UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

SOUTHCOAST FAIR HOUSING, INC.	:	
	:	
Plaintiff	:	
	:	
v.	:	C.A. No. 18-cv-00536-JJM-LDA
	:	
DEBRA SAUNDERS, in her official capacity as Clerk of the Rhode Island Supreme Court,	:	
	:	
Defendant	:	

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S OBJECTION TO DEFENDANT'S MOTION TO DISMISS

Plaintiff SouthCoast Fair Housing, Inc. ("Plaintiff" or "SCFH"), objects to the Motion to Dismiss filed by Defendant Debra Saunders, in her official capacity as Clerk of the Rhode Island Supreme Court ("Defendant").

I. INTRODUCTION

First, in her zeal to construct the grounds for a dispositive motion, Defendant erroneously characterizes this lawsuit as a direct challenge to the previous issuance of an Order by the Rhode Island Supreme Court. But that description is directly at odds with the clear and unambiguous allegations of the Amended Complaint. Moreover, Defendant's effort to dispense with this action by treating it as an impermissible "appeal" of a state court order would leave Plaintiff without any mechanism to contest the constitutionality of the underlying Supreme Court Rule. Defendant's arguments in this regard are contrary to controlling precedent of the U.S. Supreme Court – the very case upon which Defendant purports to rely – which specifically contemplates that such facial constitutional challenges can and should proceed in situations just like this. Plaintiff is not claiming that the September 29, 2017 Order denying its application for a license to practice law was incorrect, but rather is challenging the constitutionality of the underlying

Supreme Court Rule on its face. Hence, for reasons set forth in greater detail below, this aspect of Defendant's motion should be denied.

Second, Defendant also argues that Plaintiff has named the wrong defendant, and should have named the Rhode Island Supreme Court itself. In so doing, Defendant ignores that a suit against the Clerk of the Court in her official capacity is a suit against the Rhode Island Supreme Court. The Rhode Island Supreme Court acts through the Clerk in accepting and reviewing, and in either approving or denying, any application to practice law pursuant to Article II, Rules 10 and 11 of the Rhode Island Supreme Court Rules.

Therefore, for these reasons and other reasons set forth below, the Defendant's Motion to Dismiss should be denied in its entirety.

II. FACTUAL BACKGROUND

The following facts are alleged in the Amended Complaint dated November 26, 2018, and must be taken as true for the purposes of a motion to dismiss.

SCFH is a nonprofit corporation incorporated under the laws of the Commonwealth of Massachusetts. (Amended Complaint at ¶1.) SCFH exists for the purposes of promoting fair housing practices, eliminating prejudice and discrimination, and ensuring fair, equal, and affordable housing opportunities for all. (*Id.)* Plaintiff brought this action to challenge certain unconstitutional requirements of Article II, Rule 11 of the Rhode Island Supreme Court Rules ("Rule 11"), which regulates the ability of a nonprofit corporation, like SCFH, to obtain a license to practice law in the State of Rhode Island. (*See* Amended Complaint at ¶¶ 9-13.) Plaintiff named a single defendant, Debra Saunders, solely in her official capacity as Clerk of the Rhode Island Supreme Court. (Amended Complaint at ¶ 2.) Plaintiff alleges that the Defendant "is

responsible for the administration and enforcement of certain rules of the Rhode Island Supreme Court governing the practice of law in the State of Rhode Island." (*Id.)*

Rule 11 governs the practice of law by nonprofit organizations as follows:

> Nonprofit organizations **incorporated in this state** for the purpose of providing legal assistance **to the indigent** and that provide legal assistance to a defined and limited class of clients, may practice law in their own names through attorneys who are members of the Rhode Island Bar, subject to the approval of this Court. These organizations shall follow the application and registration requirements imposed on limited liability entities pursuant to Rule 10 but shall be exempt from the payment of application and registration fees. Organizations providing legal assistance pursuant to this rule may practice law under a trade name as approved by the Court.
> *See* Amended Complaint at ¶ 10. (Emphasis added.)

Plaintiff alleges that two of the requirements of Rule 11 are unconstitutional, namely, the requirements (1) that a nonprofit organization be "incorporated in this state" and (2) that a nonprofit organization provide legal assistance only "to the indigent." (*See* Amended Complaint at ¶¶ 18-19.) Specifically, the requirement that nonprofits be incorporated in the State of Rhode Island violates Article IV, Section 2 and the First and Fourteenth Amendments to the U.S. Constitution. (Amended Complaint at ¶ 18.) Further, the requirement that nonprofits limit their legal services exclusively "to the indigent" violates the First and Fourteenth Amendments to the U.S. Constitution. (Amended Complaint at ¶ 19.)

