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

DAMON JONES,)	1:06 CV 01812 AWI YNP SMS (PC)
)	
Plaintiff,)	ORDER DECLINING TO ADOPT
v.)	FINDINGS & RECOMMENDATIONS
)	
JAMES YATES, et al.,)	ORDER REFERRING MOTION TO
)	DISMISS TO MAGISTRATE JUDGE
Defendants.)	
_____)	Document # 26

Plaintiff is a state prisoner proceeding pro se in this civil rights action. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 72-302.

On October 9, 2009, the Magistrate Judge issued [Findings and Recommendations](#) that recommended Defendants’ motion to dismiss be granted and this action be dismissed for failure to state a claim upon which relief can be granted. Plaintiff was provided an opportunity to file objections within thirty days. Plaintiff has not filed objections.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(B) and Local Rule 73-305, this court has conducted a de novo review of this case. Having carefully reviewed the entire file, the court declines to adopt the Findings and Recommendations. The sole reason cited in the Findings and Recommendations for granting the motion to dismiss and dismissing the complaint against Defendant James Yates is Plaintiff’s failure to oppose Defendant James Yates’ motion to dismiss. When an opposing party receives notice of a motion to dismiss and is given sufficient

1 time to respond to a motion to dismiss, a district judge does not abuse his discretion in granting
2 the motion based on failure to comply with a local rule that requires an opposition. See Martinez
3 v. Stanford, 323 F.3d 1178, 1183 (9th Cir. 2003); Ghazali v. Moran, 46 F.3d 52, 54 (9th Cir.
4 1995). But, before dismissing a case for failing to follow local rules, the district court must
5 weigh five factors: “(1) the public's interest in expeditious resolution of litigation; (2) the court's
6 need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy
7 favoring disposition of cases on their merits and (5) the availability of less drastic sanctions.”
8 Henderson v. Duncan, 779 F.2d 1421, 1423 (9th Cir. 1986).

9 Here, nothing in the Findings and Recommendations indicates Plaintiff was given proper
10 notice of the motion to dismiss. The court never issued an order that clearly informed Plaintiff
11 about the consequences of his failure to comply with the Local Rules and file an opposition.
12 The Findings and Recommendations fail to address the factors, set forth above, that must be
13 considered before dismissal as a sanction. Finally, the Findings and Recommendations never
14 discuss the inconsistencies of the court finding the complaint stated a claim against Defendant
15 Yates when the court screened the complaint pursuant to 28 U.S.C. § 1915A but then dismissing
16 the complaint for failing to state a claim against Defendant Yates. Thus, the court declines to
17 adopt the Findings and Recommendations based on current analysis.

18 Accordingly, THE COURT HEREBY ORDERS that:

- 19 1. The court declines to adopt the Magistrate Judge’s Findings and
20 Recommendations;
- 21 2. This action, along with the motion to dismiss, is referred to the Magistrate Judge
22 for further proceedings.

23
24 IT IS SO ORDERED.

25 **Dated: December 23, 2009**

26 **/s/ Anthony W. Ishii**
27 **CHIEF UNITED STATES DISTRICT JUDGE**