

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT
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5 _____
6 August Term, 2003
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8 (Argued May 5, 2004 Decided October 1, 2004)
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10 Docket No. 02-7809
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13 ANNA GUALANDI and CLAUDIA TRAVERS,
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15 Plaintiffs-Appellants,
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17 v.
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19 GLORIA ADAMS, J.J. NEWMAN CO., INC., JOHN NEWMAN, also known
20 as Jack Newman, U.S.I. ADMINISTRATORS, U.S.I. INSURANCE CORP.,
21 DONALD HANFT, BRUCE LAVALLE, CORNELIUS MAHONEY, BRUCE MEIROWITZ,
22 SHOREHAM-WADING RIVER TEACHERS ASSOCIATION and JEFFREY WASSERMAN,
23
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25 Defendants-Cross-Claimants-Cross-
26 Defendants-Appellees.
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30 Before:

31 CARDAMONE, JACOBS, and B.D. PARKER,
32 Circuit Judges.
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36 Plaintiffs Anna Gualandi and Claudia Travers appeal the
37 order entered June 21, 2002 in the United States District Court
38 for the Eastern District of New York (Mishler, J.) dismissing for
39 lack of subject matter jurisdiction their ERISA claims against
40 defendants Gloria Adams, J.J. Newman Co., Inc., John "Jack"
41 Newman, U.S.I. Administrators, U.S.I. Insurance Corp., Donald
42 Hanft, Bruce Lavalley, Cornelius Mahoney, Bruce Meirowitz,
43 Shoreham-Wading River Teachers Association, and Jeffrey
44 Wasserman.
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46 Affirmed.
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EDWARD R. HOPKINS, Smithtown, New York, for Plaintiffs-
Appellants.

HANAN B. KOLKO, Meyer, Suozzi, English & Klein, P.C., New York,
New York, for Defendants-Appellees Donald Hanft, Bruce
Lavalle, Cornelius Mahoney, Bruce Meirowitz, Shoreham-Wading
River Teachers Association and Jeffrey Wasserman.

ANDREW CRABTREE, Melville, New York (Thomas Schulz, Schulz and
Associates, Melville, New York, of counsel), for Defendants-
Appellees Gloria Adams, J.J. Newman Co., Inc., John Newman,
a/k/a Jack Newman, U.S.I. Administrators and U.S.I.
Insurance Corp.

1 CARDAMONE, Circuit Judge:

2 Plaintiffs appeal from an order entered on June 21, 2002 in
3 the United States District Court for the Eastern District of New
4 York (Mishler, J.) that dismissed their ERISA complaint against
5 defendants. We have to resolve on this appeal a dispute between
6 plaintiffs public school teachers and the defendant labor union
7 to which they belong, as well as various other defendants
8 associated with their employee benefit plan. The issue before us
9 is whether the employee benefit plan -- which defendants set up
10 and administered using funds from the public school district in
11 which plaintiffs were employed -- was subject to the provisions
12 of the Employee Retirement Income Security Act of 1974 (ERISA),
13 Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in
14 scattered sections of 26 U.S.C. and 29 U.S.C.). Basing
15 jurisdiction for their suit on ERISA, plaintiffs allege in their
16 complaint that in administering the benefit plan defendants
17 violated certain ERISA provisions. Ruling that it lacked subject
18 matter jurisdiction, the district court dismissed plaintiffs'
19 complaint on the ground that ERISA excludes governmental plans
20 from the scope of the Act. See 29 U.S.C. § 1003(b)(1). We
21 affirm.

22 BACKGROUND

23 Plaintiff Anna Gualandi is a New York public school teacher
24 in the Shoreham-Wading River Central School District (School
25 District). Plaintiff Claudia Travers was a public school teacher
26 in the same district until she retired (plaintiffs or

1 appellants). Both plaintiffs have been members of a labor union
2 called the Shoreham-Wading River Teachers Association (SWRTA or
3 union), and have participated in an employee benefit plan called
4 the SWRTA Out-of-Pocket Reimbursement Fund (Plan).

