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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

PEOPLE WITH DISABILITIES  
FOUNDATION,

Plaintiff,

v.

NANCY A. BERRYHILL,

Defendant.

Case No. [15-cv-02570-HSG](#)

**ORDER GRANTING DEFENDANT'S  
MOTION TO DISMISS PLAINTIFF'S  
SECOND AMENDED COMPLAINT**

Re: Dkt. No. 34

People with Disabilities Foundation (“Plaintiff” or “PWDF”) is a § 501(c)(3) organization whose staff attorneys represented nine claimants in proceedings before the Social Security Agency (“Agency”). Dkt. No. 30 (“SAC”) ¶¶ 17, 22; Dkt. No. 36 (“Opp.”) at 1 n.2.<sup>1</sup> Plaintiff alleges that each claimant prevailed before the Administrative Law Judge and was awarded fees pursuant to either the “fee petition process” governed by 42 U.S.C. § 406(a)(1) or by the “fee agreement process” governed by § 406(a)(2). SAC ¶¶ 4-6. Plaintiff contends that after the expiration of time allotted in § 406(a)(3), Defendant Nancy A. Berryhill, Acting Commissioner of Social Security, failed to pay some or all of the attorney’s fees without providing reasonable notice or the opportunity to submit a written opposition. SAC ¶ 6. Plaintiff asserts a declaratory relief claim premised upon the alleged violations of 42 U.S.C. § 406(a), and a due process claim. SAC ¶¶ 64-71. Defendant has moved to dismiss the SAC for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. Dkt. No. 34 (“Mot.”) at 15-25; see also Fed. R. Civ. P. 12(b)(1), (b)(6). The motion is **GRANTED WITHOUT LEAVE TO AMEND.**<sup>2</sup>

<sup>1</sup> Although Plaintiff originally made allegations relating to ten claimants, SAC ¶ 22, it subsequently withdrew allegations relating to one of them, Opp. at 1 n.2.

<sup>2</sup> The Court finds that this matter is appropriate for disposition without oral argument and the matter is deemed submitted. See N.D. Civ. L.R. 7-1(b).

1           **I.   LEGAL STANDARD**

2           **A.   Motion to Dismiss for Lack of Subject Matter Jurisdiction**

3           Rule 12(b)(1) allows a defendant to move for dismissal on grounds that the court lacks  
4 jurisdiction over the subject matter. Fed. R. Civ. P. 12(b)(1). The burden is on the plaintiff to  
5 establish that the Court has subject matter jurisdiction over an action. See *Assoc. of Am. Medical*  
6 *Colleges v. United States*, 217 F.3d 770, 778-79 (9th Cir. 2000); *Kokkonen v. Guardian Life Ins.*  
7 *Co. of Am.*, 511 U.S. 375, 376-78 (1994).

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

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

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

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

21           **B.   Motion to Dismiss for Failure to State a Claim**

22           Federal Rule of Civil Procedure 8(a) requires that a complaint contain “a short and plain  
23 statement of the claim showing that the pleader is entitled to relief[.]” A defendant may move to  
24 dismiss a complaint for failing to state a claim upon which relief can be granted under Federal  
25 Rule of Civil Procedure 12(b)(6). “Dismissal under Rule 12(b)(6) is appropriate only where the  
26 complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory.”  
27 *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). To survive a Rule  
28 12(b)(6) motion, a plaintiff must plead “enough facts to state a claim to relief that is plausible on

1 its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible  
2 when a plaintiff pleads “factual content that allows the court to draw the reasonable inference that  
3 the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

4 In reviewing the plausibility of a complaint, courts “accept factual allegations in the  
5 complaint as true and construe the pleadings in the light most favorable to the nonmoving party.”  
6 *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). Nonetheless,  
7 Courts do not “accept as true allegations that are merely conclusory, unwarranted deductions of  
8 fact, or unreasonable inferences.” *In re Gilead Scis. Secs. Litig.*, 536 F.3d 1049, 1055 (9th Cir.  
9 2008). And even where facts are accepted as true, “a plaintiff may plead [him]self out of court” if  
10 he “plead[s] facts which establish that he cannot prevail on his . . . claim.” *Weisbuch v. County of*  
11 *Los Angeles*, 119 F.3d 778, 783 n.1 (9th Cir. 1997) (quotation marks and citation omitted).

