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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

 Plaintiff,

 v.

JACK MOOTZ,

 Defendant.

No. 1:17-cr-00053-DAD-BAM

ORDER DENYING DEFENDANT’S
EMERGENCY MOTION FOR
MODIFICATION OF SENTENCE UNDER 18
U.S.C. § 3582(c)(1)(A)

(Doc. No. 56)

Pending before the court is defendant Jack Mootz’s motion for a reduction of his sentence pursuant to 18 U.S.C. § 3582(c)(1)(A). The motion is based in part on the purported risks posed to defendant Mootz by the ongoing coronavirus (“COVID-19”) pandemic. For the reasons explained below, defendant’s motion will be denied.

BACKGROUND

On March 9, 2017, defendant Mootz was indicted on one count of receipt and distribution of material involving the sexual exploitation of minors in violation of 18 U.S.C. § 2252(a)(2). (Doc. No. 1.) On May 31, 2017, defendant entered a plea of guilty to that charge, which carried it a maximum penalty of a minimum mandatory five-year term of imprisonment up to twenty years in prison. (Doc. Nos. 21, 25 at 1.) On August 23, 2017, the court sentenced defendant Mootz to 108 months in the custody of the U.S. Bureau of Prisons (“BOP”), to be followed by a 180-month term of supervised release. (Doc. Nos. 28, 38, 39.) The court also ordered defendant to pay

1 special assessments in the amount of \$100.00 and \$8,000.00 in restitution to the victims of his
2 offense. (Doc. Nos. 39, 44.) Defendant is now serving his sentence at Federal Correctional
3 Institution, Lompoc (“FCI Lompoc”). (See Doc. No. 56 at 8.) As of the date of this order,
4 defendant Mootz has served approximately 41 months of his 108-month prison sentence. (*Id.* at
5 9.)

6 On June 2, 2020, defendant filed the pending motion. (Doc. No. 56.) On June 12, 2020,
7 the government filed its opposition to the motion, and on June 17, 2020, defendant filed his reply
8 thereto. (Doc. Nos. 58, 61.)

9 LEGAL STANDARD

10 A court generally “may not modify a term of imprisonment once it has been imposed.”
11 18 U.S.C. § 3582(c); *see also Dillon v. United States*, 560 U.S. 817, 824 (2010) (“[A] judgment
12 of conviction that includes [a sentence of imprisonment] constitutes a final judgment’ and may
13 not be modified by a district court except in limited circumstances.”). Those limited
14 circumstances include compassionate release in extraordinary cases. *See United States v. Holden*,
15 3:13-cr-00444-BR, 2020 WL 1673440, at *2 (D. Or. April 6, 2020). Prior to the enactment of the
16 First Step Act of 2018 (“the FSA”), motions for compassionate release could only be filed by the
17 BOP. 18 U.S.C. § 3582(c)(1)(A) (2002). Under the FSA, however, imprisoned defendants may
18 now bring their own motions for compassionate release in the district court. 18 U.S.C.
19 § 3582(c)(1)(A) (2018). In this regard, the FSA specifically provides that a court may

20 upon motion of the defendant after the defendant has fully exhausted
21 all administrative rights to appeal a failure of the [BOP] to bring a
22 motion on the defendant’s behalf¹ or the lapse of 30 days from the
23 receipt of such a request by the warden of the defendant’s facility,
whichever is earlier, may reduce the term of imprisonment (and may
impose a term of probation or supervised release with or without

24 ¹ If the BOP denies a defendant’s request within 30 days of receipt of such a request, the
25 defendant must appeal that denial to the BOP’s “Regional Director within 20 calendar days of the
26 date the Warden signed the response.” 28 C.F.R. § 542.15(a). If the regional director denies a
27 defendant’s administrative appeal, the defendant must appeal again to the BOP’s “General
28 Counsel within 30 calendar days of the date the Regional Director signed.” *Id.* “Appeal to the
General Counsel is the final administrative appeal.” *Id.* When the final administrative appeal is
resolved, a defendant has “fully exhausted all administrative rights.” *See* 18 U.S.C.
§ 3582(c)(1)(A).