5 Defendants are the union and its officers, as well as
6 insurance broker J.J. Newman Co., Inc. (Newman), its agents, and
7 various affiliated corporations, all of which entities and
8 individuals have been involved with administering the Plan.
9 Plaintiffs contend defendants' actions with regard to the Plan
10 violated various provisions of ERISA. In particular, they allege
11 defendants violated §§ 104(b)(4), 404(a)(1)(C), and 406(a)(1)(B)
12 of ERISA, 29 U.S.C. §§ 1024(b)(4), 1104(a)(1)(C), 1106(a)(1)(B)
13 (2000), by withholding information from the Plan's participants,
14 breaching their fiduciary duties, and engaging in prohibited
15 transactions with the Plan's funds.

16 A. The Plan

17 The Plan, which is the subject of this litigation, is an
18 out-of-pocket reimbursement fund for the benefit of the public
19 school teachers employed in the School District. It was designed
20 to work as follows: when a teacher is attended by a medical
21 provider and the statement for the services rendered is not
22 already covered by one of the numerous policies that insure the
23 teachers, the teacher must pay herself for the medical services
24 rendered. She may then seek reimbursement for her out-of-pocket
25 expense from the Plan at issue in this litigation. The Plan was
26 created by using excess insurance payments from the School

1 District that had been accumulating in a bank account since the
2 1980s. These excess payments were made under the terms of a
3 series of collective bargaining agreements between the School
4 District and the union. The agreements required the School
5 District to provide medical, dental, optical, life and
6 superimposed major medical insurance to its employees by paying a
7 fixed yearly amount per teacher to insurance broker Newman. In
8 some years, the School District's payments exceeded the total
9 cost of the premiums due for the insurance coverage provided.
10 Newman set aside the excess money in a separate account, which by
11 1996 amounted to \$267,000.

12 B. The Agreement

13 In 1996 a dispute arose because the School District refused
14 to contribute a fixed amount sum to the extent that it exceeded
15 the actual cost of the premiums. The School District and the
16 union ultimately resolved the dispute through a settlement
17 agreement. That agreement provided that the School District
18 would now be required to pay only the actual amount of the
19 insurance premiums, not the fixed yearly amount per teacher that
20 it was paying before. The settlement agreement further stated

21 1. The [School] District agrees to forward
22 by December 1, 1996, \$60,000 to the SWRTA
23 Insurance Fund Account.

24
25 2. The [School] District relinquishes any
26 and all claims to any funds previously
27 accumulated in the SWRTA Insurance Fund
28 Account including the above \$60,000 payment.
29 [SWRTA] relinquishes any and all claims to
30 funds previously due to the SWRTA Insurance
31 Fund in excess of the \$60,000 for the 1995-96

1 school year. The [School] District will
2 provide any approvals necessary for SWRTA to
3 set up a SWRTA Benefit Trust.
4

5 The union used the \$60,000 specified in the agreement and the
6 money from excess payments already in the account to set up the
7 out-of-pocket reimbursement fund, the Plan at issue in this case.

8 Subsequently, plaintiffs instituted the instant suit based
9 on the manner in which defendants had administered the Plan.
10 When the matter came before Judge Mishler he found the money used
11 by defendants to set up and run the Plan was government funds,
12 which made the Plan a governmental plan not covered by ERISA.
13 Accordingly, the district court dismissed plaintiffs' complaint
14 for lack of subject matter jurisdiction. From the order of
15 dismissal, plaintiffs appeal.

16 DISCUSSION

17 ERISA is the sole basis plaintiffs assert for federal
18 jurisdiction over their claims, and the district court dismissed
19 because it determined such jurisdiction was lacking. It held the
20 School District had funded the out-of-pocket reimbursement fund,
21 and it concluded this funding was enough to exclude the Plan from
22 ERISA's coverage as a "governmental plan." On appeal, plaintiffs
23 attack the district court's factual finding and its legal
24 conclusion. They also argue the district court erroneously
25 failed to grant their request for additional discovery.

26 We go first to our standard of review. In reviewing a
27 district court's determination of whether it has subject matter
28 jurisdiction, we review factual findings for clear error and

1 legal conclusions de novo. London v. Polishook, 189 F.3d 196,
2 198 (2d Cir. 1999). "A finding is 'clearly erroneous' when
3 although there is evidence to support it, the reviewing court on
4 the entire evidence is left with the definite and firm conviction
5 that a mistake has been committed." United States v. U.S. Gypsum
6 Co., 333 U.S. 364, 395 (1948); Bronx Household of Faith v. Bd. of
7 Educ., 331 F.3d 342, 348 (2d Cir. 2003). We turn next to the
8 merits.

