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4 UNITED STATES DISTRICT COURT  
5 NORTHERN DISTRICT OF CALIFORNIA

6 UNITED STATES OF AMERICA,  
7 Plaintiff,

8 v.

9 REAL PROPERTY AND  
10 IMPROVEMENTS LOCATED AT 2366  
11 SAN PABLO AVENUE, BERKELEY,  
12 CALIFORNIA,

13 Defendant.

Case No. 13-cv-02027-JST

**ORDER DENYING MOTION FOR  
RELIEF FROM PRETRIAL  
NONDISPOSITIVE ORDER BY  
MAGISTRATE JUDGE**

Re: ECF No. 76

14 Before the Court is the Government's "Objection to Magistrate James' Order Granting  
15 Berkeley Patients Group, Inc.'s Request to Quash the Subpoena to California State Board of  
16 Equalization," ECF No. 76. Despite the title given on the caption, the Court will treat the filing as  
17 a motion for relief from nondispositive pretrial order of magistrate judge pursuant to Civil Local  
18 Rule 72-2. The motion will be denied.

19 A district court may modify or set aside a magistrate judge's nondispositive order "where  
20 it has been shown that the magistrate judge's order is clearly erroneous or contrary to law." 28  
21 U.S.C. 636(b)(1)(A). See also Fed. R. Civ. P. 72(a); Bhan v. NME Hospitals, Inc., 929 F.2d 1404,  
22 1414 (9th Cir. 1991). A magistrate judge's resolution of a discovery dispute is "entitled to great  
23 deference." Doubt v. NCR Corp., No. 09-cv-5917-SBA, 2011 WL 5914284, at \*2 (N.D. Cal.  
24 Nov. 28, 2011). "A finding of fact is clearly erroneous" if the court is left with the "definite and  
25 firm conviction that a mistake has been committed." Burdick v. C.I.R., 979 F.2d 1369, 1370 (9th  
26 Cir. 1992). "A decision is 'contrary to law' if it applies an incorrect legal standard or fails to  
27 consider an element of the applicable standard." Conant v. McCoffey, No. 97-0139-FMS, 1998  
28 WL 164946, \*2 (N.D. Cal. Mar.16, 1998) (citing Hunt v. National Broadcasting Co., 872 F.2d

1 289, 292 (9th Cir. 1989)).

2 The Government and Claimant Berkeley Patients Group (“BPG”) filed a joint discovery  
3 letter brief on December 13, 2013 regarding a dispute over a subpoena served by the Government  
4 on the California State Board of Equalization seeking production of records, including tax records,  
5 pertaining to BPG. Jt. Ltr., ECF No. 69. The Court referred the instant dispute and all further  
6 discovery disputes for resolution by a magistrate judge. ECF No. 71. The magistrate assigned to  
7 the case issued a “Notice of Referral for Discovery” on December 23, 2013, ECF No. 74, which  
8 states, in part: “The parties are advised that they must meet and confer in person before any  
9 dispute is considered. Thus, any pending discovery motions are hereby DENIED WITHOUT  
10 PREJUDICE to the filing of a joint letter.” Id. at 1. This portion of the December 23 Order did  
11 not apply to the parties’ joint letter brief, as it was not filed as a motion. However, the Order  
12 continued: “If the parties submitted a letter to the presiding judge instead of a motion, the letter  
13 shall not be considered unless the parties attest that they met and conferred in person prior to filing  
14 the letter. Accordingly, within three days from issuance of this notice, the parties shall file a joint  
15 statement verifying that they met in person prior to filing the letter.” Id.

16 The parties did not file such a joint statement. On January 13, 2014, the magistrate judge  
17 issued an order resolving the dispute and quashing the Government’s subpoena to the Board of  
18 Equalization. ECF No. 75.

