bar – however, before the district judge could act on that recommendation, Sakon elected instead to withdraw that entire action and commence this new action with amended allegations. *See id.* at ECF No. 16. Although he might not have understood the impact of this choice on the Court's jurisdiction, the Court cannot invent subject-matter jurisdiction where it is lacking. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) ("Federal courts are courts of limited jurisdiction . . . which is not to be expanded by judicial decree.") (citations omitted). Third, pursuant to Rule 72 and Local Rule 72.2, Sakon will have 14 days to file an objection to the recommended rulings herein, so he will be afforded an opportunity to provide the district judge with the "benefit of the [his] opposing views" prior to the district judge's decision on dismissal. *See Watley*, 631 F. App'x at 76. It is

[11] On remand, after Watley was provided with the opportunity to respond, the district court granted the defendants' Rule 12(b)(1) and (6) motion to dismiss, and the Second Circuit affirmed. *See Watley v. Dep't of Child. & Fams.*, No. 3:13-cv-1858 (RNC), 2019 WL 7067043, at *10 (D. Conn. Dec. 23, 2019) (dismissing complaint based on *Rooker-Feldman*, statute of limitations, standing, and collateral estoppel), *aff'd*, 991 F.3d 418 (2d Cir. 2021) (affirming dismissal on collateral estoppel grounds and not reaching *Rooker-Feldman* issue).

also noteworthy that dismissal of the Complaint in this action will not have any preclusive effect on Sakon's pending appeal in the state courts – to the contrary, this Court's adherence to the limits of its jurisdiction will permit the state appellate review to proceed unhindered. For all the foregoing reasons, the undersigned recommends that the Complaint be dismissed for lack of subject matter jurisdiction.

D. FAILURE TO STATE A PLAUSIBLE ADA CLAIM

The undersigned also recommends that the Complaint be dismissed for failure to state a plausible claim for relief under the ADA. The new Complaint abandons all claims against Judge Nguyen-O'Dowd and asserts only ADA claims against the State of Connecticut. Doc. No. 1. Although certain allegations have been modified or added in an attempt to address the deficiencies identified in the Recommended Ruling in the April Action, those deficiencies remain.

1. Inapposite theories

As a threshold matter, some of the amended language is immaterial. For example, the Complaint newly claims that the State created a "hostile environment of coercion because of [Sakon's] disability." Doc. No. 1, at 10. However, hostile environment jurisprudence concerns discrimination in the employment or education contexts. *See, e.g.*, *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986) (hostile work environment claim under Title VII); *Jemmott v. Coughlin*, 85 F.3d 61, 67 (2d Cir. 1996) (hostile work environment in Equal Protection claim brought under § 1983); *Hayut v. State Univ. of New York*, 352 F.3d 733, 744 (2d Cir. 2003) (hostile educational environment in Equal Protection claim brought under § 1983); *Papelino v. Albany Coll. of Pharmacy of Union Univ.*, 633 F.3d 81, 89 (2d Cir. 2011) (hostile educational

environment claim under Title IX). Accordingly, the hostile environment allegation is inapposite here.

The Complaint also includes cursory citations to Title VI and Title IX of the Civil Rights Act and § 504 of the Rehabilitation Act as legal authority for an award of attorney's fees. Title VI and Title IX are clearly inapposite to the factual allegations. As for any putative claims under the Rehabilitation Act, they would be analyzed identically to the ADA claims for present purposes, and so does not warrant a separate discussion. *See Lynch v. Jud. Branch*, No. 3:15-cv-1379 (MPS), 2019 WL 3716511, at *1 n.1 (D. Conn. Aug. 7, 2019) (ADA and Rehabilitation Act claims are "identical" for purposes of initial review under § 1915(e)(2)(B), citing *Henrietta D. v. Bloomberg*, 331 F.3d 261, 272 (2d Cir. 2003) ("[A]lthough there are subtle differences between these disability acts, the standards adopted by Title II of the ADA for State and local government services are generally the same as those required under section 504 of federally assisted programs and activities. . . . Indeed, unless one of those subtle distinctions is pertinent to a particular case, we treat claims under the two statutes identically.") (citations and quotation marks omitted)).