9 I The School District Funded the Plan

10 The district court found the School District funded the Plan
11 based on evidence that all of the money originally came from the
12 School District and was specifically earmarked for an employee
13 benefit plan. Plaintiffs concede the School District was the
14 original source of the money, but nonetheless insist that the
15 union, not the School District, actually funded the Plan. In
16 plaintiffs' view, the School District gave the money to the union
17 "with no strings attached," and the union then chose to use it
18 for the Plan. Plaintiffs maintain it was clearly erroneous for
19 the district court to find otherwise.

20 The trial court based its finding on three pieces of
21 evidence: (1) the affidavit of one William Cala, the School
22 District's superintendent at the time of the 1996 settlement
23 agreement between the School District and the union; (2) the
24 language of the settlement agreement; and (3) the language of the
25 collective bargaining agreements. In the affidavit, Cala states
26 he negotiated the settlement agreement on behalf of the School

1 District and it was his understanding that the money turned over
2 to the union under the agreement could be used only to purchase
3 additional insurance for School District employees. The court
4 found this testimony supported by the language of the settlement
5 agreement, which provided that the School District forward
6 \$60,000 to the "SWRTA [union] Insurance Fund Account" and for the
7 School District to grant "any approvals necessary for SWRTA [the
8 union] to set up a [union] Benefit Trust." In addition, the
9 collective bargaining agreements provided that the insurance
10 money paid by the School District "shall be spent for the
11 insurance plans so designated."

12 Plaintiffs contend the district court should not have
13 considered the Cala affidavit because it contains legal
14 conclusions. Yet, even assuming that to be the case, the
15 district court did not rely on any legal conclusions in the
16 affidavit. Instead, it looked to Cala's statements as evidence
17 of how he and the School District understood the terms of the
18 settlement agreement.

19 Appellants also assert the affidavit constituted parol
20 evidence that should not have been considered because the
21 settlement agreement was a fully integrated contract. The parol
22 evidence rule generally prohibits the admission of extrinsic
23 evidence of prior or contemporaneous oral agreements to explain
24 the meaning of a contract that the parties have reduced to an
25 unambiguous integrated writing. 11 Richard A. Lord, Williston on
26 Contracts § 33:1, at 541 (4th ed. 1999). Such extrinsic evidence

1 may not be used to modify, explain, vary or supplement the
2 written integrated contract. Id. at 550-51. To conclude that
3 the settlement agreement is an integrated contract subject to the
4 parol evidence rule, however, we would need to find that the
5 parties intended the settlement agreement to constitute the
6 complete and final expression of their agreement. See Starter
7 Corp. v. Converse, Inc., 170 F.3d 286, 295 (2d Cir. 1999). If
8 anything, there is evidence of just the contrary intent in this
9 case, since the agreement explicitly states "past practice . . .
10 shall be admissible to clarify any ambiguity in the express
11 provisions of this Agreement." Thus, there is no merit to
12 appellants' parol evidence argument.

13 More fundamentally, appellants erroneously assume the
14 critical issue to be whether the settlement agreement created a
15 legally enforceable obligation restricting the union's use of the
16 money. They seek to litigate the agreement itself in order to
17 show that the School District did not fund the Plan. But we need
18 not determine the legal effect of the agreement in order to
19 resolve the question of the Plan's funding. Our primary concern
20 is to determine whether the School District intended to fund the
21 Plan and whether the union actually used the School District's
22 money for that purpose. The Cala affidavit is highly relevant to
23 that inquiry irrespective of the extent to which it may be used
24 to interpret the settlement agreement itself.

25 Appellants make a number of other assertions that are also
26 without merit. They attack certain statements defendants made to

1 the district court, but ignore the fact that the district court
2 did not rely on any of these statements. They also emphasize
3 allegations in defendants' pleadings that suggest the union's
4 ownership of the money from the School District, but they do not
5 (and cannot) point to anything to indicate that the School
6 District intended to give the money to the union with no strings
7 attached.

