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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DONALD HUENE,

Plaintiff,

v.

UNITED STATES DEP'T OF THE
TREASURE, INTERNAL REVENUE
SERVICE,

Defendant.

No. 2:11-cv-2110 JAM AC PS

FINDINGS & RECOMMENDATIONS

On November 6, 2013, the court held a hearing on the parties' cross-motions for summary judgment. Donald R. Huene appeared in pro per. Gerald A. Role appeared for defendant. On review of the motions, the documents filed in support and opposition, upon hearing the arguments of plaintiff and counsel, and good cause appearing therefor, THE COURT FINDS AS FOLLOWS:

UNDISPUTED FACTS

On December 14, 2010, plaintiff executed an IRS Form 2848, designating his certified public accountant ("CPA"), Richard L. Holland, as his power of attorney. Huene Decl., Ex. 1, ECF No. 65 at 13-14. In March 2011, plaintiff and Mr. Holland met with IRS agent Sui E. Chan at Mr. Holland's Fresno office. Huene Decl. ¶ 3; Holland Decl. ¶¶ 3-5. At this meeting, plaintiff verbally informed the IRS agent that he was revoking his power of attorney previously granted to

1 Mr. Holland. Holland Decl. ¶ 4.

2 Notwithstanding the oral revocation, plaintiff wrote multiple letters to the IRS in March
3 and April 2011 asserting that he is proceeding in propria persona, but then referring to Mr.
4 Holland as his “co-counsel” and stating that Mr. Holland can assist plaintiff in representation:

- 5
6 1. On March 16, 2011, plaintiff wrote a letter to Agent Chan, stating “[y]ou do have
7 authorization so that Mr. Holland, CPA, can assist me in representation.” Shelly Decl.,
8 Ex. A, ECF No. 68-3 at 5-6.
- 9 2. On March 21, 2011, plaintiff wrote to Agent Chan, stating “As you know, I was not
10 present during your previous meeting with R. Holland, CPA. My information would
11 indicate that you were there for about six hours and we produced documents and papers
12 referable to that meeting.” Shelly Decl., Ex. B, ECF No. 68-3 at 7-8. This letter indicates
13 that Mr. Holland received a courtesy copy of the letter. See id. 8.
- 14 3. On March 23, 2011, plaintiff wrote to Agent Chan, stating that “[a]s regards to our
15 meeting, I must have R. Holland CPA accompanying me, as I previously informed you.”
16 Shelly Decl., Ex. D, ECF No. 68-3 at 10-11.
- 17 4. April 7, 2011, plaintiff wrote the following to Agent Chan:

18 I have now received your letter of April 5, 2011, addressed to
19 Richard L. Holland, CPA, with no copy to me. [¶] Let me reiterate,
20 perhaps clarify, my previous correspondence. I am appearing for
21 your audit and all present and subsequent litigation in propria
22 persona, and may have occasional a [sic] co-counsel with me at
23 times. Consequently, you are hereby instructed to contact only me,
24 the party in propria persona. You are free to copy Richard L.
25 Holland, CPA as co-counsel, but I am the one that is the primary
26 contact mandated by law.

27 Shellnoy Decl., Ex. D, ECF No. 68-3 at 13-14.

28 Agent Chan frequently updated her supervisor, Anthony Shelly, Supervisory Internal
Revenue Agent with the IRS, on the progress of the case concerning plaintiff. Shelly Decl. ¶ 3.
It was this last letter dated April 7, 2011 that confused Anthony Shelly because plaintiff had
previously filed an IRS Form 2848 designating Mr. Holland as his power of attorney for the tax
year under examination and he had not filed anything rescinding the power of attorney. Shelly
Decl. ¶ 6. In an attempt to clarify, Anthony Shelly and Agent Chan contacted Mr. Holland on
April 13, 2011 to ask whether it was indeed plaintiff’s intent to revoke the power of attorney. Id.
¶ 7. Mr. Shelly asserts that Mr. Holland told him during this contact that the power of attorney

1 was not revoked. Id. Mr. Holland refutes this assertion.¹ Holland Decl. ¶ 10.

2 On June 7, 2011, plaintiff wrote to Anthony Shelly:

3 I received a call and an email from my CPA, Richard L. Holland.
4 You apparently have not read my previous letters. I rescinded Mr.
5 Holland's release. I also informed Ms. Chan that the only way to
6 reach me was by letter and I would respond promptly. . . . [¶] Now I
7 found that you have phone Mr. Holland despite my telling you not
8 to. . . . [¶] Because of your unauthorized communications with my
9 CPA, I am getting bills from Mr. Holland which would not have
10 existed had you not made the contact.

