

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PEOPLE WITH DISABILITIES
FOUNDATION,

 Plaintiff,

 v.

CAROLYN COLVIN,

 Defendant.

Case No. 15-cv-02570-HSG

**ORDER GRANTING MOTION TO
DISMISS FIRST AMENDED
COMPLAINT**

Re: Dkt. No. 20

Pending before the Court is the Social Security Administration’s (“Agency”) motion to dismiss Plaintiff People with Disabilities Foundation’s first amended complaint. Having reviewed the arguments submitted in the papers and at the hearing, the Court GRANTS the motion to dismiss with leave to amend.

I. FACTUAL ALLEGATIONS

Plaintiff filed the operative complaint on September 28, 2015. Dkt. No. 19 (“FAC”). Plaintiff is a § 501(c)(3) public, charitable organization that employs salaried staff attorneys, who assist Plaintiff’s legal director Steven Bruce in representing clients who claim Social Security disability benefits. FAC at 2. The attorneys sign a single fee agreement, and the fees are paid to Plaintiff through the primary client representative, Steven Bruce, and are deposited into Plaintiff’s operating account. Id. at 2-3.

The operative complaint alleges that the Agency failed to pay attorneys’ fees in full despite an Administrative Law Judge’s (“ALJ”) order approving attorneys’ fees. FAC at 3. Plaintiff alleges that, under the social security regulations, it was entitled to direct payment of fees once (1) the ALJ approved the fees, and (2) there was no protest to the fee resulting in an unfavorable administrative fee appeal. Id.

1 Plaintiff contends it successfully represented eight claimants in their social security cases
2 before the Agency. *Id.* at 5. In each case, an ALJ approved an award of attorneys’ fees, and in
3 each case, the Agency paid only a portion or none of the award. *Id.* at 3-7. Plaintiff argues that
4 the Agency should have withheld the claimants’ past due benefits and used these withheld
5 amounts to pay attorneys’ fees directly to Plaintiff, *id.* at 5.

6 Plaintiff has pled four “claims for relief.” First, it seeks injunctive relief against the
7 Agency contending that it continues to refuse to pay the fees and that Plaintiff does not have an
8 adequate remedy at law and has suffered damage. *Id.* at 11-12. Second, Plaintiff seeks
9 declaratory relief against Defendant. *Id.* at 13. Third, Plaintiff seeks a writ of mandamus against
10 the Agency compelling it to pay the fees within 10 days of the writ; it alleges that the Agency has
11 a ministerial, non-discretionary duty to pay attorney fees within a reasonable time. *Id.* at 14-15.
12 Plaintiff also contends that it “has fully exhausted its remedies in attempting to receive these
13 attorney fees, and Plaintiff has no other adequate remedy available.” *Id.* at 15. Finally, Plaintiff
14 contends there is a violation of due process, alleging:

15 Defendant uses a nonpublic (secret) adjudication channel from its
16 payment center to a ‘Chief Regional Administrative Judge’ without
17 affording the parties a meaning [sic] opportunity to be heard . . . A
18 primary motivating SSA purpose is to discourage attorneys from
19 representing the disabled claimants before ALJ proceedings.
20 Specifically, the SSA is in violation of a Congressional mandate
21 authorized in OBRA 1990 to encourage attorneys to represent the
22 disabled population before the SSA. Claimants Attorneys through
23 the present can contract with a claimant to charge the lesser of 25%
24 or \$6,000.00 of the retroactive benefits owed. The SSA has been
25 conducting a campaign to make it more difficult for attorneys by
26 making them itemize fee petitions which Congress does not
27 necessarily require.

28 *Id.* at 15-16.

On October 23, 2015, the Agency filed a motion to dismiss the complaint under Federal
Rules of Civil Procedure, Rules 12(b)(1) and 12(b)(6).

II. LEGAL STANDARD

A. Rule 12(b)(1)

Rule 12(b)(1) allows a defendant to move for dismissal on grounds that the court lacks
jurisdiction over the subject matter. Fed. R. Civ. P. 12(b)(1). The burden is on the plaintiff to

1 establish that the Court has subject matter jurisdiction over an action. See *Assoc. of Am. Medical*
2 *Colleges v. United States*, 217 F.3d 770, 778-79 (9th Cir. 2000); *Kokkonen v. Guardian Life Ins.*
3 *Co. of America*, 511 U.S. 375, 376-78 (1994).

