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15UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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HEATHER MATTSON and ROMAN
BORISOV,

Plaintiffs,

v.

JEH JOHNSON, et al.,

Defendants.

3:15-CV-00182-LRH-WGC

ORDER

16 Before the Court is Defendants' Motion to Dismiss, or Alternatively, Motion for
17 Summary Judgment. Doc. #20 and 21. Plaintiffs Heather Mattson and Roman Borisov
18 (collectively "Plaintiffs") filed a Response (Doc. #29), to which Defendants replied (Doc. #34).
19 Also before the Court is Plaintiffs' Motion for Summary Judgment. Doc. #22. Defendants filed
20 a Response (Doc. #26), to which Plaintiffs replied (Doc. #36). Additionally, Plaintiffs filed a
21 Motion to Amend their Complaint. Doc. #31. Defendants filed a Response (Doc. #35), to which
22 Plaintiffs replied (Doc. #38).

I. Factual Background

24 Plaintiffs' first cause of action in this case involves a Freedom of Information Act
25 ("FOIA") request. On March 12, 2012, the National Records Center ("NRC") of the United
26 States Citizenship and Immigration Services ("USCIS"), a component of the Department of
27 Homeland Security ("DHS"), received a FOIA request from Plaintiff Roman Borisov
28 ("Borisov"). On March 12, 2012, the NRC informed Borisov that it had received his FOIA

1 request and it was placing his request on the “complex track” for processing. The NRC sent
2 Borisov a letter dated July 20, 2012, providing him with responsive material and describing what
3 was being withheld. The letter also informed Borisov that he had the right to appeal the USCIS’s
4 FOIA determination within 60 days of July 20, 2012. There is a dispute as to when Borisov
5 received this letter, since despite the fact the letter is dated July 20, 2012, Borisov alleges that he
6 received it in September of 2012.

7 On March 27, 2015, Plaintiffs filed their initial Complaint. Doc. #2. On July 15, 2015,
8 Borisov filed an appeal to the FOIA response. The USCIS responded to Borisov’s appeal in a
9 letter dated July 28, 2015, stating that the USCIS was denying the appeal because it had not been
10 received within 60 days of July 20, 2012. On September 10, 2015, Plaintiffs filed an Amended
11 Complaint. Doc. #12. On November 16, 2015, Defendants filed a Motion to Dismiss, or
12 Alternatively, Motion for Summary Judgment on the FOIA claim. Doc. #20 and 21. Also on
13 November 16, 2015, Plaintiffs filed a Motion for Summary Judgment on the FOIA claim. Doc.
14 #22. On December 10, 2015, Defendants filed a Response to Plaintiffs’ Motion for Summary
15 Judgment. Doc. #27. Also, on December 10, 2015, Plaintiffs filed a Response to Defendants’
16 Motion to Dismiss, or Alternatively, Motion for Summary Judgment. Doc. #29. On December
17 13, 2015, Plaintiffs filed a Motion to Amend. Doc. #31. On December 28, 2015, Defendants
18 filed a Reply in support of their Motion to Dismiss, or Alternatively, Motion for Summary
19 Judgment. Doc. #34. Also on December 28, 2015, Defendants filed a Response to Plaintiffs’
20 Motion to Amend. Doc. #35. Additionally on December 28, 2015, Plaintiffs filed a Reply in
21 support of their Motion for Summary Judgment. Doc. #36. Finally, on January 3, 2016,
22 Plaintiffs filed a Reply in support of their Motion to Amend. Doc. #38.

23 **II. Legal Standard**

24 A Rule 12(b)(1) motion challenges subject matter jurisdiction and may be either facial or
25 factual. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir.2004). A facial 12(b)(1) motion
26 involves an inquiry confined to the allegations in the complaint, whereas a factual 12(b)(1)
27 motion permits the court to look beyond the complaint to extrinsic evidence. *Id.* When a
28 defendant makes a facial challenge, all material allegations in the complaint are assumed true,

1 and the court must determine whether lack of federal jurisdiction appears from the face of the
2 complaint itself. *Thornhill Publ'g Co. v. General Tel. Elec.*, 594 F.2d 730, 733 (9th Cir.1979).

3 To survive a motion to dismiss for failure to state a claim, a complaint must satisfy the
4 Federal Rule of Civil Procedure 8(a)(2) notice pleading standard. *Menciondo v. Centinela Hosp.*
5 *Med. Ctr.*, 521 F.3d 1097, 1103 (9th Cir. 2008). That is, a complaint must contain “a short and
6 plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P.
7 8(a)(2). The 8(a)(2) pleading standard does not require detailed factual allegations, but a
8 pleading that offers “‘labels and conclusions’ or ‘a formulaic recitation of the elements of a
9 cause of action’” will not suffice. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl.*
10 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

11 To satisfy the plausibility standard, 8(a)(2) requires a complaint to “contain sufficient
12 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.*
13 (quoting *Twombly*, 550 U.S. at 570). A claim has facial plausibility when the pleaded factual
14 content allows the Court to draw the reasonable inference, based on the Court’s “judicial
15 experience and common sense,” that the defendant is liable for the misconduct alleged. See *id.* at
16 678-79. The plausibility standard “is not akin to a probability requirement, but it asks for more
17 than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts
18 that are merely consistent with a defendant’s liability, it stops short of the line between
19 possibility and plausibility of entitlement to relief.” *Id.* at 678 (internal quotation marks
20 omitted).