8 In sum, we are unable to conclude the district court was in
9 error, let alone clearly erroneous, in finding the School
10 District funded the Plan. By no means are we "left with the
11 definite and firm conviction," Bronx Household of Faith, 331 F.3d
12 at 348, that the district court committed a mistake. We
13 therefore affirm its factual finding that the School District
14 funded the Plan.

15 II The School District's Funding Made the Plan
16 Governmental for ERISA Purposes
17

18 Having established that the School District funded the Plan,
19 the district court went on to hold that the Plan was therefore a
20 governmental plan excluded from ERISA coverage. We review this
21 legal conclusion de novo.

22 Title I of ERISA specifically excludes from its coverage any
23 employee benefit plan that is a governmental plan. 29 U.S.C.
24 § 1003(b). The Act defines governmental plan as "a plan
25 established or maintained for its employees by the Government of
26 the United States, by the government of any State or political
27 subdivision thereof, or by any agency or instrumentality of any

1 of the foregoing." 29 U.S.C. § 1002(32). As the plain language
2 here indicates, a plan need only be established or maintained by
3 a governmental entity in order to constitute a governmental plan.
4 Roy v. Teachers Ins. & Annuity Ass'n, 878 F.2d 47, 50 (2d Cir.
5 1989).

6 Our Court has not yet had occasion to rule on whether a
7 governmental entity may be considered to have established a plan
8 for ERISA purposes simply by providing the plan's exclusive
9 funding. ERISA itself does not further define the term
10 "establish," which can mean both "to bring into existence," and
11 "to provide for" or "endow." Webster's Third New International
12 Dictionary (1981). The Act's legislative history, however,
13 convinces us to construe Congress' language broadly.

14 We pause here before resolving the funding issue to explore
15 why Congress differentiated between private and governmental
16 plans. When Congress began considering new legislation to
17 regulate employee benefit plans in 1973, subcommittees of both
18 houses had already undertaken detailed studies of the issue,
19 focusing on the private sector. See H.R. Rep. No. 93-533, at 8
20 (1973), reprinted in 1974 U.S.C.C.A.N. 4,639, 4,646; 119 Cong.
21 Rec. 130 (1973) (statement of Sen. Williams). Among other
22 things, the Senate Subcommittee on Labor had provided a public
23 forum for workers who, in "one heartbreaking story after another"
24 dramatically documented widespread weaknesses in existing private
25 pension plans. 119 Cong. Rec. 130 (statement of Sen. Williams).

1 The hearings provided the spur that pricked Congress' conscience,
2 resulting ultimately in the enactment of ERISA.

3 Most in need of federal regulation were the vesting,
4 funding, fiduciary and disclosure requirements of benefit plans.
5 Id. Initially, coverage extended, in the bill introduced in the
6 House, to state and local government plans as well as to private
7 ones. See H.R. 2, 93d Cong. §§ 101, 201, 301 (Jan. 3, 1973),
8 reprinted in 1 Subcomm. on Labor of the Comm. on Labor and Pub.
9 Welfare, Legislative History of the Employee Retirement Income
10 Security Act of 1974, at 14-15, 51-52, 58-59 (1976) [Legislative
11 History]. Only later, and over the objections of at least one
12 member of Congress, were all government plans -- state and local
13 as well as federal -- excluded. See H.R. Rep. 93-533, at 43; 120
14 Cong. Rec. 4,305-06 (1974) (statement of Rep. Broyhill).
15 Although some concern was expressed regarding the consequences of
16 leaving government plans unregulated, see S. Rep. No. 93-383, at
17 67 (1973), reprinted in 1974 U.S.C.C.A.N. 4,890, 4,952, there was
18 inadequate information respecting benefit plans in the public
19 sector to evaluate the impact that regulation might have. See
20 H.R. Rep. No. 93-533, at 9. It was therefore decided that all
21 government plans would be exempted from regulation for the time
22 being and set aside for further study. See id.; 29 U.S.C.
23 § 1231.

