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

DONALD R. HUENE,

Plaintiffs,

No. CIV-S-11-2110-JAM-KJN-PS

v.

U.S. DEPARTMENT OF THE  
TREASURY, INTERNAL REVENUE  
SERVICE, et al.,

Defendants.

ORDER

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On May 14, 2012, the magistrate judge filed findings and recommendations (Dkt. No. 35) herein which were served on the parties and contained notice that any objections to the findings and recommendations were to be filed within fourteen days. On May 25, 2012, defendant Internal Revenue Service (“IRS”) filed objections to the proposed findings and recommendations (Dkt. Nos. 36-37), which have been considered by the court in part. The court has not considered Exhibits 2 and 3 submitted by the IRS, or any arguments that rely on those exhibits (see Objections at 7-8), because the IRS neither requested that the court take judicial notice of Exhibits 2 and 3 nor offered any legal or factual basis for the court to take judicial notice of what readily appear to be documents that are not the proper subject of judicial notice.

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1 At the outset, the court notes that the IRS raises numerous entirely new legal and factual  
2 arguments in its objections to the findings and recommendations.<sup>1</sup> This practice is, at a  
3 minimum, disfavored. The IRS should have raised all of its substantive arguments directed at  
4 dismissal when it filed its motion, and nothing suggests that these arguments were unavailable to  
5 the IRS when it filed its motion. Instead, the IRS filed a rather perfunctory motion and chose not  
6 to file a reply brief, but now seeks to cure its previous scant briefing. The IRS and its counsel are  
7 advised that objections to findings and recommendations are not intended to serve as the moving  
8 party's "second bite at the apple."<sup>2</sup> Nevertheless, the court has considered the IRS' objections,  
9 except as stated above.

10 This court reviews de novo those portions of the proposed findings of fact to which an  
11 objection has been made. 28 U.S.C. § 636(b)(1); McDonnell Douglas Corp. v. Commodore  
12 Business Machines, 656 F.2d 1309, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982); see  
13 also Dawson v. Marshall, 561 F.3d 930, 932 (9th Cir. 2009). As to any portion of the proposed  
14 findings of fact to which no objection has been made, the court assumes its correctness and  
15 decides the motions on the applicable law. See Orand v. United States, 602 F.2d 207, 208 (9th

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17 <sup>1</sup> The court also notes that the IRS purports to correct the magistrate judge's reading of  
18 paragraph 26 of plaintiff's complaint, but in doing so grossly misquotes paragraph 26. (Compare  
19 Compl. ¶ 26, with Objections at 2 & n.1.)

20 <sup>2</sup> In a somewhat different context, another judge of this court declined to consider new  
21 evidence submitted with objections to proposed findings and recommendations addressing a  
22 motion for summary judgment, stating:

23 If this court were to consider new evidence on objection to the Magistrate  
24 Judge's Findings and Recommendations, there would be nothing to  
25 prevent the parties from presenting a partial record to the Magistrate  
26 Judge, wait to see if the recommended decision is against them, and then  
present whatever evidence they need to overcome the defects pointed out  
by the Findings and Recommendations. If that were to be the procedure  
followed, this court would be better off hearing the motion in the first  
place. While the parties might not object to that procedure, it would  
neither assist the court nor make the best use of the magistrate judges.

Galik v. Nangalama, No. CIV. 2:09-0152 WBS KJN (PC), 2012 WL 469850, at \*2 (E.D. Cal.  
Feb. 7, 2012) (unreported).

1 Cir. 1979). The magistrate judge’s conclusions of law are reviewed de novo. See Britt v. Simi  
2 Valley Unified School Dist., 708 F.2d 452, 454 (9th Cir. 1983).

3 The court has reviewed the applicable legal standards and, good cause appearing,  
4 concludes that it is appropriate to adopt the proposed findings and recommendations in part. The  
5 court adopts all of the magistrate judge’s recommendations, except the recommendation that  
6 plaintiff’s Privacy Act claim for “improper dissemination” of information about plaintiff by IRS  
7 employees to a third party, which is premised on 5 U.S.C. § 552a(b). Although the IRS waited  
8 until it filed its objections to raise a challenge to this court’s jurisdiction over plaintiff’s improper  
9 dissemination claim, the court agrees that this court lacks jurisdiction over plaintiff’s claim on  
10 the basis of 26 U.S.C. § 7852(e), which renders certain provisions of the Privacy Act inapplicable  
11 to the determination of the existence of tax-related liability.

12 Nevertheless, the court grants plaintiff leave to amend to state a claim for the wrongful  
13 disclosure of a return or return information pursuant to 26 U.S.C. §§ 6103 and 7431(a)(1). As  
14 the magistrate judge noted in his proposed findings and recommendations, plaintiff alleges that  
15 he complained to the IRS’ employees that their repeated contacts with third parties and disclosure  
16 of information about plaintiff violated 26 U.S.C. § 6103(a). (See Compl. ¶¶ 11, 19; see also  
17 Findings & Recommendations at 2-4 & n.2.) Section 6103(a) generally prohibits officers or  
18 employees of the United States from disclosing return or return information to third parties and,  
19 as the magistrate judge noted, 26 U.S.C. § 7431(a)(1) permits a taxpayer to “bring a civil action  
20 for damages against the United States in a district court of the United States” based on an alleged  
21 violation of Section 6103(a). (Findings & Recommendations at 3 n.2.) Accordingly, plaintiff is  
22 granted leave to file an amended complaint that alleges a claim for wrongful disclosure in  
23 violation of 26 U.S.C. § 6103(a).

24 Accordingly, IT IS ORDERED that:

25 1. The Proposed Findings and Recommendations filed May 14, 2012, are ADOPTED in  
26 part;

