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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

HANNAH HENRY,  
Plaintiff,

v.

NAPA VALLEY UNIFIED,  
Defendant.

Case No. [16-cv-04021-MEJ](#)

**ORDER GRANTING MOTION TO  
DISMISS**

Re: Dkt. No. 21

**INTRODUCTION**

Pending before the Court is Napa Valley United School District’s (the “District”) Motion to Dismiss Plaintiff Hannah Henry’s (“Plaintiff”) First Amended Complaint (“FAC”; Dkt. No. 17) pursuant to Federal Rule of Civil Procedure (“Rule”) 12(b)(6) and Rule 12(b)(1). Mot., Dkt. No. 21-1.<sup>1</sup> Plaintiff filed an Opposition (Dkt. No. 26), and the District filed a Reply (Dkt. No. 29). The Court previously vacated the hearing and took the matter under submission. Dkt. No. 32. Having considered the parties’ positions, the record in this case, and the relevant legal authority, the Court **GRANTS** the District’s Motion as set forth below.

**BACKGROUND**

On April 4, 2016, the parties entered into a settlement agreement of a pending due process case, Office of Administrative Hearings Case No. 2016010051. FAC ¶¶ 10-11. During the 2015-2016 school year, the District had filed a due process complaint against Plaintiff’s child, a minor

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<sup>1</sup> The District filed its memorandum of points and authorities in a separate document and docket number (Dkt. No. 21-1) from its Motion (Dkt. No. 21). Civil Local Rule 7-2(b) requires parties submit “[i]n one filed document” both their motion, notice of motion, and memorandum of points and authorities. Consequently, for purposes of this Order, where the Court cites to the District’s Motion, it is referring to its memorandum of points and authorities in Dkt. No. 21-1.

1 student with a disability. FAC ¶ 7. The District alleged Plaintiff was refusing to consent to the  
2 District’s offer of a free and appropriate public education for her child pursuant to the Individuals  
3 with Disabilities Education Act (“IDEA”), 20 U.S.C. §§1400, et seq. Plaintiff also had filed a due  
4 process complaint against the District, alleging violations of the IDEA and its corresponding  
5 provisions in the Education Code. FAC ¶ 8. The parties’ Settlement Agreement contains the  
6 following language:

7 [Paragraph] G. District agrees to reimburse reasonable attorney’s  
8 fees in an amount not to exceed eighteen thousand dollars (\$18,000)  
9 for attorney fees related to Napa Valley Unified School District v.  
10 Parent on Behalf of Student and Parent on Behalf of Student v. Napa  
11 Valley Unified School District, OAH Consolidated Case No.  
2016010051. Payment shall be made after execution of this  
Agreement and Board approval and within forty-five (45) business  
days of receipt of an itemized statement of attorney’s fees and  
services from Tania L. Whiteleather.

12 FAC ¶¶ 11, 14; Burkhart Decl., Ex. A (Settlement Agreement), Dkt. No. 21-3.<sup>2</sup>

13 Upon the District Board’s approval of the Settlement Agreement on April 8, 2016,  
14 Plaintiff’s counsel, Tania Whiteleather, immediately presented a Billing Statement to the District,  
15 totaling on or around \$18,000. FAC ¶¶ 14-15. The District owed payment on these fees by May  
16 23, 2016. *Id.* ¶ 14. However, the District “did not respond in any way to the Billing Statement  
17 until July 7, 2016,” and then initially paid Ms. Whiteleather \$15,210, based on its interpretation of  
18 reasonable fees. *Id.* ¶ 15; Burkhart Decl. ¶¶ 2-5. Ms. Whiteleather deposited the payment on July  
19 8, 2016. Burkhart Decl. ¶ 5.

20 Plaintiff filed her original Complaint on July 15, 2016 alleging a single claim for breach of  
21 a settlement agreement between the parties. Dkt. No. 1. On August 26, 2016, Plaintiff’s counsel  
22 effectuated service of the original Complaint on the District. Dkt. No. 6. In the intervening  
23 period, however, the District’s counsel wrote to Ms. Whiteleather on July 19, 2016 and agreed to  
24 pay the remaining balance of the fees allegedly owed; Ms. Whiteleather received the check on July  
25 22, 2016, and deposited it on August 1, 2016. FAC ¶ 24; Burkhart Decl. ¶¶ 6-7.