21 In reviewing a motion to dismiss, the court accepts the facts alleged in the complaint as
22 true. *Id.* The “factual allegations that are taken as true must plausibly suggest an entitlement to
23 relief, such that it is not unfair to require the opposing party to be subjected to the expense of
24 discovery and continued litigation.” *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).
25 Moreover, “bare assertions . . . amount[ing] to nothing more than a formulaic recitation of the
26 elements of a . . . claim . . . are not entitled to an assumption of truth.” *Moss v. U.S. Secret Serv.*,
27 572 F.3d 962, 969 (9th Cir. 2009) (citing *Iqbal*, 556 U.S. at 681) (brackets in original) (internal
28 quotation marks omitted). The court discounts these allegations because “they do nothing more

1 than state a legal conclusion—even if that conclusion is cast in the form of a factual allegation.”
2 Id. (citing *Iqbal*, 556 U.S. at 681). “In sum, for a complaint to survive a motion to dismiss, the
3 non-conclusory ‘factual content,’ and reasonable inferences from that content, must be plausibly
4 suggestive of a claim entitling the plaintiff to relief.” Id.

5 Summary judgment is appropriate only when the pleadings, depositions, answers to
6 interrogatories, affidavits or declarations, stipulations, admissions, and other materials in the
7 record show that “there is no genuine issue as to any material fact and the movant is entitled to
8 judgment as a matter of law.” Fed. R. Civ. P. 56(a). In assessing a motion for summary
9 judgment, the evidence, together with all inferences that can reasonably be drawn therefrom,
10 must be read in the light most favorable to the party opposing the motion. *Matsushita Elec.*
11 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Cnty. of Tuolumne v. Sonora Cmty.*
12 *Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001). A motion for summary judgment can be complete
13 or partial, and must identify “each claim or defense—or the part of each claim or defense—on
14 which summary judgment is sought.” Fed. R. Civ. P. 56(a).

15 The party moving for summary judgment bears the initial burden of informing the court
16 of the basis for its motion, along with evidence showing the absence of any genuine issue of
17 material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). On those issues for which it
18 bears the burden of proof, the moving party must make a showing that no “reasonable jury could
19 return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
20 (1986). On an issue as to which the nonmoving party has the burden of proof, however, the
21 moving party can prevail merely by demonstrating that there is an absence of evidence to support
22 an essential element of the non-moving party’s case. *Celotex*, 477 U.S. at 323.

23 To successfully rebut a motion for summary judgment, the nonmoving party must point
24 to facts supported by the record that demonstrate a genuine issue of material fact. *Reese v.*
25 *Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 738 (9th Cir. 2000). A “material fact” is a fact “that
26 might affect the outcome of the suit under the governing law.” *Liberty Lobby*, 477 U.S. at 248.
27 Where reasonable minds could differ on the material facts at issue, summary judgment is not
28 appropriate. See *v. Durang*, 711 F.2d 141, 143 (9th Cir. 1983). A dispute regarding a material

1 fact is considered genuine “if the evidence is such that a reasonable jury could return a verdict
2 for the nonmoving party.” *Liberty Lobby*, 477 U.S. at 248. The mere existence of a scintilla of
3 evidence in support of the party’s position is insufficient to establish a genuine dispute; there
4 must be evidence on which a jury could reasonably find for the party. See *id.* at 252.

5 “[S]peculative and conclusory arguments do not constitute the significantly probative evidence
6 required to create a genuine issue of material fact.” *Nolan v. Cleland*, 686 F.2d 806, 812 (9th
7 Cir. 1982).

8 A party may amend its pleadings after a responsive pleading has been filed by leave of
9 court. Fed. R. Civ. P. 15(a)(2). Leave of court to amend should be freely given when justice so
10 requires and when there is no undue delay, bad faith, or dilatory motive on the part of the moving
11 party. See *Wright v. Incline Village General Imp. Dist.*, 597 F.Supp.2d 1191 (D. Nev. 2009);
12 *DCD Programs, LTD v. Leighton*, 883 F.2d 183 (9th Cir. 1987).

13 **III. Discussion**

14 Defendants argue as a preliminary matter that because Plaintiffs failed to exhaust their
15 administrative remedies, this Court lacks subject matter jurisdiction to consider their FOIA
16 challenge, and consequently, their FOIA claim should be dismissed. Plaintiffs argue that
17 because Borisov received the letter in September of 2012, he did not have time to appeal and that
18 the Court should excuse the delay.