Plaintiff alleges as follows for purposes of establishing its standing to bring this action:

> 27. On or about May 22, 2017, SCFH sent an application to the Defendant for a license to practice law as a nonprofit organization pursuant to Rule 11.
>
> 28. By Order dated September 29, 2017 (the "September 29 Order"), Defendant rejected SCFH's application for a license to practice because SCFH did not meet the requirements of Rule 11, in that (a) SCFH is not incorporated under the laws of the State of Rhode Island, and (b) SCFH does not limit its services exclusively to "indigent" persons.

> 29. SCFH alleges the circumstances surrounding the September 29 Order not for the purposes of seeking review of the September 29 Order, but only for the purposes of establishing standing and to demonstrate that SCFH's challenge to the constitutionality of Rule 11 is ripe for adjudication.

However, it is Rule 11, not the September 29 Order, that prevents Plaintiff from practicing law in the state of Rhode Island. (*See* Amended Complaint at ¶ 30.)

III. STANDARD OF LAW

Dismissal pursuant to Fed. R. Civ. P. 12(b)(6) is appropriate when a complaint fails to allege "enough facts to state a claim for relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 540, 570 (2007). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (*citing Twombly*, 550 U.S. at 556). When determining whether a claim has facial plausibility, a court must view a complaint in the light most favorable to the plaintiff, taking all well-pleaded allegations as true and giving the plaintiff the benefit of all reasonable inferences. *See Fitzgerald v. Harris*, 549 F.3d 46, 52 (1st Cir. 2008); *Arruda v. Sears, Roebuck & Co.*, 310 F.3d 13, 18 (1st Cir. 2002); *Carreiro v. Rhodes Gill & Co.*, 68 F.3d 1443, 1446 (1st Cir. 1995); *Negron-Gaztambide v. Hernandez-Torres*, 35 F.3d 25, 27 (1st Cir. 1994).

IV. ARGUMENT

A. The Rooker-Feldman Doctrine Does Not Bar this Action

The Defendant first argues that the *Rooker-Feldman* doctrine[1] bars this action. But, in so doing, Defendant mischaracterizes Plaintiff's Amended Complaint as inviting this Court to engage in an appellate-like review of the September 29 Order. Defendant argues: "Throughout this lawsuit, SouthCoast makes clear that it contends it has been injured *as a result* of the

[1] *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S. Ct. 149 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S. Ct. 1303 (1983).

September 29, 2017 Order and asks this Court to grant it the relief that the Rhode Island Supreme Court denied." Defendant's Memorandum of Law in Support of Motion to Dismiss ("Def. Memo"), ECF No. 14 at ¶¶ 12-13 (emphasis added). However, Defendant ignores the actual allegations of the Amended Complaint, and overlooks that the U.S. Supreme Court has actually made clear that a District Court has jurisdiction to hear a challenge to the constitutionality of a state bar rule, even after the state court previously denied a litigant's application to practice law.

The *Rooker-Feldman* doctrine applies to 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 Industries Corp.*, 544 U.S. 280, 284, 125 S. Ct. 1517 (2005). Because federal district courts "are empowered to exercise original, not appellate, jurisdiction," the district court lacks jurisdiction over a complaint that "essentially invited federal courts of first instance to review and reverse unfavorable state-court judgments." *Id.* at 283.

Notably, the *Feldman* court made a clear distinction between a review of a final state court judgment and a challenge "to the constitutionality of state bar rules." *Feldman*, 460 U.S. at 486. In *Feldman*, the plaintiff, who was admitted to the state bars of both Virginia and Maryland, had not graduated from an approved law school as required by Rule 46 I(b)(3). 460 U.S. at 465-466. The plaintiff's counsel had written to the Chief Judge of the District of Columbia Court of Appeals to request the court waive that requirement on the grounds that it raised "serious question under the United States Constitution." *Id.* at 467. Nevertheless, the Court refused to waive the requirement and denied the application. *Id.* at 468. The plaintiff filed a complaint in the United States District Court for the District of Columbia to challenge the

District of Columbia Court of Appeals' refusal to waive the requirement of Rule 46 I(b)(3), on the grounds that the "defendants' actions" (refusing to waive the requirement and denying his application) violated the Fifth Amendment to the Constitution. *Id.*