11 Shelly Decl., Ex. J, ECF No. 68-3 at 18.

12 Plaintiff wrote another letter to Anthony Shelly on July 11, 2011 regarding “a serious
13 breach of the law on [Shelly's] part.” Shelly Decl., Ex. M, ECF No. 68-3 at 24-25. Specifically,
14 plaintiff stated:

15 As you know, I informed you by written expression that I was
16 rescinding my authorization for you to contact my C.P.A., and
17 directed you to contact me instead. The purpose was obvious: the
18 contacts by the IRS to my accountant were costing me money, and
19 those contacts were unnecessary and resulting in no resolution. In
20 spite of that letter telling you that you had (and have) no authority
21 to deal with my accountant directly, you nonetheless contacted him
22 again, and then again. You did this knowing that his time was
23 expensive, not to the IRS or you personally, but rather to me.

24 In response to this letter and because there was still confusion as to whether Mr. Holland
25 was representing plaintiff, Anthony Shelly sent a letter to Mr. Holland (with a copy to plaintiff)
26 on July 18, 2011 asking for clarification as to whether he was continuing as plaintiff's
27 representative or whether plaintiff was revoking the power of attorney. Shelly Decl., Ex. N, ECF
28 No. 68-3 at 26-27.

On July 19, 2011, plaintiff responded to Mr. Shelly's letter, stating “[f]or at least the third
time, I am instructing you to have all further communication with me directly.” Shelly Decl., Ex.
O, ECF No. 68-3 at 28.

On July 27, 2011, Anthony Shelly sent a letter to plaintiff with instructions on how to
revoke a power of attorney. Shelly Decl., Ex. P, ECF No. 68-3 at 29-35.

¹ This factual dispute is immaterial to the ultimate resolution of the parties' cross-motions for summary judgment.

1 Due to the IRS agents’ “contact[s],” “communications,” and “conference[s]” with Mr.
2 Holland following plaintiff’s oral revocation, Mr. Holland billed plaintiff \$360. Huene Decl. ¶ 6;
3 Holland Decl. ¶¶ 6-8.

4 PROCEDURAL BACKGROUND

5 Plaintiff filed a complaint on August 5, 2011 against the Internal Revenue Service (“IRS”)
6 and Anthony Shelly pursuant to the Privacy Act of 1974, 5 U.S.C. § 552a and 26 U.S.C. § 6103;
7 the Freedom of Information Act, 5 U.S.C. § 552; the Federal Declaratory Judgment Act, 26
8 U.S.C. § 2201; and the Civil Rights Act of 1964, 42 U.S.C. § 1983.

9 On August 27, 2012, plaintiff filed a first amended complaint asserting a single claim as to
10 the IRS alleging that one of defendant’s agents, Anthony Shelly, disclosed plaintiff’s tax return
11 information to his accountant in violation of 26 U.S.C. § 6103. Plaintiff seeks damages pursuant
12 to 26 U.S.C. § 7431.

13 LEGAL STANDARDS

14 A principal purpose of the summary judgment procedure is to identify and dispose of
15 factually unsupported claims. Celotex Corp. v. Cattrett, 477 U.S. 317, 323-24 (1986). Summary
16 judgment is proper when the “pleadings, depositions, answers to interrogatories, and admissions
17 on file, together with the affidavits, if any, show that there is no genuine issue as to any material
18 fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c).
19 “In considering a motion for summary judgment, the court may not weigh the evidence or make
20 credibility determinations, and is required to draw all inferences in a light most favorable to the
21 non-moving party.” Freeman v. Arpaio, 125 F.3d 732, 735 (9th Cir. 1997).

22 The party moving for summary judgment bears the initial burden of identifying those
23 portions of the pleadings, discovery, and affidavits that demonstrate the absence of a genuine
24 issue of material fact. Celotex, 477 U.S. at 323. An issue of fact is “genuine” only if there is
25 sufficient evidence for a reasonable fact finder to find for the non-moving party. Anderson v.
26 Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986). A fact is “material” if it may affect the
27 outcome of the case. Id. at 248. If the party moving for summary judgment does not have the
28 ultimate burden of persuasion at trial, that party must produce evidence which either negates an

1 essential element of the non-moving party's claims or that party must show that the non-moving
2 party does not have enough evidence of an essential element to carry its ultimate burden of
3 persuasion at trial. Nissan Fire & Marine Ins. Co. v. Fritz Cos., 210 F.3d 1099, 1102 (9th Cir.
4 2000). Once the moving party meets its initial burden, the non-moving party must go beyond the
5 pleadings and, by its own evidence, "set forth specific facts showing that there is a genuine issue
6 for trial." Fed. R. Civ. P. 56(e).