12 **II. DISCUSSION**

13 Plaintiff asserts federal question jurisdiction under 28 U.S.C. § 1331; jurisdiction under the  
14 Administrative Procedures Act, 5 U.S.C. §§ 701-06 (“APA”); and mandamus jurisdiction under  
15 28 U.S.C. § 1361. In dismissing the First Amended Complaint, Dkt. No. 20 (“FAC”), the Court  
16 already considered whether there was jurisdiction under any of these statutes, the Social Security  
17 Act, or the Declaratory Judgment Act. See Dkt. No. 29 (*People with Disabilities Found. v. Colvin*,  
18 No. 15-cv-02570-HSG, 2016 WL 2984898, at \*4-6 (N.D. Cal. May 24, 2016)). The Court found  
19 that Plaintiff had failed to allege that the United States had unequivocally waived its sovereign  
20 immunity under any statute. *Id.* at \*4; see also *Rattlesnake Coal. v. U.S. E.P.A.*, 509 F.3d 1095,  
21 1103 (9th Cir. 2007) (holding that the federal courts lack subject matter jurisdiction over claims  
22 brought against a federal agency unless the United States has waived its sovereign immunity);  
23 *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (“A waiver of sovereign immunity cannot be  
24 implied but must be unequivocally expressed.” (internal quotation marks omitted)).

25 The Court ruled that the relevant attorney fee provision of the Social Security Act, 42  
26 U.S.C. § 406(a), did not waive sovereign immunity. See *Colvin*, 2016 WL 2984898, at \*4; see  
27 also *Binder & Binder P.C. v. Colvin*, 818 F.3d 66, 70 (2d Cir. 2016) (“[T]he Social Security Act’s  
28 fee provision, 42 U.S.C. § 406(a), does not waive sovereign immunity . . . .”); *In re Handel*, 570

1 F.3d 140, 144 (3d Cir. 2009) (“[42 U.S.C. § 406] is not a waiver of sovereign immunity, but rather  
2 a statutory interference with the attorney client contractual relationship which would otherwise be  
3 determined by the marketplace for legal services.” (internal quotation marks omitted)); *Pittman v.*  
4 *Sullivan*, 911 F.2d 42, 46 (8th Cir. 1990) (“Section 406 ‘cannot be construed as a waiver of  
5 immunity’ because it ‘contemplates payment of the fee award by the claimant, out of past-due  
6 benefits, rather than by the government, out of general funds.’” (emphasis in original)).

7 Moreover, the Court found that the grants of jurisdiction under the federal question and  
8 mandamus statutes, 28 U.S.C. §§ 1331 and 1361, did not waive sovereign immunity, and that the  
9 Declaratory Judgment Act provided no independent basis for jurisdiction. *Colvin*, 2016 WL  
10 2984898, at \*6; see also *Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 (9th Cir. 1985) (“28 U.S.C. §  
11 1331 . . . cannot by itself be construed as constituting a waiver of the government’s defense of  
12 sovereign immunity.”); *Pit River Home & Agric. Co-op Ass’n v. United States*, 30 F.3d 1088,  
13 1098 n.5 (9th Cir. 1994) (declaring that the Mandamus Act’s grant of jurisdiction over mandamus  
14 actions does not constitute a waiver of sovereign immunity); *Skelly Oil Co. v. Phillips Petroleum*  
15 *Co.*, 339 U.S. 667, 671 (1950) (ruling that the Declaratory Judgment Act merely expands the  
16 scope of remedies a federal court may award without providing any independent basis for  
17 jurisdiction).