While the *Feldman* Court held that the district court lacked jurisdiction to hear a challenge to the denials of the application and of the request to waive the rule's requirement, the Supreme Court held that the district court "has subject matter jurisdiction" over the allegations that "involve a general attack on the constitutionality" of the bar admission rule. *Id.* at 487. The Supreme Court rejected the argument that "the sum and substance" of the federal complaint was "to obtain review of the prior adverse decisions," because the complaint sought both "a general challenge to the constitutionality of the rule *and* sought review of the District of Columbia Court of Appeals' decisions." *Id.* at 487 n.18 (emphasis in original). The Supreme Court held that in a constitutional challenge, "the district court may simply be asked to assess the validity of a rule promulgated in a nonjudicial proceeding. If this is the case, the district court is not reviewing a state-court judicial decision." *Id.* at 486. "United States district courts, therefore, have subject-matter jurisdiction over general challenges to state bar rules, promulgated by state courts in nonjudicial proceedings, which do not require review of a final state-court judgment in a particular case." *Id.*

In the present action, SCFH does not challenge the September 29 Order that denied its application for a license to practice law. Rather, SCFH alleges that it has been unable to practice law in Rhode Island, "[a]s a direct result of the requirements of Rule 11." (*See* Amended Complaint at ¶ 30.) Nowhere in the Amended Complaint does SCFH mount a direct challenge to the September 29 Order. Rather, SCFH alleges that Rule 11 itself violates its rights to freedom of speech, petition, association and assembly, and the right to petition for redress of grievances.

(Id. at ¶ 36.) SCFH further alleges that Rule 11 denies rights of Due Process, *id*. at ¶ 38, and Equal Protection, *id*. at ¶ 40, and violates the Privileges and Immunities Clause of the Fourteenth Amendment and of Article IV § 2 of the United States Constitution, *id*. at ¶ 43. SCFH alleges that Rule 11, not the September 29 Order, denies it the right to practice law on an equal basis with domestic nonprofit corporations. *Id*. at ¶ 32.

Plaintiff only mentions the September 29 Order in Paragraphs 28-29 of the Amended Complaint. As Plaintiff clearly states, it "alleges the circumstances surrounding the September 29 Order not for the purposes of seeking review of the September 29 Order, but only for the purposes of establishing standing and to demonstrate that SCFH's challenge to the constitutionality of Rule 11 is ripe for adjudication." *Id.* at ¶ 30. Plaintiff does not allege that the September 29 Order was incorrectly decided. In fact, Plaintiff alleges that the license to practice law "was denied because it did not meet the requirements of Rule 11." *Id.* at ¶ 33. Therefore it is clear that the allegations of the Amended Complaint do not challenge the September 29 Order; Plaintiff is challenging the constitutionality of Rule 11.

Plaintiff's challenge falls squarely within the language of *Feldman,* which allowed a plaintiff to challenge the constitutionality of a state's bar admission rules. 460 U.S. at 486. The Supreme Court expressly stated, that District Courts "have subject-matter jurisdiction over general challenges to state bar rules." *Id.* Therefore, the *Rooker-Feldman* doctrine does not bar Plaintiff's challenge to the constitutionality of Rule 11.

B. Res Judicata and Collateral Estoppel Do Not Bar this Action

Next, Defendant argues that *res judicata* and collateral estoppel bar this action. SCFH does not dispute that the parties in this action are the same as in the context of the September 29 Order (assuming that the Defendant, in her official capacity, is representative of the Rhode Island

Supreme Court).[2] However, the September 29 Order does not constitute a final judgment on the merits and does not resolve issues identical to those raised in the present proceeding. Hence, neither *res judicata* nor collateral estoppel apply.

"*Res judicata* serves as a bar to a second cause of action where there exists: (1) identity of parties; (2) identity of issues; and (3) finality of judgment in an earlier action." *Goodrow v. Bank of America, N.A.*, 184 A.3d 1121, 1126 (R.I. 2018) (internal quotation marks omitted); *see also Koolen v. Mortg. Elec. Registration Sys., Inc.*, 953 F. Supp. 2d 348, 351 (D.R.I. June 28, 2013) (describing elements to test for *res judicata* as "(1) a final judgment on the merits in an earlier suit, (2) sufficient identicality between the causes of action asserted in the earlier and later suits, and (3) sufficient identicality between the parties in the two suits."). "Where all three elements are satisfied, the parties will be barred from adjudicating the new complaint." *Koolen*, 953 F. Supp. 2d at 351.