4 “A complaint will be dismissed if, looking at the complaint as a whole, it appears to lack
5 federal jurisdiction either ‘facially’ or ‘factually.’” *Thornhill Publishing Co., Inc. v. General Tel.*
6 *& Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). In resolving a “facial” attack, a court limits its
7 inquiry to a plaintiff’s allegations, which are taken as true, and construes the allegations in the
8 light most favorable to the plaintiff. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th
9 Cir. 2004); *NL Indus. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986).

10 In contrast, “[i]n resolving a factual attack on jurisdiction, the district court may review
11 evidence beyond the complaint without converting the motion to dismiss into a motion for
12 summary judgment.” *Safe Air*, 373 F.3d at 1039.

13 Once the moving party has converted the motion to dismiss into a
14 factual motion by presenting affidavits or other evidence properly
15 brought before the court, the party opposing the motion must furnish
16 affidavits or other evidence necessary to satisfy its burden of
17 establishing subject matter jurisdiction.

18 *Id.* (internal quotation marks omitted).

19 **B. Rule 12(b)(6)**

20 Under Rule 12(b)(6), a motion to dismiss should be granted if plaintiff fails to proffer
21 “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*,
22 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual
23 content that allows the court to draw the reasonable inference that the defendant is liable for the
24 misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

25 In determining whether a complaint states a claim, all allegations of material fact “are
26 accepted as true, as well as all reasonable inferences to be drawn from them.” *Navarro v. Block*,
27 250 F.3d 729, 732 (9th Cir. 2001); *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 338 (9th Cir.
28 1996) (holding that the allegations must be “construed in the light most favorable to the
nonmoving party”). “A complaint should not be dismissed unless a plaintiff can prove no set of
facts in support of his claim which would entitle him to relief.” *Cahill*, 80 F.3d at 338.

1 When considering a 12(b)(6) motion, the Court generally may not consider materials
2 outside of the pleadings. *Lee v. City of Los Angeles*, 350 F.3d 668, 688 (9th Cir. 2001). There are
3 two exceptions, however: the Court may look beyond the complaint to undisputed facts subject to
4 judicial notice, including matters of public record, and the Court may consider materials not
5 attached to the complaint “if the documents’ ‘authenticity . . . is not contested’ and ‘the plaintiff’s
6 complaint necessarily relies’ on them.” *Id.* at 688. The Court may examine these materials
7 without converting the motion to one for summary judgment. *Id.*

8 **III. REQUEST FOR JUDICIAL NOTICE**

9 As a preliminary matter, the Court addresses the Agency’s requests for judicial notice. See
10 Dkt. No. 20, 24. The Agency seeks judicial notice of three documents attached to its motion: (1)
11 the Agency’s Hearing Appeals Litigation and Law Manual (“HALLEX”) provisions concerning
12 representative fees; (2) the Agency’s Program Operations Manual System (“POMS”); and (3) IRS
13 Revenue Procedure 92-95, 1992-2 C.B. 411. Dkt. No. 20-1. Additionally, it seeks judicial notice
14 of two documents attached to its reply: (1) the August 13, 2015 Amended Authorization to Charge
15 and Collect Fee regarding Claimant Golitsyn; and (2) provision I-1-2-49 of the HALLEX. Dkt.
16 No. 24-1.

17 Federal Rule of Evidence 201 allows a court to take judicial notice of a fact that is “not
18 subject to reasonable dispute because it: (1) is generally known within the trial court’s jurisdiction;
19 or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably
20 be questioned.” Accordingly, the Court takes judicial notice of the POMS, HALLEX, and IRS
21 procedure provisions attached to the motion to dismiss, Dkt. No. 20-1, as well the HALLEX
22 provision attached to the reply. These documents are not reasonably subject to dispute, and are a
23 matter of public record available on the Agency’s website. See *Interstate Nat. Gas Co. v. S.*
24 *California Gas Co.*, 209 F.2d 380, 385 (9th Cir. 1953) (“We may take judicial notice of records
25 and reports of administrative bodies.”); *Gustavson v. Wrigley Sales Co.*, No. 12-CV-01861-LHK,
26 2014 WL 60197, at *3 (N.D. Cal. Jan. 7, 2014) (taking judicial notice of FDA’s guidance
27 document because the document was available on the agency’s website); *Hernandez v. Cty. of*
28 *Monterey*, 305 F.R.D. 132, 139 n.2 (N.D. Cal. 2015) (taking judicial notice of the agency manuals,

1 rules, and policies); *Indep. Living Ctr. v. City of Los Angeles*, 973 F. Supp. 2d 1139, 1155 (C.D.
2 Cal. 2013) (taking judicial notice of HUD’s manuals located on agency’s website).