26 On September 16, 2016, the District filed a motion to dismiss the Complaint arguing,  
27

28 <sup>2</sup> An unredacted version of the Settlement Agreement is available at Dkt. No. 22-2. The Court separately granted the motion to seal this document. Dkt. No. 33.

1 among other things, that the breach of contract claim was moot and that the Court lacked  
2 jurisdiction over it. Dkt. Nos. 8-12. Rather than filing an opposition, Plaintiff amended her  
3 complaint, filing her FAC on October 6, 2016.

4 The FAC contains three claims: (1) the First Cause of Action is for retaliation under the  
5 Americans with Disabilities Act (“ADA”); (2) the Second Cause of Action is for disability  
6 discrimination under Section 504 of the Rehabilitation Act; and (3) the Third Cause of Action is  
7 again for breach of contract. Plaintiff alleges she suffered hardship between May 23, 2016, when  
8 payment was due, and July 22, 2016, when the District allegedly made full payment. *See* FAC ¶  
9 26. She contends as a result of the District’s failure to timely pay the additional \$2,790, “Plaintiff  
10 was left to pay those amounts on her own.” *Id.* ¶ 21. She alleges that:

11  
12 Plaintiff is responsible to her counsel for the fees for her son’s  
13 administrative matter, which was brought pursuant to the [IDEA]  
14 and which sought reimbursement for services paid for by the parents  
15 for their son, an individual with a disability. The failure of [the  
16 District] to comply with the settlement agreement has left Plaintiff  
17 in the position of having to apply her son’s educational  
reimbursement funds from [the District] to her attorney’s fees,  
denying her son the benefit of the bargain under that settlement  
agreement and further denying him payment for the educational  
services privately provided to him by his parents to address his  
unique educational needs.

18 *Id.* ¶ 26. The Third Cause of Action asserts “Plaintiff’s action was filed at a time that Defendant  
19 had failed to comply with the terms of the settlement agreement with Plaintiff. Only after a  
20 complaint was filed did Defendant issue payment of the remaining fees.” FAC ¶ 44.

21 Plaintiff now seeks “an order that [the District] failed to comply with the Settlement and  
22 Release Agreement its agent signed on April 4, 2016 and which its Board approved to pay  
23 Plaintiff’s counsel up to \$18,000” and “an order that Plaintiff is entitled to payment of her  
24 attorney’s fees for the enforcement of the settlement agreement, including any related costs for the  
25 prosecution of this matter.” *Id.*, Prayer for Relief ¶¶ 1, 3; *id.* ¶ 45 (“Plaintiff now seeks  
26 enforcement of the contract allowing for attorney’s fees to a prevailing party in an action to  
27 enforce that agreement.”).

28 The District moves to dismiss on numerous grounds, including among other things: (1)

1 Plaintiff has failed to plead (and cannot plead) that she satisfied the claim presentation requirement  
2 for her breach of contract claim as required by California’s Government Claims Act; (2) the Court  
3 lacks jurisdiction over the Third Cause of Action under the Eleventh Amendment of the United  
4 States Constitution; and (3) Plaintiff’s ADA and Rehabilitation Act claims are derivative of her  
5 breach of contract claim, with no independent jurisdictional hook and with no indication she seeks  
6 to enforce rights available under either of these statutes. *See* Mot. It further points out that the  
7 FAC pleads “the District had reasons for the delay in payment – i.e. that it thought that the  
8 attorney’s billing rate was unreasonable and that her travel expenses should not be fully  
9 reimbursed.” Mot. at 16 (citing FAC ¶ 15). Thus “[o]n the face of the contract, the District was  
10 only required to reimburse ‘reasonable’ attorneys’ fees, ‘[i]n an amount not to exceed eighteen  
11 thousand dollars.’” *Id.* (quoting FAC ¶ 11).

