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12 Assistant United States Attorney
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15 *Attorneys for Federal Defendants*

16 IN THE UNITED STATES DISTRICT COURT
17 FOR THE EASTERN DISTRICT OF CALIFORNIA

18 AMY GRANAT, *et al.*

19 Plaintiffs,

20 v.

21 UNITED STATES DEPARTMENT OF
22 AGRICULTURE, *et al.*,

23 Federal Defendants.
24
25
26
27
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Case No. 2:15-cv-0605-MCE-DAD

**REPLY IN SUPPORT OF MOTION TO
DISMISS OR, ALTERNATIVELY, FOR
SUMMARY JUDGMENT ON THE
FREEDOM OF INFORMATION ACT
(FOIA) CLAIM**

[Fed. R. Civ. P. 12(b)(1), 56(a)]

Date: July 9, 2015
Time: 2:00 p.m.
Courtroom: 7, 14th Floor
Judge: Hon. Morrison C. England, Jr.

1 The sole reason for plaintiffs’ opposition to the Forest Service’s motion to dismiss or motion for
2 summary judgment appears to be that plaintiffs want to seek attorney’s fees on a declaratory relief claim
3 that is not included in their complaint. Plaintiffs do not dispute that they have received documents and
4 information responsive to their FOIA requests. Indeed, as the Forest Service has shown, plaintiffs have
5 now received those documents three times – back in 2010 and 2011, when the Forest Service filed its
6 motion on May 29, 2015, and again when the Forest Service provided documents to plaintiffs’ counsel
7 on a CD. *See* Ernce Decl., ¶¶ 3, 4 and Exs. A, B. There are no other responsive documents. Schramel
8 Decl., ¶¶ 5, 8, 15.

9 Contrary to the allegations and relief sought in their complaint, plaintiffs now claim that they are
10 seeking a declaration that the documents were untimely produced (so that they can seek attorney’s fees)
11 and they argue that there is a genuine issue of material fact regarding the timeliness of the responses.
12 But there is no claim in this lawsuit that the Forest Service *untimely* produced documents in response to
13 plaintiffs’ FOIA requests. Instead, they allege that the Forest Service failed and refused to acknowledge
14 or respond to the FOIA requests at all. Complaint, ¶¶ 195, 197, 199, 200. They seek a declaration “that
15 Defendants’ refusal to disclose the records requested by Plaintiffs is unlawful” and injunctive relief in
16 the form of an order requiring “Defendants to make the requested records available to Plaintiffs.”
17 Complaint, Prayer ¶¶ 5, 6.¹ Plaintiffs cannot avoid dismissal or summary judgment by creating a new
18 claim in their opposition brief.

19 Plaintiffs’ claim is that the Forest Service never produced documents in response to their FOIA
20 requests. Complaint, ¶¶ 195, 197, 199, 200. The Forest Service has shown that it produced documents
21 back in 2010/2011 and it produced them again now, and it is undisputed that plaintiffs have received the
22 documents. So plaintiffs cannot meet their burden of proving that the Forest Service has improperly
23 withheld agency records under FOIA, the claims are moot, and the Court lacks jurisdiction. *Kissinger v.*
24 *Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150, 100 S. Ct. 960 (1980).

25
26 ¹ Plaintiffs argue that some of the Forest Service’s cited legal authorities showing that FOIA claim is
27 moot once documents have been produced are distinguishable because those cases involved injunctive
28 relief and plaintiffs are only seeking declaratory relief. *See* Dkt. No. 13 at 11-12. However, plaintiffs are
seeking injunctive relief – they want the Court to order the Forest Service to produce documents in
response to their FOIA requests. Complaint, Prayer, ¶ 6. So this argument fails.

1 The other problem with plaintiffs' new untimeliness argument is that the only "evidence" they
2 have produced is the self-serving, conclusory Lazzarino declaration which denies that plaintiffs received
3 the documents from the Forest Service in the manner set forth in detail in the Schramel declaration,²
4 without providing any evidentiary support. The Lazzarino declaration is insufficient to meet plaintiffs'
5 burden of coming forward with specific facts showing the existence of genuine issues of material fact
6 for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-25 (9th Cir. 1986).