3 The Court, however, finds no basis for granting the judicial notice request as to the letter
4 the Agency purportedly sent to Golitsyn, titled the Amended Authorization to Charge and Collect
5 Fee. See *Lee*, 250 F.3d at 689 (“[A] court may not take judicial notice of a fact that is ‘subject to
6 reasonable dispute.’”). Moreover, although the Court may take judicial notice of documents
7 referenced in the complaint, assuming their authenticity is uncontested, *id.* at 688-89, this letter
8 does not qualify. The complaint references an August 12, 2015 letter sent to Plaintiff, whereas the
9 letter attached to the Agency’s reply is dated August 13, 2015. For these reasons, the request for
10 judicial notice of the Amended Authorization to Charge and Collect Fee is denied.

11 Plaintiff has attached several declarations and exhibits to its response, but has not
12 requested that the Court take judicial notice of the documents. See Dkt. No. 23-1. Accordingly,
13 the Court only considers these attachments with respect to the Agency’s Rule 12(b)(1) motion to
14 dismiss, and not the 12(b)(6) motion. See *Outdoor Media Grp., Inc. v. City of Beaumont*, 506 F.3d
15 895, 899 (9th Cir. 2007).

16 **IV. ANALYSIS**

17 Although Plaintiff’s complaint expressly identifies only “claims for relief,” and no causes
18 of action, for the purposes of its analysis, the Court construes the allegations to assert two causes
19 of action: (1) failure to follow requirements under the Social Security Act for payment of
20 attorneys’ fees, and (2) a due process violation. Within this framework, the Court first examines
21 whether it has subject matter jurisdiction to consider Plaintiff’s first cause of action, concluding
22 that it does not. Next, the Court examines whether Plaintiff has stated a claim supporting its
23 second cause of action, and finds that it has not. For the reasons stated below, the Agency’s
24 motion to dismiss is GRANTED with leave to amend.

25 **A. Subject-Matter Jurisdiction**

26 Defendant contends that this Court lacks subject-matter jurisdiction because Plaintiff’s
27 claims are barred by the doctrine of sovereign immunity. It argues that the United States has no
28 liability for the payment of attorneys’ fees absent the express waiver of sovereign immunity.

1 “The United States, as a sovereign, is immune from suit unless it has waived its
2 immunity.” Consejo de Desarrollo Economico de Mexicali, A.C. v. United States, 482 F.3d 1157,
3 1173 (9th Cir. 2007). “The United States must waive its sovereign immunity before a federal
4 court may adjudicate a claim brought against a federal agency.” Rattlesnake Coal. v. U.S. E.P.A.,
5 509 F.3d 1095, 1103 (9th Cir. 2007). Otherwise, the court lacks subject matter jurisdiction over
6 the claims. Id. “A waiver of sovereign immunity cannot be implied but must be unequivocally
7 expressed.” United States v. Mitchell, 445 U.S. 535, 538 (1980). “A plaintiff suing in a federal
8 court must show in his pleading, affirmatively and distinctly, the existence of whatever is essential
9 to federal jurisdiction, and, if he does not do so, the court, on having the defect called to its
10 attention or on discovering the same, must dismiss the case, unless the defect be corrected by
11 amendment.” Fifty Assocs. v. Prudential Ins. Co. of Am., 446 F.2d 1187, 1189 (9th Cir.1970).

12 The FAC asserts jurisdiction under various federal statutes, including the Administrative
13 Procedures Act, 5 U.S.C. § 701 et seq. (“APA”); the Declaratory Judgment Act, 28 U.S.C. §§
14 2201, 2202; federal question jurisdiction, 28 U.S.C. § 1331; and mandamus, 28 U.S.C. § 1361.
15 The FAC, however, fails to allege that the United States has waived its sovereign immunity under
16 any statute.