7 In order to make this showing, the non-moving party must "identify with reasonable
8 particularity the evidence that precludes summary judgment." Keenan v. Allan, 91 F.3d 1275,
9 1279 (9th Cir. 1996). In addition, the party seeking to establish a genuine issue of material fact
10 must take care adequately to point a court to the evidence precluding summary judgment because
11 a court is "not required to comb the record to find some reason to deny a motion for summary
12 judgment." Carmen v. San Francisco Unified School Dist., 237 F.3d 1026, 1029 (9th Cir. 2001)
13 (quoting Forsberg v. Pacific Northwest Bell Telephone Co., 840 F.2d 1409, 1418 (9th Cir.
14 1988)). If the non-moving party fails to point to evidence precluding summary judgment, the
15 moving party is entitled to judgment as a matter of law. Celotex, 477 U.S. at 323.

16 DISCUSSION

17 Plaintiff moves for judgment on his claim that the IRS improperly disclosed "tax return
18 information" to plaintiff's CPA after plaintiff orally revoked his power of attorney, in violation of
19 26 U.S.C. §6103(a). In order to succeed in this action, plaintiff must prove that the IRS
20 "disclose[d]" a "return or return information" to an unauthorized person. 26 U.S.C. § 7431(a).
21 Each of these phrases has a particular statutory definition, as set forth in Section 6103. Section
22 6103 defines a "disclosure" as "the making known to any person in any manner whatever a return
23 or return information." 26 U.S.C. § 6103(b)(8). Plaintiff must also prove that the information
24 provided was either a "return" or "return information" as defined by 26 U.S.C. § 6103. 26 U.S.C.
25 § 7431(a)(1). A "return" for purposes of section 6103 means:

26 [A]ny tax or information return, declaration of estimated tax, or
27 claim for refund required by, or provided for or permitted under, the
28 provisions of this title which is filed with the Secretary by, on
behalf of, or with respect to any person, and any amendment or
supplement thereto, including supporting schedules, attachments, or

1 lists which are supplemental to, or part of, the return so filed.

2 26 U.S.C. § 6103(b)(1). Section 6103 defines “Return information” as:

3 [A] taxpayer’s identity, the nature, source, or amount of his income,
4 payments, receipts, deductions, exemptions, credits, assets,
5 liabilities, net worth, tax liability, tax withheld, deficiencies,
6 overassessments, or tax payments, whether the taxpayer’s return
7 was, is being, or will be examined or subject to other investigation
8 or processing, or any other data, received by, recorded by, prepared
by, furnished to, or collected by the Secretary with respect to a
return or with respect to the determination of the existence, or
possible existence, of liability (or the amount thereof) of any person
under this title for any tax, penalty, interest, fine, forfeiture, or other
imposition, or offense [. . .]

9 26 U.S.C. § 6103(b)(2)(A).

10 A. Validity of Oral Revocation

11 Plaintiff moves for summary judgment on his claim that his March 2011 oral revocation
12 was valid. In support, plaintiff relies on the California Probate Code and Karen Rush v. JJJ, Inc.,
13 988 F.2d 1112 (11th Cir. 1993), which discusses Alabama law.

14 Defendant moves for judgment on the ground that a revocation of a power-of-attorney
15 must be in writing pursuant to IRS regulations, and therefore plaintiff’s oral revocation was
16 invalid.

17 The Secretary of the Internal Revenue Service is delegated with the authority to prescribe
18 “all needful rules and regulations for the enforcement of Title 26.” 26 U.S.C. § 7805; see also 26
19 U.S.C. § 7801. Pursuant to that authority, the Secretary promulgated 26 C.F.R. § 601.503(a),
20 which states that a power of attorney must be in writing and must contain the following
21 information:

- 22 (1) Name and mailing address of the taxpayer;
- 23 (2) Identification number of the taxpayer (i.e., social security
24 number and/ or employer identification number);
- 25 (3) Employee plan number (if applicable);
- 26 (4) Name and mailing address of the recognized representative(s);
- 27 (5) Description of the matter(s) for which representation is
28 authorized which, if applicable, must include—
 - (i) The type of tax involved;

- 1 (ii) The Federal tax form number;
- 2 (iii) The specific year(s)/period(s) involved; and
- 3 (iv) In estate matters, decedent's date of death; and
- 4 (6) A clear expression of the taxpayer's intention concerning the
- 5 scope of authority granted to the recognized representative(s).