1 conditions that does not exceed the unserved portion of the original
2 term of imprisonment), after considering the factors set forth in [18
3 U.S.C. §] 3553(a) to the extent that they are applicable, if it finds
4 that –

5 (i) extraordinary and compelling reasons warrant such a
6 reduction; or

7 (ii) the defendant is at least 70 years of age, has served at least 30
8 years in prison, pursuant to a sentence imposed under section
9 3559(c), for the offense or offenses for which the defendant
10 is currently imprisoned, and a determination has been made
11 by the Director of the Bureau of Prisons that the defendant is
12 not a danger to the safety of any other person or the
13 community, as provided under section 3142(g);

14 and that such a reduction is consistent with applicable policy
15 statements issued by the Sentencing Commission [.]

16 18 U.S.C. § 3582(c)(1)(A)(i) and (ii).²

17 The applicable policy statement with respect to compassionate release in the U.S.
18 Sentencing Guidelines sets out criteria and circumstances describing “extraordinary and
19

20 ² Under 18 U.S.C. § 3624(c)(2), the BOP may release an incarcerated defendant to home
21 confinement “for the shorter of 10 percent of the term of imprisonment of that prisoner or 6
22 months.” The Coronavirus Aid, Relief, and Economic Security Act (“the CARES Act”), Pub. L.
23 116-136, expands the BOP’s authority to release incarcerated defendants without judicial
24 intervention. The CARES Act allows the BOP to “lengthen the maximum amount of time” for
25 which a prisoner may be placed in home confinement under § 3624(c)(2) “as the Director
26 determines appropriate,” assuming “the Attorney General finds that emergency conditions will
27 materially affect the functioning” of the BOP. CARES Act, Pub. L. 116-136, Div. B, Title II, §
28 12003(b)(2) (2020). However, the BOP’s authority in this regard is limited to “the covered
emergency period.” *Id.* The BOP’s authority expires “30 days after the date on which the
national emergency declaration terminates.” *Id.* § 12003(a)(2). After the CARES Act was
enacted, the Attorney General issued a memo instructing the BOP to “immediately review all
inmates who have COVID-19 risk factors” beginning with those who are housed at facilities
where “COVID-19 is materially affecting operations.” Office of Att’y Gen., *Increasing Use of
Home Confinement at Institutions Most Affected by COVID-19* (Apr. 3, 2020). The BOP has
acted on the Attorney General’s guidance, including one case in which a sentenced prisoner was
released to home confinement after serving less than half his sentence from a facility that reported
no positive COVID-19 cases at the time of his release. *See* Hannah Albarazi, *Paul Manafort
Seeks Prison Release Over COVID-19 Fears*, LAW360 (Apr. 14, 2020), <https://www.law360.com/articles/1263706/paul-manafort-seeks-prison-release-over-covid-19-fears> (noting that the
prisoner’s counsel had argued that the CARES Act “broadens the authority” of the BOP to release
prisoners to home confinement); Khorri Atkinson, *Paul Manafort Released From Prison Amid
COVID-19 Fears*, LAW360 (May 13, 2020), [https://www.law360.com/articles/1273090/paul-
manafort-released-from-prison-amid-covid-19-fears](https://www.law360.com/articles/1273090/paul-manafort-released-from-prison-amid-covid-19-fears).

1 compelling reasons.” U.S. Sentencing Guidelines Manual (“U.S.S.G.”) § 1B1.13³; *see also*
2 *United States v. Gonzalez*, No. 2:18-cr-00232-TOR, 2020 WL 1536155, at *2 (E.D. Wash. Mar.
3 31, 2020) (noting that courts “universally” rely on U.S.S.G. § 1B1.13 to define “extraordinary
4 and compelling reasons,” even though that policy statement was issued before Congress passed
5 the FSA and authorized defendants to file compassionate release motions). However, a large and
6 growing number of district courts across the country have concluded that because the Sentencing
7 Commission has not amended the Guidelines since the enactment of the FSA, courts are not
8 limited by the pre-FSA categories described in U.S.S.G. § 1B1.13 in assessing whether
9 extraordinary and compelling circumstances are presented justifying a reduction of sentence
10 under 18 U.S.C. § 3582(c). *See, e.g., United States v. Parker*, 2:98-cr-00749-CAS, 2020 WL
11 2572525, at *8–9 (C.D. Cal. May 21, 2020) (collecting cases); *United States v. Rodriguez*, 424 F.
12 Supp. 3d 674, 681 (N.D. Cal. 2019).