7 It is well established that, "[w]hen the non-moving party relies on its own affidavits to oppose
8 summary judgment, it cannot rely on conclusory allegations unsupported by factual data to create an
9 issue of material fact." *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir.1993). Yet that is precisely
10 what plaintiffs have done here. The Lazzarino declaration fails to create a genuine issue of material fact
11 to avoid summary judgment, and the Court should disregard it, particularly in the face of the Schramel
12 declaration which sets forth in detail when, where, and how she transmitted documents to plaintiffs and
13 the documents she provided. There is no factual support for Lazzarino's statement that she repeatedly
14 asked Forest Service employees to respond to the FOIA requests and was assured that responses would
15 be forthcoming. ECF No. 13-1 at 4, ¶ 13. Not only are those statements inadmissible hearsay, but they
16 are unsupported by any factual or documentary evidence showing whom she talked to, when she talked
17 to them, and what was specifically was discussed. Nor have plaintiffs come forward with a shred of
18 admissible evidence to show that they ever complained to the Forest Service that they had not received
19 responses to the FOIA requests, and that contention is belied by the Forest Service's evidence. *See*
20 Schramel Decl., ¶¶ 12-13, Exs. H, I.

21 Plaintiffs argue that their FOIA claim is not moot because they want to seek attorney's fees
22 on their FOIA claim and their attorney fee request "survives independently under the court's equitable
23 jurisdiction." Dkt. No. 13 at 11 (citation and internal quotation omitted). However, this argument
24

25 ² Plaintiffs incorrectly state the standards of review applicable to the Forest Service's motion to dismiss.
26 Dkt. No. 13 at 8. In reviewing the Forest Service's factual attack on jurisdiction, which is supported by
27 the Schramel declaration, the Court does not presume that the allegations in the complaint are true.
28 *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000); *Thornhill Pub. Co. v. Gen. Tel. & Electronics Corp.*,
594 F.2d 730, 733 (9th Cir. 1979). Additionally, federal courts lack jurisdiction to consider moot
claims, *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992), and lack of jurisdiction based on
mootness is appropriately raised in a 12(b)(1) motion to dismiss. *White*, 227 F.2d at 1242.

1 supports the Forest Service’s position that the FOIA claim should be dismissed. If plaintiffs want to
2 attempt to seek attorney’s fees on their FOIA claim, they can do so at the appropriate time – by filing an
3 attorney’s fee motion within 28 days after entry of final judgment – not by arguing about attorney’s fees
4 in this motion. Local Rule 293. Plaintiffs have not cited any legal authority that would allow the Court
5 to keep the FOIA claim in the case despite their mootness because they may seek attorney’s fees on the
6 FOIA claim in the future.

7 Whether or not plaintiffs would be entitled to any attorney’s fees on their FOIA claim is an issue
8 for the Court to decide at the end of this lawsuit, not now. For purposes of this motion, suffice it to say
9 that the Forest Service does not believe plaintiffs would be entitled to any attorney’s fees on a FOIA
10 claim based on untimeliness that they have not included in their lawsuit, or on their actual FOIA claim
11 that is moot and also fails on the merits. Moreover, the federal defendants attempted in good faith to
12 avoid the need for further motion practice and a hearing by producing (for the third time) the documents
13 responsive to the FOIA requests well before the deadline for plaintiff’s opposition due date, and by
14 meeting and conferring on the language of a stipulation to dismiss the FOIA claim, all to no avail.
15 *See* Ernce Decl., ¶¶ 3-6 and Exs. A-C.

16 For all of these reasons, the Court should dismiss plaintiffs’ FOIA claim for lack of subject
17 matter jurisdiction without leave to amend or, alternatively, grant summary judgment in favor of the
18 federal defendants on the FOIA claim.

19 DATED: July 2, 2015

BENJAMIN B. WAGNER
United States Attorney

21 By: /s/ Lynn Trinka Ernce
22 LYNN TRINKA ERNCE
Assistant United States Attorney

23 JOHN C. CRUDEN
24 Assistant Attorney General
25 Environment & Natural Resources Division
United States Department of Justice

26 JOHN P. TUSTIN (TX 24056458)
27 DAVENÉ D. WALKER (GA 153042)

28 OF COUNSEL:
Sarah Birkeland, USDA, Office of the General Counsel

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Case No. 2:15-cv-0605-MCE-DAD

**DECLARATION OF LYNN TRINKA
ERNCE IN SUPPORT OF MOTION TO
DISMISS OR, ALTERNATIVELY, FOR
SUMMARY JUDGMENT ON THE
FREEDOM OF INFORMATION ACT
(FOIA) CLAIM**

[Fed. R. Civ. P. 12(b)(1), 56(a)]

Date: July 9, 2015
Time: 2:00 p.m.
Courtroom: 7, 14th Floor
Judge: Hon. Morrison C. England, Jr.