12 In her Opposition, Plaintiff concedes she did not comply with the claim presentation  
13 requirement under California law. Opp’n at 4 (“[N]o Government Claim was filed with Defendant  
14 prior to the filing of the complaint and FAC.”). She does not address the Eleventh Amendment  
15 immunity argument. As to the ADA and Rehabilitation Act claims, Plaintiff asserts that she  
16 challenges “[t]he actions of Defendant, in entering into a settlement of a pending administrative  
17 matter and then acting unreasonably and in a manner that would make other parents of children  
18 with disabilities reluctant to advocate for their child is a retaliation that violates both Section 504  
19 and the ADA.” Opp’n at 7.

## 20 LEGAL STANDARDS

### 21 A. Rule 12(b)(1)

22 Federal district courts are courts of limited jurisdiction; “[t]hey possess only that power  
23 authorized by Constitution and statute, which is not to be expanded by judicial decree.” *Kokkonen*  
24 *v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citation omitted). Accordingly, “[i]t  
25 is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing  
26 the contrary rests upon the party asserting jurisdiction.” *Id.*; *Chandler v. State Farm Mut. Auto.*  
27 *Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010).

28 Federal Rule of Civil Procedure 12(b)(1) authorizes a party to move to dismiss a lawsuit

1 for lack of subject matter jurisdiction. A jurisdictional challenge may be facial or factual. *Safe*  
 2 *Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). Where the attack is facial, the  
 3 court determines whether the allegations contained in the complaint are sufficient on their face to  
 4 invoke federal jurisdiction, accepting all material allegations in the complaint as true and  
 5 construing them in favor of the party asserting jurisdiction. *Warth v. Seldin*, 422 U.S. 490, 501  
 6 (1975). Where the attack is factual, however, “the court need not presume the truthfulness of the  
 7 plaintiff’s allegations.” *Safe Air for Everyone*, 373 F.3d at 1039. In resolving a factual dispute as  
 8 to the existence of subject matter jurisdiction, a court may review extrinsic evidence beyond the  
 9 complaint without converting a motion to dismiss into one for summary judgment. *Id.*; *McCarthy*  
 10 *v. United States*, 850 F.2d 558, 560 (9th Cir. 1988) (holding that a court “may review any  
 11 evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of  
 12 jurisdiction”).

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

14 Rule 8(a) requires that a complaint contain a “short and plain statement of the claim  
 15 showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). A complaint must therefore  
 16 provide a defendant with “fair notice” of the claims against it and the grounds for relief. *Bell Atl.*  
 17 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotations and citation omitted).

18 A court may dismiss a complaint under Rule 12(b)(6) when it does not contain enough  
 19 facts to state a claim to relief that is plausible on its face. *Id.* at 570. “A claim has facial  
 20 plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable  
 21 inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662,  
 22 678 (2009). “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for  
 23 more than a sheer possibility that a defendant has acted unlawfully.” *Id.* (quoting *Twombly*, 550  
 24 U.S. at 557). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need  
 25 detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to  
 26 relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a  
 27 cause of action will not do. Factual allegations must be enough to raise a right to relief above the  
 28 speculative level.” *Twombly*, 550 U.S. at 555 (internal citations and parentheticals omitted).

1 In considering a motion to dismiss, a court must accept all of the plaintiff's allegations as  
2 true and construe them in the light most favorable to the plaintiff. *Id.* at 550; *Erickson v. Pardus*,  
3 551 U.S. 89, 93-94 (2007); *Vasquez v. Los Angeles Cty.*, 487 F.3d 1246, 1249 (9th Cir. 2007). In  
4 addition, courts may consider documents attached to the complaint. *Parks Sch. of Bus., Inc. v.*  
5 *Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995) (citation omitted).