17 **1. Social Security Act**

18 The Social Security Act contains no waiver of immunity by the United States. The Social
19 Security Act has two attorney fee provisions: one governs an attorney’s representation before the
20 Agency, 42 U.S.C. § 406(a); the second governs the attorney’s representation before the court, §
21 406(b). This case relates to the first provision, as Plaintiff’s representation of each claimant
22 occurred before the Agency.

23 Section 406(a) provides “whenever the Commissioner of Social Security . . . makes a
24 determination favorable to the claimant, the Commissioner shall, if the claimant was represented
25 by an attorney in connection with such claim, fix . . . a reasonable fee to compensate such attorney
26 for the services performed by him in connection with such claim.” § 406(a)(1) (referred to as “fee
27 petition process”). Section 406(a) also prescribes limits regarding the amount of attorneys’ fees
28 awarded when there is a fee agreement between the claimant and representative, requiring the

1 Agency to approve the agreement as long as the section’s requirements are met. § 406(a)(2)
2 (referred to as “fee agreement process”). Furthermore, § 403(a)(3) provides a process by which
3 the claimant or representative may seek administrative review of the “amount which would
4 otherwise be the maximum fee as determined under [§ 406(a)(2)].” § 403(a)(3) (emphases added).

5 Contrary to Plaintiff’s contention at the hearing, nothing in the provisions of § 406
6 constitutes the United States’ express statutory consent to be sued, allowing this Court to enforce a
7 fee award granted by the ALJ. See *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33 (1992)
8 (“[W]aivers of sovereign immunity must be ‘unequivocally expressed’ in statutory text, and
9 cannot simply be implied”); see also *Pittman v. Sullivan*, 911 F.2d 42, 46 (8th Cir. 1990) (“Section
10 406 ‘cannot be construed as a waiver of immunity’ because it ‘contemplates payment of the fee
11 award by the claimant, out of past-due benefits, rather than by the government, out of general
12 funds.’”); *In re Handel*, 570 F.3d 140, 144 (3d Cir. 2009) (“[42 U.S.C. § 406] is not a waiver of
13 sovereign immunity, but rather a statutory interference with the attorney client contractual
14 relationship which would otherwise be determined by the marketplace for legal services.”).

15 For these reasons, the Social Security Act does not constitute an unequivocal waiver of
16 sovereign immunity conferring jurisdiction on this Court to consider the first claim.

17 **2. Administrative Procedures Act**

18 The APA provides a waiver of sovereign immunity for plaintiffs seeking equitable relief
19 against the United States government. See 5 U.S.C. § 706(1) & (2); *Gallo Cattle Co. v. U.S. Dep’t*
20 *of Agric.*, 159 F.3d 1194, 1198 (9th Cir. 1998). Section 702, the APA’s judicial review provision,
21 “permits a citizen suit against an agency when an individual has suffered ‘a legal wrong because
22 of agency action’ . . .” *Rattlesnake Coalition v. United States EPA*, 509 F.3d 1095, 1103 (9th Cir.
23 2007) (quoting 5 U.S.C. § 702). In relevant part, § 702 provides:

24 An action in a court of the United States seeking relief other than
25 money damages and stating a claim that an agency or an officer or
26 employee thereof acted or failed to act in an official capacity or
27 under color of legal authority shall not be dismissed nor relief
28 therein be denied on the ground that it is against the United States or
that the United States is an indispensable party.

§ 702. Section 704 describes the types of reviewable actions; it provides:

1 Agency action made reviewable by statute and final agency action
2 for which there is no other adequate remedy in a court are subject to
3 judicial review. A preliminary, procedural, or intermediate agency
4 action or ruling not directly reviewable is subject to review on the
5 review of the final agency action. Except as otherwise expressly
6 required by statute, agency action otherwise final is final for the
7 purposes of this section whether or not there has been presented or
8 determined an application for a declaratory order, for any form of
9 reconsideration, or, unless the agency otherwise requires by rule and
10 provides that the action meanwhile is inoperative, for an appeal to
11 superior agency authority.