6 A properly completed Form 2848 satisfies this requirement, as does another document that
7 provides the same information. See 26 C.F.R. § 601.503(b). This power-of-attorney form must
8 be signed by the individual taxpayer. Id. § 601.503(c)(1). On December 14, 2010, plaintiff
9 submitted a signed Form 2848 to designate his CPA as his power of attorney. See Pl.'s Mot.
10 Summ. J., Ex. 1, ECF No. 65 at 13-14.

11 Pursuant to 26 C.F.R. § 601.505(a)(2), a revocation of a power of attorney must also be in
12 writing:

13 A taxpayer may revoke a power of attorney without authorizing a
14 new representative by filing a statement of revocation with those
15 offices of the Internal Revenue Service where the taxpayer has filed
16 the power of attorney to be revoked. The statement of revocation
17 must indicate that the authority of the first power of attorney is
18 revoked and must be signed by the taxpayer. Also, the name and
19 address of each recognized representative whose authority is
20 revoked must be listed (or a copy of the power of attorney to be
21 revoked must be attached).

22 The language of this regulation is mirrored in the Internal Revenue Manual § 4.11.55.1.9.

23 Plaintiff argues that the Internal Revenue Manual's directive for a written revocation
24 violates black letter law. In support, plaintiff cites only to California and Alabama law, neither of
25 which is controlling here. Insofar as plaintiff is arguing that an oral revocation is valid in other
26 contexts, the fact remains that in this context, the IRS regulation specifically directs that a
27 revocation of a power of attorney must be in writing. Moreover, to the extent plaintiff's motion
28 can be construed as a challenge to the Secretary of the Treasury's authority to promulgate
regulations or as an argument that the regulation at issue, 26 C.F.R. § 601.505(a)(2), is arbitrary
or capricious, see Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 419 (1993), plaintiff presents
no legal argument in support. See Pl.'s Mot. Summ. J 7:12-14.

Accordingly, based on the undisputed facts and the IRS regulation that a revocation of a

1 power of attorney must be in writing, the court finds as a matter of law that plaintiff's oral
2 revocation is invalid. Accordingly, plaintiff's motion for summary judgment should be denied
3 and defendant's motion should be granted as to this issue.

4 B. Identification of Information Disclosed

5 Even if the oral revocation were valid, summary judgment should nonetheless be entered
6 for defendant because plaintiff does not identify what tax return information was disclosed to his
7 CPA. As plaintiff is proceeding under 26 U.S.C. § 6103, he must submit evidence of the
8 disclosure of "return or return information." But the evidence before the court establishes only
9 that the IRS made "contact" and had "communications" and "conference[s]" with the CPA after
10 the oral revocation. See Pl.'s Mot. Summ. J. 5; see also Huene Decl. ¶ 6; Shelly Decl. ¶¶ 7, 10.
11 Anthony Shelly declares that these contacts were an attempt to clarify whether plaintiff intended
12 to revoke Mr. Holland's power of attorney. Shelly Decl. ¶¶ 7, 10. None of this evidence
13 establishes the disclosure of "return or return information."

14 The greatest detail regarding the nature of information disclosed to Mr. Holland appears in
15 the first amended complaint, wherein plaintiff accuses the IRS in general terms of unlawfully
16 disclosing his "tax return information," FAC ¶ 5,² but "return information" has a carefully
17 delimited statutory definition, see 26 U.S.C. § 6103(b)(2)(A). Plaintiff presents no affidavits or
18 other evidence identifying the information allegedly disclosed, and he states only that he was
19 billed by his CPA after "conferences the IRS had with my CPA." Huene Decl. ¶ 6. In light of
20 plaintiff's broad and unspecific allegation that his "return information" was disclosed, summary
21 judgment should be entered for defendant for failure of proof.³

22 ///

23 ² "Agent Shelley freely, without legal or factual authorization, disclosed the Plaintiff's tax
24 information and did it in connection with his service as an employee of the U.S. Department of
25 treasury, Internal Revenue Service. He knowingly and negligently disclosed he Plaintiff's tax
26 return information in the expressed unauthorized free-flow discussion that he initiated with the
27 accountant causing civil damages to be incurred by the Plaintiff." Id.

