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28UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

MARCO ESCALANTE,

Plaintiff,

No. C-08-2242 PJH

v.

MICHAEL CHERTOFF, Secretary  
of Homeland Security,

Defendant.

**ORDER GRANTING  
DEFENDANT'S MOTION  
TO DISMISS**

Defendant's motion to dismiss plaintiff's complaint came on for hearing before this court on October 29, 2008. Plaintiff, Marco Escalante ("Escalante"), appeared through his counsel, Jonathan M. Kaufman, Esq. Defendant, Secretary of Homeland Security Michael Chertoff ("Chertoff"), appeared through his counsel, Ila C. Deiss. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby GRANTS the motion, for the reasons stated at the hearing, and as follows.

1. No subject matter jurisdiction exists under the Administrative Procedure Act ("APA") because the APA only waives sovereign immunity when an agency has taken a final, nondiscretionary action. Escalante has failed to identify any nondiscretionary agency action taken by the Department of Homeland Security ("DHS").

2. Alternatively, neither 28 U.S.C. § 1331 nor 28 U.S.C. § 1361 provide a basis for subject matter jurisdiction, because neither statute waives sovereign immunity. Moreover, plaintiff conceded at the hearing that he does not proceed under § 1361, despite the position stated in his papers.

3. Finally, as Escalante's counsel conceded when he withdrew his claim for

1 monetary relief, 28 U.S.C. § 1346 only applies to claims that seek either monetary  
2 damages pursuant to a money-mandating statute or relief pursuant to an express or implied  
3 contract with the United States. As Escalante has withdrawn his claim for reimbursement  
4 of the \$305.00 filing fee he paid to DHS, no such claim exists. Therefore, § 1346 does not  
5 provide the court with subject matter jurisdiction.

6 Accordingly, the court DISMISSES Escalante's complaint on grounds of lack of  
7 subject matter jurisdiction.

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9 **IT IS SO ORDERED.**

10 Dated: October 31, 2008



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11 PHYLLIS J. HAMILTON  
12 United States District Judge  
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