12 § 704. Finally, § 706 “prescribes standards for judicial review and demarcates what relief a court
13 may (or must) order.” *Rosemere Neighborhood Ass’n v. United States EPA*, 581 F.3d 1169, 1172
14 n.2 (9th Cir. 2009). When a plaintiff asserts an agency’s failure to act, a court can grant relief by
15 compelling “agency action unlawfully withheld or unreasonably delayed.” § 706(1).

16 The APA waives sovereign immunity “only if three conditions are met: (1) its claims are
17 not for money damages, (2) an adequate remedy for its claims is not available elsewhere and (3)
18 its claims do not seek relief expressly or impliedly forbidden by another statute.” *Tucson Airport
19 Auth. v. Gen. Dynamics Corp.*, 136 F.3d 641, 645 (9th Cir. 1998). Moreover, to invoke the APA’s
20 jurisdiction, Plaintiff must show that: “(1) an agency had a nondiscretionary duty to act and (2) the
21 agency unreasonably delayed in acting on that duty. Once a petitioner has proven a right to relief
22 under the circumstances, it is the reviewing court’s duty to ‘compel agency action unlawfully
23 withheld or unreasonably delayed.’” *Gelfer v. Chertoff et al.*, 2007 WL 902382 at *1 (N.D. Cal.
24 2007), citing *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63-65 (2004). “[A]
25 claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a
26 discrete agency action that it is required to take.” *Norton*, 542 U.S. at 64.

27 Here, Plaintiff alleges “that Defendant failed to deliver the total amount of awarded
28 attorneys’ fees.” Plaintiff seeks a permanent injunction enjoining the Agency from “depriving
Plaintiff of fees properly approved by the SSA for work performed before the SSA,” declaratory
relief stating that Defendant shall pay Plaintiff fees properly approved by the Commissioner,” and
a writ of mandamus compelling payment of fees owed. FAC at 14. At least facially, these
constitute equitable claims for relief, not monetary damages, and fall within the APA’s scope. See
Presbyterian Church (U.S.A.) v. United States, 870 F.2d 518, 524 (9th Cir. 1989) (“[T]he

1 amendment to § 702 was designed to ‘strengthen this accountability by withdrawing the defense
2 of sovereign immunity in actions seeking relief other than money damages, such as an injunction,
3 declaratory judgment, or writ of mandamus.’”).

4 That being said, the Court finds that the APA does not provide a basis for suit in this case
5 because Plaintiff has failed to allege a nondiscretionary duty to act. Plaintiff has pointed to
6 nothing in the Social Security Act that requires a federal agency to take discrete and specific
7 action with regard to how the Agency pays attorneys’ fees. See Norton, 542 U.S. at 64 (APA
8 “empowers a court only to compel an agency ‘to perform a ministerial or non-discretionary act,’ or
9 ‘to take action upon a matter, without directing how it shall act’” (emphasis added)). As Plaintiff
10 acknowledged at the hearing, Plaintiff can obtain its fees from the Agency or the claimant.
11 Because there is no support for the argument that the Agency must pay the representative directly,
12 sovereign immunity is not waived through the APA.

13 **3. Federal Question Jurisdiction, Mandamus, and Declaratory Judgment**
14 **Act**

15 Plaintiff’s reliance on §§ 1331, 1361, and 2202 cannot overcome the sovereign immunity
16 hurdle. Section 1331 is merely a jurisdictional statute; it does not waive the United States’
17 sovereign immunity for all causes of action simply because they arise under federal law. See
18 Gilbert v. DaGrossa, 756 F.2d 1455, 1458 (9th Cir. 1985) (holding that § 1331 “by itself [cannot]
19 be construed as constituting a waiver of the government’s defense of sovereign immunity.”).
20 Similarly, the Mandamus Act’s grant of jurisdiction over mandamus actions does not constitute a
21 waiver of sovereign immunity. See Pit River Home & Agric. Co-op Ass’n v. United States, 30
22 F.3d 1088, 1098 n. 5 (9th Cir. 1994). Finally, the Declaratory Judgment Act also does not provide
23 an independent basis for jurisdiction; it merely enlarges the range of remedies a federal court may
24 award. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671 (1950).

25 * * *

26 Because Plaintiff has identified no valid basis for waiving the United States’ sovereign
27 immunity, the Court DISMISSES Plaintiff’s first cause of action alleging violations under the
28 Social Security Act for the payment of attorneys’ fees. The dismissal is without prejudice.