24 Discussions of the governmental plan exemption in the
25 legislative history are filled with such general references as
26 "public employee plans," the protection of "public employees,"

1 and "plans sponsored by state and local governments." See, e.g.,
2 H.R. Rep. No. 93-533, at 9, 43; H.R. Rep. No. 93-779, at 46
3 (1974), reprinted in 2 Legislative History, at 2,590, 2,635. One
4 Senator commented that "State and local governments must be
5 allowed to make their own determination of the best method to
6 protect the pension rights of municipal and state employees."
7 119 Cong. Rec. 741 (statement of Sen. Bentsen). Thus, it is
8 plain that in differentiating between private and governmental
9 plans, Congress was "concerned more with the governmental nature
10 of public employees and public employers than with the details of
11 how a plan was established or maintained." See Roy, 878 F.2d at
12 50 (quoting Feinstein v. Lewis, 477 F. Supp. 1256, 1262 (S.D.N.Y.
13 1979)).

14 Published opinions of the Department of Labor (DOL) also
15 support the conclusion that an employee benefit plan is a
16 governmental plan if it is exclusively funded by a governmental
17 agency. A 1999 Opinion Letter states that the term governmental
18 plan includes "a plan administered by an 'employee organization,'
19 . . . that provides benefits exclusively to employees of a
20 political subdivision, agency, or instrumentality of local
21 government . . . , provided that the plan is funded exclusively
22 by the government and by the government's employees who are
23 members of the sponsoring employee organization." Dep't of Labor
24 ERISA Op. Letter No. 99-15A (Nov. 19, 1999), 1999 ERISA LEXIS 20,
25 at *6 (quoting Dep't of Labor ERISA Op. Letter No. 86-10A (Feb.
26 18, 1986), 1986 ERISA LEXIS 18). A 1985 Opinion Letter similarly

1 advised that a drug plan was subject to the governmental plan
2 exception because "only a governmental entity contributes to the
3 [plan] on behalf of its employees and all employees covered are
4 employees of that governmental entity." Dep't of Labor ERISA Op.
5 Letter No. 85-21A (May 8, 1985), 1985 ERISA LEXIS 23, at *4.
6 Although DOL Opinion Letters are not binding, that executive
7 agency is nonetheless "a body of experience and informed judgment
8 to which courts and litigants may properly resort for guidance,"
9 and we have often relied on DOL Opinion Letters for their
10 persuasive value. See Marcella v. Capital Dist. Physicians'
11 Health Plan, Inc., 293 F.3d 42, 47 & n.1 (2d Cir. 2002) (quoting
12 Bragdon v. Abbott, 524 U.S. 624, 642 (1998) and citing cases)
13 (noting that despite lack of formal notice-and-comment procedures
14 attending DOL Opinion Letters, such opinions should be accorded
15 deference because DOL has statutory power to issue administrative
16 interpretations of ERISA that carry the force of law).

17 In light of all this, we are convinced that Congress aimed
18 for a broad definition of the term "establish." We therefore
19 hold that exclusive governmental funding is enough to constitute
20 governmental establishment of a plan. Cf. Fromm v. Principal
21 Health Care of Iowa, Inc., 244 F.3d 652, 653-64 (8th Cir. 2001)
22 (by offering government employees the choice of multiple plans
23 and paying the premiums on these plans, city had established the
24 plans); Silvera v. Mut. Life Ins. Co. of N.Y., 884 F.2d 423, 425-
25 27 (9th Cir. 1989) (by purchasing a plan for its employees, a
26 city had established the plan even though the plan was designed,

1 set up, and administered by a private insurer); Feinstein, 477 F.
2 Supp. at 1260 ("The mere fact that a town or school district sets
3 up a benefit plan for its employees as a consequence of
4 negotiations and collective bargaining rather than because of
5 some unilateral action or decision simply does not lead to the
6 conclusion that the plan was not 'established' by the town or
7 school district.").

8 By providing the exclusive funding for the Plan in this
9 case, the School District established that Plan within the
10 meaning of ERISA. Further, the School District established the
11 Plan "for its employees," 29 U.S.C. § 1002(32), since only School
12 District employees are allowed to participate. There is no
13 dispute that the School District is a governmental entity for
14 ERISA purposes. All of these circumstances lead inevitably to
15 the conclusion that the Plan here is a governmental one, and that
16 it is therefore excluded from the purview of Title I of ERISA.

