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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

CRAIG COOK,

No. CIV S-08-1860-FCD-CMK

Plaintiff,

vs.

FINDINGS AND RECOMMENDATIONS

UNITED STATES OF AMERICA,

Defendant.

_____ /

Plaintiff, proceeding in pro per, brings this civil action against the defendant for damages and tax refund. Pending before the court is Plaintiff's motion to voluntarily dismiss his complaint pursuant to Federal Rule of Civil Procedure 41(a)(2). A hearing on this motion was held on August 27, 2009, before the undersigned. Defendant's attorney Henry Darmstadter appeared telephonically. Plaintiff did not appear.

Federal Rule of Civil Procedure 41(a)(2) provides:

an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

1 Here, Defendant does not oppose the dismissal of this action, with the provision
2 that the complaint is dismissed with prejudice, and the counterclaim is dismissed without
3 prejudice. Defendant “expressly wishes to reserve the right to collect the subject erroneous
4 refund either through administrative means or by a subsequent erroneous refund suit.” Plaintiff
5 did not file a reply setting forth any opposition to these proposed provisions, nor did he appear at
6 the hearing to oppose them. Based on the moving and opposing papers, and discussion at the
7 hearing on this matter, the undersigned finds it appropriate to grant these requests.

8 Based on the foregoing, the undersigned recommends that:

- 9 1. Plaintiff’s motion to voluntarily dismiss his complaint be granted, with
10 prejudice;
- 11 2. Defendant’s voluntary request to dismiss the counterclaim without
12 prejudice be granted;
- 13 3. This action be dismissed in its entirety; and
- 14 4. All other pending motions be denied as moot.

15 These findings and recommendations are submitted to the United States District
16 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days
17 after being served with these findings and recommendations, any party may file written
18 objections with the court. The document should be captioned “Objections to Magistrate Judge’s
19 Findings and Recommendations.” Failure to file objections within the specified time may waive
20 the right to appeal. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

21 DATED: October 22, 2009

22 
23 **CRAIG M. KELLISON**
24 UNITED STATES MAGISTRATE JUDGE
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