13 In the past, when moving for relief under 18 U.S.C. § 3582(c), it was recognized that the
14 defendant bore the initial burden of demonstrating that a sentence reduction was warranted. *See*
15 *United States v. Sprague*, 135 F.3d 1301, 1306–07 (9th Cir. 1998). Although the Ninth Circuit
16 has not specifically addressed the question of which party bears the burden in the context of a
17 motion for compassionate brought pursuant to § 3582(c) as amended by the FSA, district courts
18 to have done so have agreed that the burden remains with the defendant. *See, e.g., United States*
19 *v. Greenhut*, No. 2:18-cr-00048-CAS, 2020 WL 509385, *1 (C.D. Cal. Jan. 31, 2020); *United*
20 *States v. Van Sickle*, No. 18-cr-0250-JLR, 2020 WL 2219496, *3 (W.D. Wash. May 7, 2020).

21 ANALYSIS

22 As district courts have summarized, in analyzing whether a defendant is entitled to
23 compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i), the court must determine whether a
24 defendant has satisfied three requirements:

25 First, as a threshold matter, the statute requires defendants to exhaust
26 administrative remedies. 18 U.S.C. § 3582(c)(1)(A). Second, a

27 ³ The Sentencing Guidelines also require that to be granted a reduction of sentence under 18
28 U.S.C. § 3582(c)(1)(A), the defendant must not pose “a danger to the safety of any other person
or to the community, as provided in 18 U.S.C. § 3142(g).” U.S.S.G. § 1B1.13(2).

1 district court may grant compassionate release only if “extraordinary
2 and compelling reasons warrant such a reduction” and “that such
3 reduction is consistent with applicable policy statements issued by
4 the Sentencing Commission. *Id.* Third, the district court must also
5 consider “the factors set forth in Section 3553(a) to the extent that
6 they are applicable.” *Id.*

7 *Rodriguez*, 424 F. Supp. 3d at 680; *see also United States v. Ramirez-Suarez*, 16-cr-00124-LHK-
8 4, 2020 WL 3869181, at *2 (N.D. Cal. July 9, 2020); *Parker*, 2020 WL 2572525, at *4; *United*
9 *States v. Trent*, No. 16-cr-00178-CRB-1, 2020 WL 1812242, at *2 (N.D. Cal. Apr. 9, 2020)
10 (noting that as to the third factor, under 18 U.S.C. § 3582(c)(1)(A) release must be “consistent
11 with” the sentencing factors set forth in §3553(a)).

12 **A. Administrative Exhaustion**

13 Defendant Mootz represents that on April 8, 2020, he submitted a request for
14 compassionate release to the acting warden of FCI Lompoc. (Doc. No. 56 at 9) (citing Doc. No.
15 52). On or about May 14, 2020, defendant Mootz received a letter from the acting warden dated
16 May 4, 2020 denying his request. (*Id.*) (citing Doc. No. 49). In its opposition to the pending
17 motion, the government states that defendant Mootz did not appeal the acting warden’s denial of
18 his request for compassionate release. (Doc. No. 58 at 5.) Defendant did not address this
19 contention in his reply, nor has he presented any evidence or argument suggesting that he pursued
20 an administrative appeal from the warden’s denial of his request to the BOP’s Regional Director
21 as required under 28 C.F.R. § 542.15(a). *See* note 1, above. Thus, it appears that defendant
22 Mootz has failed to exhaust his administrative remedies and that his motion is subject to denial on
23 that ground alone.

24 Defendant has not requested that he be excused from complying with § 3582(c)(1)(A)’s
25 administrative exhaustion requirement. Nonetheless, the court declines to decide whether a
26 failure to satisfy that requirement can be excused and, if so, under what circumstances. *See, e.g.,*
27 *United States v. Connell*, No. 18-cr-00281-RS, 2020 WL 2315858 (N.D. Cal. May 8, 2020)
28 (finding that administrative exhaustion under § 3582(c)(1)(A) can be excused); *United States v.*
Meron, No. 2:18-cr-0209-KJM, 2020 WL 1873900 (E.D. Cal. Apr. 15, 2020) (holding that the
exhaustion requirement is jurisdictional and cannot be excused under any circumstances). Rather,

1 for the reasons explained below, the court finds that defendant Mootz has not established that
2 extraordinary and compelling reasons warrant his compassionate release. The court also
3 concludes that the requested reduction in defendant's sentence would be inconsistent with
4 consideration of the sentencing factors set forth at 18 U.S.C. § 3553(a). Accordingly, defendant
5 Mootz's motion will be denied.