6 If a Rule 12(b)(6) motion is granted, the "court should grant leave to amend even if no  
7 request to amend the pleading was made, unless it determines that the pleading could not possibly  
8 be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en  
9 banc) (internal quotations and citations omitted). However, the Court may deny leave to amend  
10 for a number of reasons, including "undue delay, bad faith or dilatory motive on the part of the  
11 movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice  
12 to the opposing party by virtue of allowance of the amendment, [and] futility of amendment."  
13 *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (citing *Foman v.*  
14 *Davis*, 371 U.S. 178, 182 (1962)).

## 15 ANALYSIS

16 The Court first addresses Plaintiff's Breach of Contract claim, then her ADA and  
17 Rehabilitation Act claims.

### 18 A. Breach of Contract Claim

19 The Court finds Plaintiff's breach of contract claim must be dismissed for failure to  
20 comply with California's claims presentation requirement and because the District has immunity  
21 from this claim under the Eleventh Amendment. "State tort claims included in a federal action  
22 may proceed only if the claims were first presented . . . in compliance with the claim presentation  
23 requirement." *Talib v. Nicholas*, 2015 WL 456546, at \*8 (C.D. Cal. Feb. 2, 2015), *appeal*  
24 *dismissed* (Mar. 24, 2015) (citing *Karim-Panahi v. L.A. Police Dep't*, 839 F.2d 621, 627 (9th Cir.  
25 1988)); *see also* Cal. Gov't Code §§ 905, 911.2(a), 945.4 (no suit for money or damages may be  
26 brought against a public entity unless and until a timely claim has been presented to the entity, and  
27 the entity has rejected the claim); *City of Stockton v. Superior Court*, 42 Cal. 4th 730, 738 (2007)  
28 ("Contract claims fall within the plain meaning of the requirement that 'all claims for money or

1 damages' be presented to a local public entity"). Plaintiff concedes she has failed to comply with  
 2 the claims presentation requirement. *See* Opp'n at 4. Thus, as "submission of a claim to a public  
 3 entity pursuant to section 900 et seq. is a condition precedent to a tort action[,]" Plaintiff's "failure  
 4 to present the claim bars the action." *State v. Superior Court (Bodde)*, 32 Cal. 4th 1234, 1240  
 5 (2004) (internal quotation marks omitted).

6 Furthermore, the Ninth Circuit has previously held that school districts in California are  
 7 arms of the state under California's unique system and are thus entitled Eleventh Amendment  
 8 immunity. *See Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248, 254 (9th Cir. 1992); *Holz v.*  
 9 *Nenana City Pub. Sch. Dist.*, 347 F.3d 1176, 1181 (9th Cir. 2003) (discussing California's unique  
 10 public school system as compared with other states); *see also C.W. v. Capistrano Unified Sch.*  
 11 *Dist.*, 784 F.3d 1237, 1247-48 (9th Cir. 2015) (citing *Belanger* for its holding that "in California,  
 12 school districts are state agencies for purposes of Eleventh Amendment immunity"). Plaintiff  
 13 does not address the District's Eleventh Amendment immunity argument; nor does she contest that  
 14 immunity bars her claims. Typically, failure to address in an opposition arguments raised in an  
 15 opening motion, as Plaintiff did here, constitutes waiver or concession of the argument. *See*  
 16 *Stichting Pensioenfonds ABP v. Countrywide Fin. Corp.*, 802 F. Supp. 2d 1125, 1132 (C.D. Cal.  
 17 2011) ("[I]n most circumstances, failure to respond in an opposition brief to an argument put  
 18 forward in an opening brief constitutes waiver or abandonment in regard to the uncontested issue."  
 19 (quotation and citations omitted)); *see also Allen v. Dollar Tree Stores, Inc.*, 475 F. App'x 159,  
 20 159 (9th Cir. 2012) (district court properly dismissed claims where plaintiff's "opposition to the  
 21 motion to dismiss failed to respond to [the defendant's] argument").

22 As Plaintiff has neither alleged facts showing how she may maintain her breach of contract  
 23 claim, nor demonstrated in her Opposition demonstrating such a claim is viable, the Court  
 24 accordingly dismisses Plaintiff's breach of contract claim with prejudice.