The September 29 Order does not constitute a final adjudication. The September 29 Order states, "For the following reasons, the application is denied without prejudice." The last paragraph again states, "the request that this Court grant a license allowing SouthCoast Fair Housing, Inc. to practice law in Rhode Island as a legal service organization is hereby denied without prejudice." The Rhode Island Supreme Court has stated that "[a] dismissal, with prejudice, constitutes a final judgment on the merits." *Goodrow v. Bank of America, N.A.*, 184 A.3d 1121, 1128 (2018); *DiPinto v. Sperling*, 9 F.3d 2, 4 (1st Cir. 1993) (emphasis added). On

[2] Defendant states in the instant motion that identity of the parties is satisfied because "the matter before the Supreme Court and the matter pending before this Court involve the same party against whom preclusion is asserted, SouthCoast." Def. Memo. at ¶16. However, *res judicata* requires all parties to be the same or in privity with the parties of the previous proceeding. By arguing for the application of either *res judicata* or collateral estoppel, Defendant is acknowledging that when she is sued in her official capacity, she is deemed representative of the Rhode Island Supreme Court itself. Plaintiff agrees, and therefore the parties are identical.

the other hand, a dismissal without prejudice is not final for res judicata purposes. *Semtek Intern. Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505, 121 S.Ct. 1021 (2001) ("dismissal without prejudice" does not bar "the plaintiff from returning later, to the same court, with the same underlying claim," and "ordinarily (though not always)" does not "bar[] the claim from *other* courts"); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990); *Cook & Company Ins. Servs., Inc. v. Volunteer Firemen's Ins. Servs., Inc.*, 2015 WL 5458279, at *1 (D. Mass. Sept. 17, 2015), *aff'd sub nom. Cook & Co. v. Volunteer Firemen's Ins. Servs.*, 657 F. App'x 1 (1st Cir. 2016). Nothing in the September 29 Order prevents the Plaintiff from reapplying for a license to practice law at a later date, if Plaintiff can demonstrate compliance with Rule 11. Therefore, the application of *res judicata* fails for lack of a final judgment. *See, e.g., Sinapi v. R.I. Board of Bar Exam.,* 910 F.3d 544 (1st Cir. 2018) (noting that application of the *res judicata* doctrine to the denial of a request for reasonable accommodations in bar examination procedures "raises troublesome issues -- regarding, for example, the finality of Chief Justice Suttell's ruling and the precise issues raised in the parallel state and federal proceedings -- that we need not address here").

Further, the Defendant merely glosses over the requirement of identity of <u>issues</u>. The September 29 Order was focused on a limited inquiry -- whether SCFH's application complied with the requirements of Rule 11. The Amended Complaint does not allege that SCFH meets the requirements of Rule 11. The Amended Complaint seeks a declaration that Rule 11 is unconstitutional. Plaintiff did not place the constitutionality of Rule 11 into question in its application, nor could such an application have resulted in any adjudication of the constitutionality of the rule. Plaintiff did not and could not have raised a constitutional challenge within the limited procedure outlined by Rule 11. *See* R.I. Gen. Laws 9-30-1 (requiring an

action in Superior Court for declaratory judgment); *see also* R.I. Super R. 24(d) (requiring notice to attorney general, and permitting the attorney general to intervene, where constitutionality of a state statute is challenged).

Therefore, the Amended Complaint is not barred by the doctrine of *res judicata*.

C. Plaintiff Named the Correct Defendant

Defendant argues that the Amended Complaint should be dismissed because the Plaintiff named the wrong defendant. Defendant argues that the Supreme Court itself, not the Clerk of the Supreme Court, has the sole authority to grant Plaintiff a license to practice law. (*See* Def. Memo at 19.) But Defendant ignores the fact that a suit against the court clerk, in her official capacity, is in actuality a suit against the Supreme Court itself. Defendant further ignores the rules and procedures surrounding Rule 11 which demonstrate that the Supreme Court acts through the Defendant when enforcing Rule 11.

The law is clear that an action against a state official, in that person's official capacity, is a suit against the state. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 2312, 105 L. Ed. 2d 45, 58 (1989) ("a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. … As such, it is no different from a suit against the State itself."); *see also Lambert v. Hartman*, 517 F.3d 433, 439-40 (6th Cir. 2008) (suing county court clerk in his official capacity "is the equivalent of suing the Clerk's employer, the County"). When alleging a constitutional violation by an officer of the State, "such officer must have some connection with the enforcement of the act." *Ex parte Young*, 209 U.S. 123, 157, 28 S. Ct. 441, 453 (1908).

In the present action, Defendant has a "connection with the enforcement" of Rule 11. Rule 11 requires a non-profit corporation to submit an application to the court pursuant to Rule

10. Rule 10(d) requires a limited liability entity to file "with the Clerk of the Supreme Court a copy of its limited liability entity charter together with an application for license on a form to be prescribed by the Clerk." Rule 10(d) states that it is the Clerk who reviews the application, as follows:

> The Clerk of the Supreme Court shall review the copy of the limited liability entity charter and the application for license to determine if all requirements of law and these rules have been complied with and notify the Court of the Clerk's findings. The Court may then order the issuance of a license to practice to the limited liability entity or may refer the application for further consideration to such committee as it may appoint or designate.