19 The FOIA clearly requires a party to exhaust all administrative remedies before seeking
20 redress in the federal courts. *Taylor v. Appleton*, 30 F.3d 1365, 1367 (11th Cir. 1994); *Dresser*
21 *Indus., Inc. v. United States*, 596 F.2d 1231, 1238 (5th Cir.1979); *Hedley v. United States*, 594
22 F.2d 1043, 1044 (5th Cir.1979) (per curiam); *Spannaus v. U.S. Dept. of Justice*, 824 F.2d 52, 58
23 (D.C.Cir.1987); *In re Steele*, 799 F.2d 461, 465 (9th Cir.1986); *Brumley v. U.S. Dept. of Labor*,
24 767 F.2d 444, 445 (8th Cir.1985) (per curiam); *Stebbins v. Nationwide Mutual Ins. Co.*, 757 F.2d
25 364, 366 (D.C.Cir.1985); *Cazalas v. United States Dept. of Justice*, 660 F.2d 612 (5th Cir.1981).

26 This is “so that the agency has an opportunity to exercise its discretion and expertise on the
27 matter and to make a factual record to support its decision. The exhaustion requirement also
28 allows the top managers of an agency to correct mistakes made at lower levels and thereby

1 obviates unnecessary judicial review.” *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 61
2 (D.C.Cir.1990) (citing *McKart v. United States*, 395 U.S. 185, 194, 89 S.Ct. 1657, 23 L.Ed.2d
3 194 (1969)); see also *Dettmann v. U.S. Dep't of Justice*, 802 F.2d 1472, 1476 (D.C.Cir.1986) (“It
4 goes without saying that exhaustion of remedies is required in FOIA cases.”) (citing *Stebbins*,
5 757 F.2d at 366). Further, “[i]f there is to be any uniformity in FOIA interpretations within a
6 given agency, and if agencies are to have an opportunity to revise their responses in light of
7 intervening responses to the same FOIA request by other agencies, such uniformity can best be
8 afforded through the administrative appeal process.” *Oglesby*, 920 F.2d at 64-65. In short,
9 exhaustion of administrative remedies in a FOIA case is treated as an element of a FOIA claim,
10 which, as with all elements of any claim, must be proved by the plaintiff in order to prevail.
11 *Bruzon v. Drug Enf't Admin.*, 576 F. Supp. 2d 1, 3 (D.D.C. 2008). “[F]oregoing an
12 administrative appeal will preclude the requester from ever bringing suit on that request because
13 the individual will not have exhausted his administrative remedies.” *Oglesby*, 920 F.2d at 65.
14 Moreover, exhaustion of administrative remedies is a prerequisite to subject matter jurisdiction and
15 dismissal is appropriate under Federal Rule of Civil Procedure 12(b)(1) where the plaintiff failed
16 to exhaust his or her administrative remedies. See *United States v. Steele (In re Steele)*, 799 F.2d
17 461, 465-66 (9th Cir.1986).

18 Here, it is clear that Borisov did not exhaust his administrative remedies before filing
19 suit, and thus, this Court lacks subject matter jurisdiction over the FOIA claim. The law and the
20 letter Plaintiff received clearly stated that he had 60 days in which to file an appeal, and Borisov
21 did not do so in that time. Even if the Court accepts that he received the letter in September of
22 2012, nothing excuses the fact that he did not file an appeal within 60 days of that date. Instead,
23 he waited nearly three years, and only filed an appeal after he had already filed the complaint in
24 this case. Moreover, Plaintiff provides no adequate justification to excuse his lengthy delay.
25 Additionally because Plaintiff Heather Mattson never filed a FOIA request, much less appealed
26 one, there was no exhaustion there either. Because Plaintiffs failed to exhaust their
27 administrative remedies, this Court dismisses their FOIA claim for lack of subject matter
28 jurisdiction with prejudice as any amendment would be futile. Specifically, Plaintiff requests

1 leave to amend to add the DHS as a defendant if necessary; however, this would have no effect
2 on the underlying exhaustion of administrative remedies issue, which is dispositive, and thus
3 there is no need to address the motion for leave to amend, and it is denied as moot.

4 **IV. Conclusion**

5 IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss Plaintiffs' Freedom
6 of Information Act claim (Doc. #20) is GRANTED.

7 IT IS FURTHER ORDERED that Plaintiffs' Freedom of Information Act claim is
8 DISMISSED from Plaintiffs' First Amended Complaint with prejudice. (Doc. #12).

9 IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment (Doc.
10 #21) is DENIED as moot.

11 IT IS FURTHER ORDERED that Plaintiffs' Motion for Summary Judgment (Doc. #22)
12 is DENIED as moot.

13 IT IS FURTHER ORDERED that Plaintiffs' Motion to Amend (Doc. #31) is DENIED as
14 moot.

15 IT IS SO ORDERED.

16 DATED this 23rd day of February, 2016.

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19 LARRY R. HICKS
20 UNITED STATES DISTRICT JUDGE
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