25 **B. ADA and Rehabilitation Act Claims**

26 Plaintiff's ADA and Rehabilitation Act claims must likewise be dismissed for failure to  
 27 allege plausible facts supporting these claims. To state a claim for retaliation under the ADA, a  
 28 plaintiff must "make out a prima facie case (a) that he or she was engaged in protected activity, (b)

1 that he or she suffered an adverse action, and (c) that there was a causal link between the two.”  
 2 *T.B. ex rel. Brenneise v. San Diego Unified Sch. Dist.*, 806 F.3d 451, 473 (9th Cir. 2015) (adopting  
 3 Title VII’s framework for ADA retaliation claims). Similarly, “[t]he Ninth Circuit has held that a  
 4 retaliation claim brought under the Rehabilitation Act requires a plaintiff to show: ‘(1)  
 5 involvement in a protected activity, (2) an adverse [] action and (3) a causal link between the  
 6 two.’” *Kitchen v. Lodi Unified Sch. Dist.*, 2014 WL 5817320, at \*4 (E.D. Cal. Nov. 5, 2014)<sup>3</sup>  
 7 (quoting *Coons v. Sec’y of U.S. Dep’t of Treasury*, 383 F.3d 879, 887 (9th Cir. 2004)) (quotation  
 8 and internal marks omitted).

9 First, even assuming Plaintiff engaged in a protected activity,<sup>4</sup> she has not plausibly  
 10 alleged a causal link between that activity and suffering an adverse action. As the District asserts,  
 11 both Plaintiff’s ADA and Rehabilitation Act claims are derivative of the breach of contract claim  
 12 and generally contend the District’s failure to timely pay was in retaliation for the advocacy of her  
 13 son in the underlying due process action. *See* FAC ¶¶ 32, 33 (alleging the District had “no reason  
 14 to believe that its refusal to comply with the settlement agreement terms was reasonable,” and that  
 15 it “took the actions it did with the intent to discourage both Plaintiff’s advocacy for her son and  
 16 her retention of counsel for that advocacy.”). But Plaintiff does not allege facts supporting a  
 17 retaliation theory; in fact, Plaintiff’s allegations about the parties’ Settlement Agreement and  
 18 subsequent disputes related to that agreement clarify the reasons for the District’s delay—none of  
 19 which involve retaliation. *See* Mot. at 16. Among other things, the FAC pleads the District had  
 20 reasons for the delay in payment, including that it thought Ms. Whiteleather’s billing rate, which  
 21 was over \$450 per hour, was unreasonable and that her travel expenses should not be reimbursed  
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23 <sup>3</sup> The Rehabilitation Act contains no anti-retaliation provision of its own. Instead, it “incorporates  
 24 the ADA’s anti-retaliation provision, 42 U.S.C. § 12203.” *Kitchen*, 2014 WL 5817320, at \*4 n.1  
 25 (citing *McCoy v. Dep’t of Army*, 789 F. Supp. 2d 1221, 1234 (E.D. Cal. 2011)). Accordingly,  
 26 courts “draw[] . . . from the case law and requirements of that section, which provides that ‘[n]o  
 27 person shall discriminate against any individual because such individual has opposed any act or  
 28 practice made unlawful by this chapter or because such individual made a charge, testified,  
 assisted, or participated in any manner in an investigation, proceeding, or hearing under this  
 chapter.’” *Id.* (quoting 42 U.S.C. § 12203(a)).

<sup>4</sup> The District challenges this contention. *See* Mot. at 12-13, 15-16.



1 at the amount she claimed. *See* FAC ¶ 15. The Settlement Agreement also facially allows for  
 2 such disputes as to the reasonableness of those fees: the District was only required to reimburse  
 3 “reasonable” attorney’s fees, “[i]n an amount *not to exceed* eighteen thousand dollars.” *Id.* ¶ 11  
 4 (emphasis added).