Because applications under Rule 11 are directed to Defendant, the Defendant reviews the applications to determine if they meet the requirements of Rule 11, and the Defendant, not any justice of the Supreme Court, grants or denies those applications, hence, Defendant has a "connection with the enforcement of" Rule 11 and is properly named a party defendant in this action.

Finally, Plaintiff notes a wealth of precedent challenging bar admission rules, in which the defendant was a party other than the relevant state's Supreme Court. *See Barnard v. Thorstenn*, 489 U.S. 546, 550, 109 S. Ct. 1294, 1298, 103 L. Ed. 2d 559, 566 (1989) (defendant was the Chairman of the Committee of Bar Examiners of Virgin Islands); *United Mine Workers of Am. v. Ill. State Bar Ass'n*, 389 U.S. 217, 222, 88 S. Ct. 353, 19 L. Ed. 2d 426 (1967) (defendant was a state bar association); *NAACP v. Button*, 371 U.S. 415, 429, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1965) (defendant was the state attorney general); *but see Supreme Court of Va. v. Friedman*, 487 U.S. 59, 63, 108 S. Ct. 2260, 2263, 101 L. Ed. 2d 56, 62, (1988) (defendants were "the Supreme Court of Virginia and its Clerk"); *Supreme Court of New Hampshire v. Piper*, 470

U.S. 274, 276-277, 105 S. Ct. 1272, 1274, 84 L. Ed. 2d 205, 208 (1985) (defendants were "the State Supreme Court, its five Justices, and its Clerk").

On the other hand, Defendant's memorandum has a paucity of cases, none of which involve a constitutional challenge to bar admission rules, in Rhode Island or other states, and none of which involve a suit against an official, in her official capacity, to challenge the constitutionality of a state rule. A review of these cases suggest that even though state supreme courts reserve the sole authority to regulate the practice of law, as a practical matter, that authority is often delegated to bar administrators or the clerk of court. Indeed, in *Sinapi v. Rhode Island Board of Bar Examiners*, a case also defended by the Rhode Island Attorney General, this Court granted an application for temporary restraining order in a case that did not name the Rhode Island Supreme Court as a defendant, even though the case concerned bar admission procedures. *Sinapi v. Rhode Island Bd. of Bar Examiners*, No. CV 15-311-M, 2016 WL 1562909, at *2 (D.R.I. Apr. 15, 2016), *dismissal aff'd*, 910 F.3d 544 (1st Cir. 2018). In dismissing the claim for damages based on the Eleventh Amendment, this Court stated, "[t]he Rhode Island Supreme Court is an arm of the State of Rhode Island and the Board is an administrative arm of the Rhode Island Supreme Court." *Id.*

Defendant's role in this case is analogous to the position of the board in *Sinapi*. Even though the Defendant, as Clerk of the Rhode Island Supreme Court, may not be the court itself, the actions of the Clerk, in her official capacity, are the actions of the court itself. Just like it acted through the Board of Bar Examiners, the Rhode Island Supreme Court acts through the Defendant when administering and enforcing Rule 11. Therefore, Plaintiff named the proper Defendant.

CONCLUSION

The *Rooker-Feldman* doctrine does not bar a constitutional challenge to a state's bar admission rules. In fact, that line of precedent expressly contemplates and permit such facial constitutional challenges, and therefore does not bar this action. Neither *res judicata* nor collateral estoppel apply because the Defendant denied Plaintiff's application without prejudice and because the limited procedure to apply for a license to practice law does not have the same issues as this constitutional challenge. Finally, because naming the Defendant in her official capacity is actually a claim against the Supreme Court itself, and because the Defendant is involved in the application and enforcement of Rule 11, Plaintiff named and proper party defendant. The Defendant's Motion to Dismiss should be denied.

SOUTHCOAST FAIR HOUSING, INC.,

By its Attorneys,

/s/ Mark W. Freel
Mark W. Freel (# 4003)
Jeffrey C. Ankrom (#7663)
LOCKE LORD LLP
2800 Financial Plaza
Providence, RI 02903
(401) 274-9200
(401) 276-6611 (fax)

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF RHODE ISLAND
Cooperating Counsel

Dated: February 15, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of February, 2019, I filed and served the foregoing document through the electronic filing system to the following counsel of record:

Michael W. Field mfield@riag.ri.gov
Andrea Shea ashea@riag.ri.gov

/s/ Mark W. Freel
Mark W. Freel