28 ³ In light of plaintiff's complete failure of proof, the court finds it unnecessary to reach
defendant's third ground for summary judgment that, if plaintiff's oral revocation had been
effective and return information had been disclosed, such disclosures would have been authorized
bylaw or made in good faith.

1 C. Judgment Independent of the Motion

2 Lastly, plaintiff must also establish that the IRS in fact *disclosed* the information at issue,
3 with “disclosure” being defined as “the making known to any person in any manner whatever a
4 return or return information.” 26 U.S.C. § 6103(b)(8). Several courts have interpreted the phrase
5 “the making known” as requiring the imparting of information to a person to whom that
6 information was previously unknown. See Brown v. United States, 755 F. Supp. 285, 287 (N.D.
7 Cal. 1990); Elias v. United States, 1990 WL 264722, at *7 n.14 (C.D. Cal. Dec. 21, 1990), *aff’d*
8 by 974 F.2d 1341 (9th Cir. 1992); Haywood v. United States, 642 F. Supp. 188, 192 (D. Kan.
9 1986); Pflum v. United States, 2007 WL 1651290, at *6 (D. Kan. June 6, 2007); Calhoun v.
10 Wells, 1980 WL 1637, at *3 (D.S.C. July 30, 1980) (“Only information previously unknown to
11 the person to whom it is imparted may be the subject matter of a ‘disclosure’ under this section;
12 i.e. you cannot ‘disclose’ information that is already known.”); *contra* Mallas v. United States,
13 993 F.2d 1111, 1121, n.10 (4th Cir. 1993) (rejecting argument that no “disclosure” had occurred
14 where plaintiff had already provided recipients with information alleged to have been disclosed
15 by the government defendants); *but see* Miller v. United States, 66 F.3d 220, 223 (9th Cir. 1995)
16 (declining to follow Mallas). For instance, if an employer already knows a taxpayer’s name and
17 social security number, providing that information to the employer again is not “making known”
18 anything and is thus not a “disclosure.” Haywood, 642 F. Supp. at 192; *see also* Brown, 755 F.
19 Supp. at 287 (citing Haywood). The court finds this interpretation to be in keeping with the plain
20 meaning of the phrase to “mak[e] known.” Accordingly, in order to prove that a disclosure
21 occurred, plaintiff must prove that the information provided to the CPA was previously unknown
22 to him. As plaintiff has failed to identify what information was in fact disclosed to the CPA, he
23 necessarily fails to meet the disclosure requirement as well.

24 “District courts unquestionably possess the power to enter summary judgment sua sponte,
25 even on the eve of trial.” Norse v. City of Santa Cruz, 629 F.3d 966, 971 (9th Cir. 2010) (*en*
26 *banc*); *see also* Cool Fuel, Inc. v. Connett, 685 F.2d 309, 312 (9th Cir. 1982) (holding that district
27 courts may grant summary judgment sua sponte if the parties have had a “full and fair opportunity
28 to ventilate the issues”). Rule 56(f)(3) of the Federal Rules of Civil Procedure provides that the

1 court may consider and grant summary judgment on its own motion after providing the parties
2 fair notice and a reasonable time to respond. The court hereby notifies the parties that it is
3 recommending the entry of summary judgment for defendant under Rule 56(f), in light of
4 plaintiff's failure of proof regarding the disclosure of information to the CPA.

5 Based on the foregoing, IT IS HEREBY RECOMMENDED that:

- 6 1. Plaintiff's motion for summary judgment (ECF No. 65) be denied;
- 7 2. Defendant's cross-motion for summary judgment (ECF No. 68) be granted;
- 8 3. Summary judgment be entered for defendant on the alternative ground specified
9 above, pursuant to Federal Rule of Civil Procedure 56(f)(3).

10 These findings and recommendations are submitted to the United States District Judge
11 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
12 after being served with these findings and recommendations, any party may file written
13 objections with the court and serve a copy on all parties. Such a document should be captioned
14 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
15 objections shall be served and filed within fourteen days after service of the objections. The
16 parties are advised that failure to file objections within the specified time may waive the right to
17 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

18 DATED: November 7, 2013

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20 ALLISON CLAIRE
21 UNITED STATES MAGISTRATE JUDGE
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