1 I, Lynn Trinka Ernce, declare as follows:

2 1. I am an Assistant United States Attorney in the Eastern District of California and am
3 one of the attorneys representing the federal defendants in this action. Unless otherwise stated, I have
4 personal knowledge of the facts in this declaration and would testify competently to them if called as a
5 witness.

6 2. On May 29, 2015, I filed the federal defendants' motion to dismiss or, alternatively,
7 motion for summary judgment on plaintiffs' FOIA claim.

8 3. Attached to this declaration as Exhibit A is a true and correct copy of my May 29, 2015
9 letter to plaintiffs' counsel, Theodore Hadzi-Antich, which enclosed a full set of the exhibits to the
10 Schramel Declaration, including the appendices which were not included in the electronic court filing
11 earlier that day. In an effort to avoid the need for further motion practice and a hearing, I asked Mr.
12 Hadzi-Antich to stipulate to dismiss the FOIA claim since all documents responsive to plaintiffs' FOIA
13 requests had been produced by the Forest Service.

14 4. On June 18, 2015, I again wrote to Mr. Hadzi-Antich to ask that plaintiffs agree to
15 dismiss the FOIA claim because all documents had been produced. A true and correct copy of my letter
16 is attached to this declaration as Exhibit B.

17 5. On June 19, 2015, I received a call from Mr. Hadzi-Antich and he informed me that his
18 clients would stipulate to dismissal on two conditions. After conferring with the Forest Service, on June
19 23, 2015, I told Mr. Hadzi-Antich that the Forest Service would agree to one of plaintiffs' conditions and
20 that the other condition, which involved proposed language for the stipulation, was not acceptable. I
21 proposed modified language that I thought would be acceptable but, on June 24, 2015, Mr. Hadzi-Antich
22 rejected the language and said that plaintiffs would oppose the motion. A true and correct copy of his
23 email message to me is attached as Exhibit C.

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1 6. Immediately after receiving Mr. Hadzi-Antich’s email, I called him to ask why we could
2 not work out the language of the stipulation, and he told me that his clients decided they want an actual
3 declaration from the court. I asked whether his clients were taking this position so that they could seek
4 attorney’s fees on the FOIA claim, which he denied. Within a few minutes after our call ended, plaintiffs
5 filed their opposition brief, which argues that their FOIA claim is not moot and should not be dismissed
6 because they want to seek attorney’s fees.

7 Executed this 2nd day of July, 2015 in Sacramento, California.

8 I declare under penalty of perjury that the foregoing is true and correct.

9 */s/ Lynn Trinka Ernce*
10 LYNN TRINKA ERNCE
11 Assistant United States Attorney

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Exhibit A



U.S. DEPARTMENT OF JUSTICE

*United States Attorney
Eastern District of California*

*Benjamin B. Wagner
United States Attorney*

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May 29, 2015

Via U.S. Mail

Theodore Hadzi-Antich
Senior Staff Attorney
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814

Re: *Granat v. USDA et al.*
Case No. 2:15-cv-00605 MCE DAD

Dear Ted:

I write to follow up our telephone discussions yesterday and today, and on federal defendants' motion to dismiss the FOIA claim filed today.

Enclosed is a CD which contains the full exhibits to the Schramel Declaration, including the appendices to the DEIS and the FEIS (Exhibit D) that were not included in today's court filing. *See Schramel Decl.*, ¶ 8. The CD is encrypted, and I emailed the password to gain access to the files on the CD to you on Friday, May 29. If you have any trouble accessing the files, please let me know.

Based on the arguments and evidence submitted with the motion to dismiss, and the fact that the federal defendants are providing plaintiffs with another full set of responsive information in the enclosed CD, please let me know whether plaintiffs will agree to dismiss the FOIA claim. For your convenience a stipulation is enclosed for your review.

I look forward to hearing from you regarding these matters.

Sincerely,

BENJAMIN B. WAGNER
United States Attorney

By: 
LYNN TRINKA ERNCE
Assistant United States Attorney

Enclosures – CD and Stipulation

1 JOHN C. CRUDEN
Assistant Attorney General
2 Environment & Natural Resources Division
United States Department of Justice
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Case No. 2:15-cv-0605-MCE-DAD

**STIPULATION OF DISMISSAL OF
PLAINTIFFS' FREEDOM OF
INFORMATION ACT (FOIA) CLAIM
[TWELFTH CLAIM FOR RELIEF];
ORDER**

[Fed. R. Civ. P. 41(a)(1)(A)(ii)]

1 The parties to this action, by and through their respective counsel, hereby stipulate and agree
2 that plaintiffs' FOIA claim against federal defendants, which is the twelfth claim for relief in plaintiffs'
3 complaint, shall be dismissed with prejudice, each party to bear his, her, or its own costs.

