

1 On April 16, 2020, the assigned magistrate issued findings and recommendations
2 recommending that defendants' motion for summary judgment be denied because defendants had
3 not met their burden of establishing that plaintiff had failed to exhaust his administrative remedies
4 prior to filing suit because the prison officials' improper cancellation¹ of plaintiff's inmate
5 grievance had caused administrative remedies to become effectively unavailable to plaintiff.
6 (Doc. No. 33.) The findings and recommendations described that plaintiff had received a
7 cancellation notice informing him that although he could not resubmit his inmate appeal after its
8 cancellation, he was permitted to file a separate appeal of the cancellation decision itself, which
9 plaintiff did not elect to pursue. (*Id.* at 6.) Those findings and recommendations were served on
10 the parties and contained notice that any objections were to be filed within thirty (30) days after
11 service. (*Id.* at 9.)

12 On May 15, 2020, defendants filed objections to those findings and recommendation,
13 arguing that the Ninth Circuit has held that a plaintiff fails to exhaust available administrative
14 remedies by failing to appeal from the cancellation of an inmate appeal, even if that cancellation
15 was improperly issued. (Doc. No. 34) (citing *Cortinas v. Portillo*, 754 Fed. App'x. 525, 527 (9th
16 Cir. 2018)). Plaintiff filed a response to defendants' objections on June 3, 2020 and an addendum
17 to his objections on July 16, 2020. (Doc. Nos. 35, 36.)

18 On September 23, 2020, the assigned magistrate judge withdrew the April 16, 2020
19 findings and recommendations, and issued new findings and recommendations recommending
20 that defendants' motion for summary judgment be granted due to plaintiff's failure to exhaust his
21 administrative remedies prior to filing suit. (Doc. No. 37.) Those findings and recommendations
22 were served on the parties and contained notice that any objections were to be filed within thirty
23 (30) days after service. (*Id.* at 9.) On October 8, 2020, plaintiff filed his objections. (Doc. No.
24 38.)

25 ¹ The findings and recommendations explained that there was no dispute of material fact that the
26 California State Prison, Corcoran Appeals Office improperly cancelled plaintiff's inmate appeal
27 at the third level of review as untimely because the office had not *received* plaintiff's initial
28 inmate grievance within thirty days after the appealed events allegedly occurred even though
plaintiff had timely *submitted* his initial grievance within thirty calendar days of the alleged
incident, in accordance with the governing regulations. (*Id.* at 7–8.)

1 In his objections, plaintiff argues that the pending findings and recommendations made
2 several factual errors and he has attempted to outline the relevant timeline of events from his
3 perspective. (Doc. No. 38 at 2–4.) Specifically, plaintiff contends that the Appeals Office never
4 actually completed its second level review of his inmate appeal; however, plaintiff confusingly
5 also asserts that the second level review was completed in an untimely fashion. (*Id.* at 3.)
6 Plaintiff further argues that he originally filed this claim in state court, where defendants did not
7 present arguments regarding his alleged failure to exhaust (*id.* at 11), and also that the state court
8 had found he had properly exhausted his remedies (*id.* at 7).

9 The court struggles to follow plaintiff’s assertions or how they rebut the finding that he
10 failed to exhaust his available administrative remedies prior to filing suit as required. Plaintiff
11 has attached to his objections an order wherein the state court did state in cursory fashion that
12 plaintiff had administratively exhausted the inmate appeal at issue in this case. (*Id.* at 45.) That
13 state court order issued in the context of the dismissal of plaintiff’s writ of mandate as moot
14 because the state court concluded prison officials had responded to his administrative appeal at all
15 three levels of review. (*Id.*) However, it is unclear what analysis was done by and whether the
16 cancellation appeal was considered by the state court in making the statement in question. Most
17 importantly, neither that state court order nor plaintiff’s objections rebut the Ninth Circuit
18 authority which appears to control the resolution of the issue presented here. *Cortinas*, 754 Fed.
19 App’x. at 527 (Because under California Code of Regulations, Title 15 § 3084.6(a)(3) and (e) an
20 inmate can appeal a cancellation decision separately pursuant to the rules in § 3084.6(c), and if
21 inmate prevails, cancelled inmate appeal can be considered at the discretion of the appeals
22 coordinator, “Cortinas could have appealed his cancellation decision, this case is distinguishable
23 from *Sapp*, and the improper cancellation of his appeal did not render administrative remedies
24 effectively unavailable to him.”) (citing *Wilson v. Zubiante*, 718 F. App’x 479, 482 (9th Cir.
25 2017)); *see also Felde v. Wilkins*, No. 1:19-cv-00339-NONE-HBK, 2021 WL 1241075, at *4
26 (E.D. Cal. Mar. 26, 2021); *Belton v. Houston*, No. ED CV 19-01179-PA (DFM), 2021 WL
27 785146, at *5 (N.D. Cal. Jan. 8, 2021), *report and recommendations adopted by* 2021 WL
28 784961 (N.D. Cal. Feb. 26, 2021) Therefore, the court is not persuaded to depart from the

1 analysis set forth in the pending findings and recommendations.

2 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), this court has conducted a
3 *de novo* review of this case. Having carefully reviewed the entire file, including plaintiff's
4 objections, the court finds the findings and recommendations to be supported by the record and
5 by proper analysis.

6 Accordingly,

- 7 1. The findings and recommendations issued on September 23, 2020 (Doc. No. 37) are
8 adopted in full;
- 9 2. Defendants' motion for summary judgment (Doc. No. 16) is granted;
- 10 3. This action is dismissed without prejudice due to plaintiff's failure to exhaust all his
11 available administrative remedies; and
- 12 4. The Clerk of the Court is directed to close this action.

13 IT IS SO ORDERED.

14 Dated: July 19, 2021

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17 UNITED STATES DISTRICT JUDGE
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