2. Failure to state a plausible Title II claim

Turning to allegations of disability discrimination under Title II, the new Complaint fails to cure the deficiencies identified in the April Action. "In order to establish a violation under the ADA, [] plaintiffs must demonstrate that (1) they are 'qualified individuals' with a disability; (2) that the defendants are subject to the ADA; and (3) that plaintiffs were denied the opportunity to participate in or benefit from defendants' services, programs, or activities, or were otherwise discriminated against by defendants, by reason of plaintiffs' disabilities." *Henrietta D.*, 331 F.3d at 272.

Regarding the requirement to identify a qualifying disability, the ADA defines "disability" to include (A) "a physical or mental impairment that substantially limits one or more major life activities," (B) a "record of such an impairment," or (C) "being regarded as having such an impairment" if there is discrimination based on that perception. 42 U.S.C. § 12102(1). The ADA clarifies that "major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." 42 U.S.C. § 12102(2)(A). The regulations explain that whether an impairment "substantially limits" a major life activity is an individualized assessment of the "ability of an individual to perform a major life activity as compared to most people in the general population," and is "construed broadly in favor of expansive coverage." 28 C.F.R. § 35.108(d).

Here, the Complaint lacks sufficient factual content for the Court to reasonably infer that Sakon has a qualifying disability under the ADA. He alleges that he has a complicated medical history, including a heart condition, that precludes him from attending court proceedings in the afternoon. It is questionable whether participation in court proceedings, in and of itself, is a "major life activity," particularly given that it is a relatively unusual and temporary activity. *Cf. Weixel v. Bd. of Educ. of City of New York*, 287 F.3d 138, 147 (2d Cir. 2002) (attending school is a major life activity); *Kelly v. New York State Off. of Mental Health*, 200 F. Supp. 3d 378, 392 (E.D.N.Y. 2016) (expressing doubt as to whether "church attendance" is a "major life activity," but concluding that plaintiff failed to allege a "qualifying disability" based on other grounds). But even assuming that court attendance could qualify as a major life activity, the Complaint fails to adequately allege that Sakon's attendance was "substantially limited" by a physical or mental impairment. The Complaint vaguely asserts that he had "diminished capacity" during the

afternoons of February 14 and 16, 2022, and that on the morning of February 18 he was medically advised to take immediate rest. Doc. No. 1, at 7. Not only does the Complaint fail to describe any functional limitations and connect the dots to a physical or mental impairment, but Sakon's allegation that he was incapacitated on the morning of February 18 – at which time the custody trial was only scheduled for every other day, and he had the prior day off – also is inconsistent with his claim that scheduling trial in the mornings was the only viable accommodation for his alleged disability. Additionally, there is a notable contrast in the Complaint between Sakon's description of medical symptoms on February 18 and the lack of any alleged symptoms on March 9 and March 15 when he refused to return after the lunch recess. In other words, as noted in the prior Recommended Ruling, Sakon does not allege that he could not comply with the family court's scheduling orders on those dates but, rather, that he would not. After the undersigned identified this deficiency in the complaint in the April Action, Sakon added a vague allegation in the new Complaint that he did not appear in the afternoons of March 9 and March 15 because he "fear[ed] for his health." Doc. No. 1, at 8. However, this conclusory assertion does not plausibly amount to a substantial limitation that prevented him from appearing in court. For these reasons, the new Complaint still fails to plausibly allege that Sakon had a qualifying disability under Title II of the ADA.

Additionally, even assuming that the Complaint adequately alleged a qualifying disability, it is short on plausible allegations that Sakon was "denied the opportunity to participate in or benefit from defendants' services, programs, or activities . . . by reason of plaintiffs' disabilities." *See Henrietta D.*, 331 F.3d at 272. Sakon alleges in conclusory fashion that he participated "with a diminished capacity" on February 14 and 16, 2022 without explaining the nature, cause, or impact of the alleged diminishment. Doc. No. 1, at 7.

Furthermore, although he admits he disregarded Judge Nguyen-O'Dowd's order to proceed on February 18, the Complaint alleges no repercussions – instead, Judge Nguyen-O'Dowd permitted him to proceed with his case on March 9 and March 15. As for Sakon's opportunity to participate on those later dates, he does not allege that he could not comply with the family court's order to appear in the afternoon but, rather, that he would not. This is consistent with Judge Nguyen-O'Dowd's articulation of her reasons for closing evidence, namely, that (1) Sakon objected to the accommodation designed by Judge Nguyen-O'Dowd (alternating full days) on the ground that it was different from what Judge Diana had approved (half days), and (2) Sakon then failed to appear after the lunch recess on March 9 and March 15 without seeking or obtaining a continuance. [12] Custody Decision, at 11. Consequently, the Complaint likewise fails to plausibly allege denial of access to court proceedings or services "by reason of" a disability.