18 Finally, the Court held that the APA was not a basis for the suit because Plaintiff did not  
19 “allege a nondiscretionary duty to act.” *Colvin*, 2016 WL 2984898, at \*6; see also *Norton v. S.*  
20 *Utah Wilderness All.*, 542 U.S. 55, 64 (2004) (“[The APA] empowers a court only to compel an  
21 agency ‘to perform a ministerial or non-discretionary act,’ or ‘to take action upon a matter,  
22 without directing how it shall act.’” (emphasis added)). The Court explained that, “[a]s Plaintiff  
23 acknowledged at the hearing, Plaintiff can obtain its fees from the Agency or the claimant.  
24 Because there is no support for the argument that the Agency must pay the representative directly,  
25 sovereign immunity is not waived through the APA.” *Colvin*, 2016 WL 2984898, at \*6 (emphasis  
26 in original).

27 In dismissing Plaintiff’s cause of action alleging violations under the Social Security Act  
28 for payment of attorneys’ fees, the Court issued the following requirements:

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

9 Id. at \*6 (emphasis added). Nonetheless, Plaintiff has done exactly what the Court said it could  
10 not do. See id. at \*6; SAC ¶¶ 12-14. In the jurisdictional section of the SAC, Plaintiff cites  
11 exclusively to § 406, apart from the paragraph summarizing the Court's prior order dismissing the  
12 FAC, and a lone quotation purportedly to section 5106 of the Omnibus Budget Reconciliation Act  
13 of 1990, see SAC ¶¶ 12-14, which is actually to a secondary source summarizing section 5106, see  
14 Social Security Related Legislation in 1990, Social Security Bulletin, May 1991, at 20 ("In cases  
15 where a claimant and an attorney or other representative submit a written agreement to the  
16 Secretary, a fee of up to the lesser of 25 percent of past-due benefits or \$4,000 is to be paid to the  
17 attorney automatically.") Once again, Plaintiff has failed to allege a nondiscretionary duty to act  
18 by the Social Security Administration, given that Plaintiff can obtain fees either from the Agency  
19 or the claimant. This cannot suffice. The Court again finds that Plaintiff has failed to allege that  
20 the United States waived sovereign immunity under any statute.

21 As recognized in the Court's prior order, a colorable constitutional claim is an exception to  
22 the doctrine of sovereign immunity. See Colvin, 2016 WL 2984898, at \*6; see also Califano v.  
23 Sanders, 430 U.S. 99, 109 (1977) ("[W]hen constitutional questions are in issue, the availability of  
24 judicial review is presumed . . ."); Udd v. Massanari, 245 F.3d 1096, 1099 (9th Cir. 2001)  
25 ("[T]he Sanders exception applies to any colorable constitutional claim of due process violation  
26 that implicates a due process right either to a meaningful opportunity to be heard or to seek  
27 reconsideration of an adverse benefits determination." (quoting Evans v. Chater, 110 F.3d 1480,  
28 1483 (9th Cir. 1997))); Klemm v. Astrue, 543 F.3d 1139, 1144 (9th Cir. 2008) ("[A] colorable  
constitutional claim . . . must be supported by facts sufficient to state a violation of substantive or  
procedural due process." (internal quotation marks omitted)). Here, Plaintiff asserts that there is  
federal question jurisdiction under 28 U.S.C. § 1331 because it is challenging the Agency's  
alleged failure to comply with 42 U.S.C. § 406(a)(3). See SAC ¶¶ 8-11. The review procedures of

1 section 406(a)(3) apply only when a claimant, representative, or adjudicator who decided the  
 2 claim timely requests a modification of the maximum fee award under a fee agreement. See 42  
 3 U.S.C. § 406(a)(3); Dkt. 34-1, Ex. A, Hearing Appeals Litigation & Law Manuel (“HALLEX”), I-  
 4 1-2-44, at 1.<sup>3</sup> Yet Plaintiff fails to allege that any such request was made here. For this reason, the  
 5 Court has serious questions about whether Plaintiff has pled facts raising a colorable due process  
 6 claim, such that the Court has jurisdiction to hear the claim.