5 Second, there is no indication Plaintiff suffered an adverse action sufficient to state a  
 6 retaliation claim. Not every action a defendant takes that affects a plaintiff who has engaged in  
 7 protected activity constitutes adverse action. *Brooks v. City of San Mateo*, 229 F.3d 917, 928 (9th  
 8 Cir. 2000). Rather, an adverse action is one that is “reasonably likely to deter [individuals] from  
 9 engaging in protected activity.” *Pardi v. Kaiser Found. Hosps.*, 389 F.3d 840, 850 (9th Cir. 2004)  
 10 (ADA employment retaliation case) (quotation marks omitted). “[O]nly non-trivial . . . actions  
 11 that would deter reasonable [individuals] from complaining . . . will constitute actionable  
 12 retaliation.” *Brooks*, 229 F.3d at 917; *see also Burlington N. & Santa Fe Ry. Co. v. White*, 548  
 13 U.S. 53, 57 (2006) (concluding that, in a Title VII employment retaliation case, a cognizable  
 14 adverse action is one that “must be harmful to the point that [it] could well dissuade a reasonable  
 15 worker from making or supporting a charge of discrimination”); *Poland v. Chertoff*, 494 F.3d  
 16 1174, 1180 (9th Cir. 2004) (an adverse action is one that is “reasonably likely to deter the charging  
 17 party or others from engaging in protected activity” (quotation marks omitted)).

18 The District notes the only alleged adverse action taken by the District was that it “failed to  
 19 pay Plaintiff’s attorney for a period of less than two months, based on the District’s contract  
 20 dispute with the attorney over the amount of fees she was entitled to under the settlement  
 21 agreement.” Mot. at 14 (citing FAC ¶¶ 13, 24); *see also* FAC ¶ 15. Even if as Plaintiff alleges she  
 22 was obligated to pay her attorney her fees not paid by the District during the brief delay (*see* FAC  
 23 ¶¶ 21, 26, 37), as the District argues “presumably once full payment was made by the District,  
 24 Plaintiff was reimbursed for this expense by her attorney” and “[t]here is no allegation that the  
 25 District knew about Plaintiff’s fee arrangement with her attorney, or intended to deprive her of any  
 26 financial resources” so as to constitute “an objectively and materially adverse action[.]” Mot. at  
 27 14. While Plaintiff argues the District’s actions “were done with intent to dissuade Plaintiff - and  
 28 thus other parents who might similarly advocate for their children from so doing - and to

1 intimidate her from further advocacy for her disabled son” (Opp’n at 7), the FAC does not contain  
2 plausible or objectively reasonable allegations that either Plaintiff or others would be dissuaded  
3 from advocating for their children as a result of the District’s delay and conduct in this case.  
4 Finally, as to the costs Plaintiff seeks to recover in filing this lawsuit, the District points out that  
5 “this is not adverse action meted out by the District; the decision to pursue this case and incur  
6 additional attorneys’ fees was entirely [Plaintiff’s] own.” Mot. at 14. The Court agrees in under  
7 these circumstances, particularly as the District paid the full attorney’s amount before it was  
8 served with the initial Complaint.<sup>5</sup>

9 In sum, the FAC fails to state a claim under either the Rehabilitation Act or the ADA.

10 **C. No Leave to Amend**

11 Plaintiff has not indicated she has any additional relevant facts to add to her Complaint that  
12 could cure the defects with her claims. *See* Opp’n at 10. As granting Plaintiff leave to amend  
13 would be futile, the Court finds no grounds to do so.

14 **CONCLUSION**

15 Based on the foregoing analysis, the Court **GRANTS** the District’s Motion to Dismiss and  
16 **DISMISSES** this action **WITH PREJUDICE**.

17 **IT IS SO ORDERED.**

18  
19 Dated: December 8, 2016

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22 \_\_\_\_\_  
23 MARIA-ELENA JAMES  
24 United States Magistrate Judge

25  
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27 \_\_\_\_\_  
28 <sup>5</sup> Moreover, Plaintiff’s initial complaint did not assert a federal question, 28 U.S.C. § 1331, and  
the amount in controversy alleged was well under the required \$75,000 minimum, 28 U.S.C. §  
1332.