17 III Plaintiffs Were Not Entitled to Further Discovery

18 Plaintiffs' final argument is that the district court should
19 have given them an opportunity to pursue further discovery on the
20 jurisdictional issue. It is not that they were denied discovery
21 altogether. On the contrary, appellants pursued discovery on the
22 jurisdictional issue from August 10, 2001 through October 22,
23 2001 obtaining over 1,200 pages of documents. On February 15,
24 2002 plaintiffs requested additional discovery, but the district
25 court instead dismissed the case under Federal Rule of Civil

1 Procedure 12(b)(1), without explicitly responding to or ruling on
2 appellants' request.

3 In resisting a motion to dismiss under Rule 12(b)(1),
4 plaintiffs are permitted to present evidence (by affidavit or
5 otherwise) of the facts on which jurisdiction rests. See Kamen
6 v. Am. Tel. & Tel. Co., 791 F.2d 1006, 1011 (2d Cir. 1986). In
7 addition, courts generally require that plaintiffs be given an
8 opportunity to conduct discovery on these jurisdictional facts,
9 at least where the facts, for which discovery is sought, are
10 peculiarly within the knowledge of the opposing party. See id.
11 Although a motion to dismiss for lack of jurisdiction cannot be
12 converted into a Rule 56 motion, a court may nonetheless look to
13 Rule 56(f) for guidance in considering the need for discovery on
14 jurisdictional facts. See id.; see also Exch. Nat'l Bank v.
15 Touche Ross & Co., 544 F.2d 1126, 1131 (2d Cir. 1976) ("[A] body
16 of decisions has developed under Rule 56 that offer guidelines
17 which assist in resolving the problem encountered if the
18 affidavits submitted on a 12(b)(1) motion should reveal the
19 existence of factual problems.").

20 To request discovery under Rule 56(f), a party must file an
21 affidavit describing: (1) what facts are sought and how they are
22 to be obtained; (2) how these facts are reasonably expected to
23 raise a genuine issue of material fact; (3) what efforts the
24 affiant has made to obtain them; and (4) why the affiant's
25 efforts were unsuccessful. See Hudson River Sloop Clearwater,
26 Inc. v. Dep't of the Navy, 891 F.2d 414, 422 (2d Cir. 1989). If

1 the district court denies the party's request -- even implicitly
2 -- we review that decision under an abuse of discretion standard.
3 See Oneida Indian Nation v. City of Sherrill, 337 F.3d 139, 167-
4 68 (2d Cir. 2003); First City, Texas-Houston, N.A. v. Rafidain
5 Bank, 150 F.3d 172, 175 (2d Cir. 1998) (reviewing for abuse of
6 discretion because district court implicitly denied motion to
7 compel discovery).

8 Analogizing to the Rule 56(f) case law, we find that while
9 plaintiffs submitted an affidavit requesting discovery of
10 particular documents and depositions, they failed to show how the
11 information they hoped to obtain from this discovery would bear
12 on the critical issue of who funded the Plan. As discussed
13 above, this issue turns more on how the School District viewed
14 the settlement agreement than on whether the settlement agreement
15 legally restricted the union's use of the money. Yet plaintiffs'
16 discovery request focused almost entirely on information held by
17 the union and the insurance broker defendants. Plaintiffs did
18 ask to subpoena "relevant documents and records of [the School
19 District] (to obtain records and internal communications on the
20 subject matter during 1993 to 1997)," but they did not describe
21 what they hoped these documents and records would show or how
22 this would impact the court's decision.

23 Although the district court did not explicitly rule on
24 plaintiffs' discovery request, it implicitly denied that request
25 by making the findings of fact necessary to dismiss for lack of
26 jurisdiction. Since appellants were unable to demonstrate that

1 additional discovery was needed in order to decide the
2 jurisdictional issue, the district court did not abuse its
3 discretion in denying plaintiffs' request. Cf. Qualls v. Blue
4 Cross of Cal., Inc., 22 F.3d 839, 844 (9th Cir. 1994) (holding
5 that district court did not abuse discretion by implicitly
6 denying discovery request where "the additional discovery would
7 not have precluded summary judgment").

8 CONCLUSION

9 Accordingly, for the foregoing reasons, we affirm the
10 district court's order dismissing this case for lack of subject
11 matter jurisdiction.