1 Plaintiff's second amended complaint must identify a specific nondiscretionary duty and its legal
2 source. The legal source must specifically identify the source of the Agency's duty to pay
3 representatives directly (as opposed to representatives obtaining payment from the claimant). A
4 cite to the Agency's general duty to award attorneys' fees, or to § 406 without more, will not
5 suffice. Failure to comply will result in dismissal of this claim with prejudice.

6 **B. Due Process Claims**

7 Under *Califano v. Sanders*, 430 U.S. 99, 108 (1977), colorable constitutional claims are an
8 exception to the doctrine of sovereign immunity. See also *Klemm v. Astrue*, 543 F.3d 1139, 1144
9 (9th Cir. 2008) ("The Court explained that federal subject matter jurisdiction exists 'where the . . .
10 denial of a petition to reopen is challenged on constitutional grounds.'"); *De Lao v. Califano*, 560
11 F.2d 1384, 1391 (9th Cir. 1977). "[T]he Sanders exception applies to any colorable constitutional
12 claim of due process violation that implicates a due process right either to a meaningful
13 opportunity to be heard or to seek reconsideration of an adverse benefits determination." *Udd v.*
14 *Massanari*, 245 F.3d 1096, 1099 (9th Cir. 2001); *Evans v. Chater*, 110 F.3d 1480, 1482 (9th Cir.
15 1997) ("[A] constitutional claim must 'implicate a due process right to a meaningful opportunity
16 to be heard.'"); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)("[T]here
17 can be no doubt that at a minimum [due process] require[s] that deprivation of life, liberty or
18 property by adjudication be preceded by notice and opportunity for hearing appropriate to the
19 nature of the case."). A due process challenge "must be supported by facts sufficient to state a
20 violation of substantive or procedural due process." *Klemm*, 543 F.3d at 1144 (citations and
21 internal quotation marks omitted). "A 'mere allegation of a due process violation' is not a
22 colorable constitutional claim." *Id.* (quoting *Anderson v. Babbitt*, 230 F.3d 1158, 1163 (9th Cir.
23 2000)). "Rather, the claim must be supported by facts sufficient to state a violation of substantive
24 or procedural due process." *Id.* (internal quotation marks omitted).

25 Plaintiff claims it was deprived of due process. It argues that the Agency violated the
26 Fifth Amendment by refusing to pay attorneys' fees, by changing two prior fee approvals without
27 notice and an opportunity to be heard, and by conducting a campaign to make it more difficult for
28 attorneys to represent the disabled population. Dkt. No. 23 at 1; see also FAC at 15 ("Defendant

1 uses a nonpublic (secret) adjudication channel from its payment center to a ‘Chief Regional
2 Administrative Judge’ without affording the parties a meaning [sic] opportunity to be heard.”). It
3 contends that Plaintiff “was never informed by any notice or rationale, or afforded a meaningful
4 opportunity to respond to the SSA’s action of approving attorney fees and then reducing the
5 approved fee amount over a year later.” Dkt. No. 23 at 9.


6 Liberally construing the complaint, the Court finds that Plaintiff has failed to plead a
7 cognizable due process claim establishing deprivation of a protectable property interest. Because
8 the complaint does not contain sufficient facts supporting a colorable due process violation as to
9 the partial fee payments or purported retroactive altered fee awards, the Court grants the Agency’s
10 motion to dismiss for failure to state a claim. Cf. *Boettcher v. Secretary of Health and Human*
11 *Serv.*, 759 F.2d 719, 722 (9th Cir. 1985) (finding that plaintiff whose challenge was not “wholly
12 insubstantial, immaterial, or frivolous” stated a colorable constitutional claim). Accordingly, the
13 Court grants the Agency’s motion to dismiss Plaintiff’s Due Process claim. The claim is
14 dismissed without prejudice so that Plaintiff has another opportunity to adequately plead its due
15 process allegation.

16 **V. CONCLUSION**

17 For the foregoing reasons, the Court GRANTS the motion to dismiss without prejudice.
18 Should Plaintiff choose to file an amended complaint, it must do so within thirty (30) days of the
19 date of this order.

20 **IT IS SO ORDERED.**

21
22 Dated: 5/24/2016

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24 
25 HAYWOOD S. GILLIAM, JR.
26 United States District Judge
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28