For each of these reasons, the Complaint fails to state a plausible claim for relief under Title II of the ADA.

3. Failure to state plausible Title V claim

The Complaint likewise fails to state a plausible claim for relief under Title V of the ADA. The elements of a retaliation claim under the ADA are: "(i) a plaintiff was engaged in protected activity; (ii) the alleged retaliator knew that plaintiff was involved in protected activity; (iii) an adverse decision or course of action was taken against plaintiff; and (iv) a causal connection exists between the protected activity and the adverse action." *Weixel v. Bd. of Educ. of City of New York*, 287 F.3d 138, 148 (2d Cir. 2002) (quotation marks omitted). The Complaint alleges protected activity insofar as Sakon requested an accommodation under the

[12] As noted in footnote 6 *supra*, the Court may take judicial notice of the family court's factual findings and legal conclusions so long as they are not relied upon for their truth.

ADA and submitted medical documentation, *see Weixel* at 149 (seeking reasonable accommodation is protected activity); it alleges that Judge Nguyen-O'Dowd was aware of these efforts; and it alleges an adverse decision, insofar as Judge Nguyen-O'Dowd curtailed Sakon's opportunity to present further evidence in the custody trial.

However, the Complaint fails to allege any causal connection between Sakon's effort to exercise his ADA rights and the adverse decisions. It is implausible that Judge Nguyen-O'Dowd scheduled full-day trial sessions, in the customary manner, in order to punish Sakon for seeking half-day sessions. In other words, the crux of Sakon's ADA claim is that Judge Nguyen-O'Dowd improperly refused to provide an accommodation, which amounts to an allegation of discrimination under Title II and not retaliation under Title V. Moreover, the Complaint confirms what the Custody Decision expressly states: of the five dates Judge Nguyen-O'Dowd scheduled in February and March 2022, Sakon was never required to proceed without a day off in between. And even after he refused to proceed on February 18 based on a submission of medical documentation, Judge Nguyen-O'Dowd permitted him to proceed with his case on March 9 and March 15. It was only after he disobeyed her orders on both those subsequent dates – based on principle and not incapacity, as discussed above – that the adverse decisions issued. The undersigned will not hypothesize as to whether there exists any set of circumstances in which a litigant's refusal to comply with a court's scheduling orders could constitute exercise of a right under the ADA. Clearly, this is not such a circumstance, and the Complaint fails to allege a causal connection between the ADA exercise and the adverse decisions sufficient to state a Title V claim of retaliation.

E. CONCLUSION

For the reasons stated above, the undersigned recommends that the Complaint, Doc. No. 1, be DISMISSED, and that the dismissal be without leave to amend because (a) the jurisdictional defect cannot be cured, and (b) the Court previously identified deficiencies in the allegations and gave Sakon a second opportunity to plead facts sufficient to state a viable claim, and further attempts would be futile. *See Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000) (court should grant leave to amend *pro se* complaint "at least once" before dismissing "when a liberal reading of the complaint gives any indication that a valid claim might be stated," but "a futile request to replead should be denied").

This is a recommended ruling. *See* Fed. R. Civ. P. 72(b)(1). Plaintiff has consented to electronic notice of court filings. Doc. No. 6. Any objections to this recommended ruling must be filed with the Clerk of the Court on or before **November 24, 2022**. *See* Fed. R. Civ. P. 72(b)(2) (objections to recommended ruling due fourteen days after being served). Failure to object by that date will preclude appellate review. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72 and 6(a); D. Conn. L. Civ. R. 72.2; *Small v. Secretary of H.H.S.*, 892 F.2d 15 (2d Cir. 1989) (per curiam); *F.D.I.C. v. Hillcrest Assoc.*, 66 F.3d 566, 569 (2d Cir. 1995).

SO ORDERED, on this 10th day of November, 2022, at Bridgeport, Connecticut.

/s/ S. Dave Vatti
Hon. S. Dave Vatti
United States Magistrate Judge