4
5 DATED: June __, 2015

M. REED HOPPER, No. 131291
THEODORE HADZI-ANTICH

7 Attorneys for Plaintiffs

8
9 DATED: June __, 2015

BENJAMIN B. WAGNER
United States Attorney

10
11 By: /s/ Lynn Trinka Ernce
12 LYNN TRINKA ERNCE
Assistant United States Attorney

13 JOHN C. CRUDEN
14 Assistant Attorney General
15 Environment & Natural Resources Division
United States Department of Justice

16 JOHN P. TUSTIN (TX 24056458)
17 DAVENÉ D. WALKER (GA 153042)

18 Attorneys for Federal Defendants

19 **ORDER**

20 **IT IS SO ORDERED.**

21 DATED: _____

22 MORRISON C. ENGLAND, JR. CHIEF JUDGE
23 UNITED STATES DISTRICT COURT

Exhibit B



U.S. DEPARTMENT OF JUSTICE

*United States Attorney
Eastern District of California*

*Benjamin B. Wagner
United States Attorney*

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June 18, 2015

Via E-Mail and U.S. Mail

Theodore Hadzi-Antich
Senior Staff Attorney
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814

Re: *Granat v. USDA et al.*
Case No. 2:15-cv-00605 MCE DAD

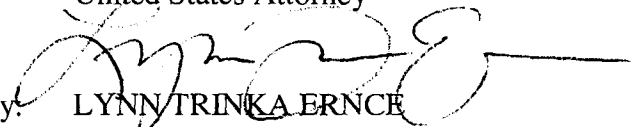
Dear Ted:

The Schramel declaration filed with federal defendants' motion to dismiss the FOIA claim establishes that, back in 2010 and 2011, the United States Forest Service produced documents and information in response to all of your clients' FOIA requests identified in their complaint. The Forest Service produced responsive documents and information again as exhibits to the Schramel declaration, and a third time in my May 29, 2015 letter and accompanying CD. Therefore, for the reasons argued in the motion to dismiss, the FOIA claim is moot.

Please let me know whether plaintiffs agree to dismiss the FOIA claim or whether they intend to oppose the motion. For your convenience another copy of the stipulation is enclosed for your review and signature.

Sincerely,

BENJAMIN B. WAGNER
United States Attorney

By: 
LYNN TRINKA ERNCE
Assistant United States Attorney

Enclosure – Stipulation

1 JOHN C. CRUDEN
Assistant Attorney General
2 Environment & Natural Resources Division
United States Department of Justice
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Case No. 2:15-cv-0605-MCE-DAD

**STIPULATION OF DISMISSAL OF
PLAINTIFFS' FREEDOM OF
INFORMATION ACT (FOIA) CLAIM
[TWELFTH CLAIM FOR RELIEF];
ORDER**

[Fed. R. Civ. P. 41(a)(1)(A)(ii)]

1 The parties to this action, by and through their respective counsel, hereby stipulate and agree
2 that plaintiffs' FOIA claim against federal defendants, which is the twelfth claim for relief in plaintiffs'
3 complaint, shall be dismissed with prejudice, each party to bear his, her, or its own costs.

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5 DATED: June __, 2015

M. REED HOPPER, No. 131291
THEODORE HADZI-ANTICH

7 Attorneys for Plaintiffs

8
9 DATED: June __, 2015

BENJAMIN B. WAGNER
United States Attorney

11 By: /s/ Lynn Trinka Ernce
12 LYNN TRINKA ERNCE
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16 JOHN P. TUSTIN (TX 24056458)
17 DAVENÉ D. WALKER (GA 153042)

18 Attorneys for Federal Defendants

19 **ORDER**

20 **IT IS SO ORDERED.**

21 DATED: _____

22 MORRISON C. ENGLAND, JR. CHIEF JUDGE
23 UNITED STATES DISTRICT COURT
24
25
26
27
28

Exhibit C

Ernce, Lynn Trinka (USACAE)

From: Ted Hadzi-Antich <tha@pacifical.org>
Sent: Wednesday, June 24, 2015 10:45 AM
To: Ernce, Lynn Trinka (USACAE)
Subject: Granat v. USDA

Dear Lynn,

I have conferred with my clients and they do not wish to enter into the stipulation, as you've presented in your most recent email. We will oppose the Motion to Dismiss / Motion for Summary Judgment.

Regards,

Ted

Theodore Hadzi-Antich
Senior Staff Attorney
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814

916-419-7111

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