7 But even assuming *arguendo* that the Court has jurisdiction to reach the merits, Plaintiff  
 8 has nonetheless failed to state a cognizable due process claim plausibly establishing deprivation of  
 9 a protectable property interest. “[A] due process claim is cognizable only if there is a recognized  
 10 liberty or property interest at stake.” *Erickson v. U.S. ex rel. Dep’t of Health & Human Servs.*, 67  
 11 F.3d 858, 861 (9th Cir. 1995) (internal quotation marks omitted). “The Constitution itself creates  
 12 no property interests . . . .” *United States v. Guillen-Cervantes*, 748 F.3d 870, 872 (9th Cir. 2014).  
 13 Rather, “to have a property interest in a benefit, a person must have ‘a legitimate claim of  
 14 entitlement to it.’” *Erickson*, 67 F.3d at 862 (quoting *Bd. of Regents of State Colleges v. Roth*, 408  
 15 U.S. 564, 577 (1972)). “Entitlements are created by rules or understandings from independent  
 16 sources, such as statutes, regulations, and ordinances, or express or implied contracts.” *Id.*  
 17 (internal quotation marks omitted). “[A] benefit is not a protected entitlement if government  
 18 officials may grant or deny it in their discretion.” *Town of Castle Rock, Colo. v. Gonzales*, 545  
 19 U.S. 748, 756 (2005); see also *United States v. Guillen-Cervantes*, 748 F.3d 870, 872 (9th Cir.  
 20 2014) (“[A] legitimate claim of entitlement . . . typically requires an individual to demonstrate  
 21 that an existing law, rule, or understanding makes the conferral of a benefit ‘mandatory.’”).

22 The section of the SAC containing Plaintiff’s due process allegations is very unclear, but in

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24 <sup>3</sup> Defendant has filed a request for judicial notice (“RJN”). Dkt. No. 34-1. The Court **GRANTS**  
 25 the RJN as to Exhibit A, which contains HALLEX provisions that are publically available on the  
 26 Administration’s website. See Fed. R. Evid. 201(b) (“The court may judicially notice a fact that is  
 27 not subject to reasonable dispute because it . . . can be accurately and readily determined from  
 28 sources whose accuracy cannot reasonably be questioned.”); *Smith v. L.A. Unified Sch. Dist.*, 830  
 F.3d 843, 851 n.10 (9th Cir. 2016) (“[C]ourts routinely take judicial notice of ‘records and reports  
 of administrative bodies[.]’” (quoting *Interstate Nat. Gas Co. v. S. Cal. Gas. Co.*, 209 F.2d 380,  
 385 (9th Cir. 1953)). Agency policies set forth in the HALLEX, while not binding, are persuasive  
 authority. See *Lockwood v. Comm’r Soc. Sec. Admin.*, 616 F.3d 1068, 1073 (9th Cir. 2010). The  
 Court **DENIES AS MOOT** the RJN as to Exhibits B, C, D, E, F, and G.

1 light of the preceding portions of the complaint (which Plaintiff incorporates by reference),  
2 Plaintiff's due process allegations appear to boil down to the following: (1) Defendant was  
3 required to withhold past due benefits awarded to the claimants that Plaintiff's attorneys  
4 represented and to pay these benefits to Plaintiff because fees were past due in each of these cases;  
5 (2) Plaintiff had a property interest in these fees; and (3) Defendant failed to give Plaintiff notice  
6 or opportunity to submit written objections regarding Defendant's nonpayment of these fees.  
7 Compl. ¶¶ 22, 69-71. With two irrelevant exceptions, Plaintiff states specific dollar figures for the  
8 remaining balance of fees allegedly due.<sup>4</sup> See id. ¶¶ 27, 31, 37, 42, 44, 48. However, the cases  
9 cited by Plaintiff cannot plausibly support the proposition that Plaintiff has a property interest in  
10 these specific fees. See id. ¶ 70 (citing *Buchanan v. Apfel*, 249 F.3d 485 (6th Cir. 2001) and  
11 *Mathews v. Eldridge*, 424 U.S. 319 (1976)); see also Opp. at 3 (same). In *Buchanan*, the Sixth  
12 Circuit declined to reach the issue of whether an attorney had a property interest in fees for  
13 representing disability benefits claimants before the Commissioner of Social Security. See 249  
14 F.3d at 490. *Mathews* merely reaffirmed that a *claimant's* interest in the "continued receipt of  
15 [Social Security] benefits is a statutorily-created 'property' interest protected by the Fifth  
16 Amendment." See 424 U.S. at 332.