19 The Government moves for relief from the magistrate judge’s order quashing its subpoena  
20 on two grounds. First, the Government argues that the magistrate judge’s order was improperly  
21 entered prior to the parties’ filing of a joint statement verifying an in-person meeting and  
22 conferral. That argument is unavailing. Judge James’ own order requiring the parties to do  
23 something did not affect Judge James’ authority to decide the dispute. Also, even if the parties  
24 had filed the letter Judge James ordered them to file, it would not have contained any information  
25 that Judge James needed to decide the underlying discovery dispute; it would merely have  
26 confirmed that the parties still had a dispute after discussing the issue further. The Court construes  
27 the Judge James’ order quashing the Government’s subpoena as vacating her prior order and  
28 deciding the issue on the merits as framed by the parties in their joint letter brief.

1           Second, on the merits, the Government moves the Court to vacate the magistrate judge’s  
2 order based on an alleged misapplication of relevant law. In particular, the Government argues  
3 that the magistrate judge improperly placed the burden on the Government to prove the tax records  
4 sought were “not readily obtainable from other sources, when actually the burden should have  
5 been placed on the BPG, the party opposing the subpoena.” ECF No. 76 at 3. According to the  
6 Government, once it had established the relevance of BPG’s tax records, the magistrate judge  
7 should have shifted the burden to BPG to show that other sources exist from which the  
8 information is readily obtainable.

9           But that isn’t the position the Government took before Judge James. Contrary to the  
10 Government’s position now, in the joint letter brief before the magistrate judge, the Government  
11 assumed the burden it now claims the magistrate judge improperly placed on it. In its opening  
12 legal discussion, BPG identified the applicable legal standard as follows: “the Court may only  
13 order the production of a litigant’s tax returns if they are relevant and when there is a compelling  
14 need for them because the information sought is not otherwise available.” ECF No. 69 at 3  
15 (emphasis omitted) (citing Aliotti v. Vessel Sonora, 217 F.R.D. 496, 498 (N.D. Cal. 2003);  
16 Advante Int’l Corp. v. Mintel Learning Tech., 2006 WL 3511956 (N.D. Cal. 2006)). The  
17 Government’s responding argument expressly accepted that burden:

18                     [T]he Government has made the showing that the returns are  
19 relevant and that there is a compelling interest to obtain the  
20 information . . . . The Government has established that the tax  
21 returns are relevant to the litigation and that there is a compelling  
22 need to obtain the information sought . . . . [I]t is evidence based on  
23 BPG’s position in their meet and confer letter that the only way for  
24 the Government to obtain records is from BOE, as the only other  
25 party possibly possessing the records is BPG and they are  
26 vehemently contesting the Government obtaining the documents  
27 from BOE.

28           ECF No. 69 at 5. In support, the Government cited only Advante International, which sets forth  
the standard as described by BPG. In reply, BPG discussed the facts of Advante International on  
this precise question. The magistrate judge also cited Advante International when she identified  
the applicable legal standard and placed the burden for showing a “compelling need for the  
documents because the information sought is not readily available from another source” on the

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Government. ECF No. 75 at 2.

The Court declines to address the Government’s new objection to the magistrate judge’s application of the law because its position constitutes a reversal of its position before the magistrate judge. Not only has the Government waived its current objection, it expressly assumed the very burden it now wishes to shift to BPG. District courts need not, and ordinarily should not address arguments raised for the first time in an objection to a magistrate judge’s order. See Greenhow v. Sec’y of Health & Human Servs., 863 F.2d 633, 638 (9th Cir. 1988) overruled on other grounds by United States v. Hardesty, 977 F.2d 1347 (9th Cir. 1992) (“[A]llowing parties to litigate fully their case before the magistrate and, if unsuccessful, to change their strategy and present a different theory to the district court would frustrate the purpose of the Magistrates Act. We do not believe that the Magistrates Act was intended to give litigants an opportunity to run one version of their case past the magistrate, then another past the district court.”); United States v. Stone, No. 12-cv-0072-JCC, 2013 WL 5934346, at \*4 (E.D. Cal. Nov. 5, 2013) (refusing to consider argument raised for the first time in objection to magistrate’s nondispositive discovery order).

The Government’s motion is denied.

**IT IS SO ORDERED.**

Dated: January 29, 2014

  
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JON S. TIGAR  
United States District Judge