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**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

HARVEY CURTIS BAKER,  
Plaintiff,  
v.  
JAMES A. YATES,  
Defendant.

Case No. 1:12-cv-00126-LJO-SAB  
ORDER ADOPTING FINDINGS AND  
RECOMMENDATIONS  
ECF NO. 41, 42

Plaintiff Harvey Curtis Baker (“Plaintiff”) is a state prisoner proceedings pro se in this civil rights action against Defendant James A. Yates (“Defendant”). On March 19, 2012, Defendant filed a motion to dismiss. (ECF No. 8.) On February 6, 2013, the magistrate judge issued an Amended<sup>1</sup> Findings and Recommendations recommending that Defendant’s motion to dismiss be denied. (ECF No. 42.)

The Amended Findings and Recommendations were served on all parties and contained notice that any objections were to be filed within thirty (30) days. Neither party has filed objections to the Findings and Recommendations.

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<sup>1</sup> The magistrate judge issued an Amended Findings and Recommendations on February 6, 2013 because the original Findings and Recommendations issued on February 5, 2013 (ECF No. 41) inadvertently omitted instructions regarding the filing of objections to the Findings and Recommendations. The Amended Findings and Recommendations are otherwise identical to the original.

1 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), this Court has conducted a  
2 de novo review of the case. Having carefully reviewed the entire file, the Court finds that the  
3 Amended Findings and Recommendations are supported by the record and by proper analysis. In  
4 this case, Plaintiff's failure to exhaust his administrative remedies was excused because prison  
5 officials mistakenly informed Plaintiff that he was attempting to appeal a non-appealable issue.  
6 The other grounds raised in Defendant's motion to dismiss cannot be properly adjudicated at this  
7 time due to confusion regarding the operative pleading in this action. Accordingly, Defendant's  
8 motion to dismiss on the grounds of failure to state a claim and failure to comply with the  
9 California Tort Claims Act will be denied without prejudice to Defendant's right to reassert those  
10 defenses after Plaintiff re-files his complaint in this matter.

11 Accordingly, it is HEREBY ORDERED that:

- 12 1. The Findings and Recommendations and Amended Findings and  
13 Recommendations dated February 5, 2013 and February 6, 2013 are ADOPTED  
14 IN FULL (ECF Nos. 41, 42);
- 15 2. Defendant's motion to dismiss on the grounds of failure to exhaust administrative  
16 remedies is DENIED;
- 17 3. Defendant's motion to dismiss on the grounds of failure to state a claim and failure  
18 to comply with the California Tort Claims Act is DENIED WITHOUT  
19 PREJUDICE;
- 20 4. Plaintiff is ORDERED to re-file his complaint. In the alternative, Plaintiff is  
21 granted leave to file an amended complaint to address any deficiencies identified  
22 in Defendant's motion to dismiss which can be cured via amendment. Plaintiff is  
23 ordered to file his complaint or amended complaint within **thirty (30) days**.

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**Plaintiff is forewarned that failure to file within thirty (30) days may result in the  
imposition of sanctions, including dismissal of this action.**

IT IS SO ORDERED.

Dated: March 4, 2013

/s/ Lawrence J. O’Neill  
UNITED STATES DISTRICT JUDGE