17 Moreover, only representatives may receive fees and only individuals (not entities) may be  
18 appointed as representatives. Under the regulations, "[r]epresentative means an attorney who  
19 meets all of the requirements of § 404.1705(a), or a person other than an attorney who meets all of  
20 the requirements of § 404.1705(b), and whom you appoint to represent you in dealings with us."  
21 See 20 C.F.R. § 404.1703 (emphasis added). "[E]ntity" is defined separately, and includes "not-  
22 for-profit organizations" like Plaintiff. See id. Under the section entitled "Who may be your  
23 representative," the regulations only envision representation by an "[a]ttorney" or a "person" who  
24 is "not an attorney," without any mention of representation by an entity like PWDF. See 20  
25 C.F.R. § 404.1705(a)-(b); see also 20 C.F.R. § 404.1705(c) ("We may refuse to recognize the  
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27 <sup>4</sup> The two exceptions are irrelevant because they cannot support a due process claim. There is no  
28 allegation regarding lack of notice relating to claimant McShane. See Compl. ¶¶ 55-60. There is  
no allegation that fees were ever approved relating to Claimant Velasco. See id. ¶¶ 61-63.

1 person you choose to represent you if the person does not meet the requirements in this section.  
2 We will notify you and the person you attempted to appoint as your representative if we do not  
3 recognize the person as a representative.” (emphasis added)). Other sections of the regulations  
4 similarly support the conclusion that a representative must be a natural person as opposed to an  
5 entity. See, e.g., 20 C.F.R. §§ 404.1707, 1717, 1740. Here only PWDF, not the individuals who  
6 represented the claimants, is a plaintiff. Neither the statute nor the regulations provide any  
7 grounds for concluding that the property interest of individual attorneys, if any, extends to an  
8 entity such as Plaintiff. See 42 U.S.C. § 406(a); 20 C.F.R. §§ 404.1700-30.<sup>5</sup>

9           Ultimately, Plaintiff has failed to allege that the United States waived sovereign immunity  
10 under any statute. Even assuming that the Court has jurisdiction to reach the merits, Plaintiff has  
11 failed to state a cognizable due process claim, even construing the SAC in the light most favorable  
12 to Plaintiff. Without any underlying claim left upon which to base federal subject matter  
13 jurisdiction, Plaintiff’s declaratory relief claim also fails. See *Diamond Real Estate v. Am. Brokers*  
14 *Conduit*, No. 16-cv-03937-HSG, 2017 WL 412527, at \*10 & n.13 (N.D. Cal. Jan. 31, 2017)  
15 (citing numerous cases holding that “where the plaintiff’s underlying claim[] fail[s], so too does  
16 [its] declaratory relief claim”). Plaintiff’s action must therefore be dismissed. Furthermore, the  
17 Court does not grant leave to amend because Plaintiff could not possibly cure its pleading by  
18 alleging other facts, see *Lopez v. Smith*, 203 F.3d 1122, and has failed to correct the deficiencies  
19 detailed in the Court’s prior order of dismissal, see *Zucco Partners, LLC v. Digimarc Corp.*, 552  
20 F.3d 981, 1007 (9th Cir. 2009) (affirming dismissal without leave to amend where court advised  
21 plaintiff of pleading deficiencies but plaintiff failed to correct those deficiencies in amended  
22 pleading).

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27 <sup>5</sup> The Court need not, and therefore does not, reach the question of whether individual attorneys  
28 have such a property interest under the Due Process Clause. In addition, because Plaintiff has not  
overcome the threshold requirement of plausibly stating a property interest, the Court does not  
reach the issue of whether plaintiff received adequate notice.




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**III. CONCLUSION**

For the foregoing reasons, Defendant’s motion to dismiss Plaintiff’s SAC is **GRANTED WITHOUT LEAVE TO AMEND**. The clerk is directed to close the case and enter judgment in favor of Defendant.

**IT IS SO ORDERED.**

Dated: 4/19/2017

  
HAYWOOD S. GILLIAM, JR.  
United States District Judge