6 **B. Extraordinary and Compelling Reasons**

7 According to the Sentencing Commission's policy statement, "extraordinary and
8 compelling reasons" warranting compassionate release may exist based on a defendant's medical
9 conditions, age and other related factors, family circumstances, or "other reasons." U.S.S.G.
10 § 1B1.13, cmt. n.1 (A)–(D). Even though the catch-all of "other reasons" was included in the
11 policy statement at a time when only the BOP could bring a compassionate release motion, courts
12 have agreed that it may be relied upon by defendants bringing their own motions for reductions in
13 their sentence under the FSA. *See, e.g., United States v. Kesoyan*, No. 2:15-cr-00236-JAM, 2020
14 WL 2039028, at *3–4 (E.D. Cal. Apr. 28, 2020) (collecting cases).

15 The medical condition of a defendant may warrant the granting of compassionate release
16 by the court where the defendant "is suffering from a terminal illness (i.e., a serious and advanced
17 illness with an end of life trajectory)," though "[a] specific prognosis of life expectancy (i.e., a
18 probability of death within a specific time period) is not required." U.S.S.G. § 1B1.13, cmt.
19 n.1(A)(i). Non-exhaustive examples of terminal illnesses that may warrant a compassionate
20 release "include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage
21 organ disease, and advanced dementia." *Id.* In addition to terminal illnesses, a defendant's
22 debilitating physical or mental condition may warrant compassionate release, including when:

23 The defendant is

- 24 (I) suffering from a serious physical or medical condition,
25 (II) suffering from a serious functional or cognitive impairment, or
26 (III) experiencing deteriorating physical or mental health because of
27 the aging process,

28 ////

1 that substantially diminishes the ability of the defendant to provide
2 self-care within the environment of a correctional facility and from
which he or she is not expected to recover.

3 *Id.* at cmt. n.1(A)(ii). Where a defendant has moderate medical issues that otherwise might not be
4 sufficient to warrant compassionate release under ordinary circumstances, many courts have
5 concluded that the risks posed by COVID-19 may tip the scale in favor of release when the
6 particular circumstances of a case are considered in their totality. *See, e.g., Parker*, 2020 WL
7 2572525, at *9–10 (“Since the onset of the COVID-19 pandemic, courts have determined that
8 inmates suffering from conditions such as hypertension and diabetes are now at an even greater
9 risk of deteriorating health, presenting ‘extraordinary and compelling’ circumstances that may
10 justify compassionate release.”) (collecting cases); *United States v. Rodriguez*, No. 2:03-cr-
11 00271-AB, 2020 WL 1627331, at *10–11 (E.D. Pa. Apr. 1, 2020) (“Without the COVID-19
12 pandemic—an undeniably extraordinary event—Mr. Rodriguez’s health problems, proximity to
13 his release date, and rehabilitation would not present extraordinary and compelling reasons to
14 reduce his sentence. But taken together, they warrant reducing his sentence.”).

15 Compassionate release may also be warranted based on a defendant’s age and other
16 related factors. Thus, “extraordinary and compelling reasons” exist where a “defendant (i) is at
17 least 65 years old; (ii) is experiencing a serious deterioration in physical or mental health because
18 of the aging process; and (iii) has served at least 10 years or 75 percent of his or her term of
19 imprisonment, whichever is less.” U.S.S.G. § 1B1.13, cmt. n.1(B). This provision, however,
20 does not apply here because, as noted above, defendant Mootz has now served approximately
21 only 41 months of his 108-month prison sentence.

22 Defendant Mootz argues that extraordinary and compelling reasons warranting his
23 compassionate release exist because he is 66 years old and suffers from hypertension,
24 hyperglycemia, and high cholesterol. (Doc. Nos. 56 at 15; 63 at 8, 9, 14.) To treat his
25 hypertension and high cholesterol, defendant has been prescribed a number of medications. (Doc.
26 No. 56 at 16.) Additionally, defendant argues that because his body mass index is 30.6, he suffers
27 from obesity. (*Id.* at 15; Doc. No. 63 at 13.) He also contends that he is vulnerable to becoming
28 severely ill were he to contract COVID-19 because he is at a 20.9 percent risk of suffering heart

1 disease and/or stroke within the next ten years, and that “COVID-19 kills far more men than it
2 does women.” (Doc. No. 56 at 15–16.) Defendant avers that he is not expected to recover from
3 these medical conditions. (*Id.* at 24.) His medical records reflect that his hypertension is “poorly
4 controlled,” even with medication, and defendant claims that he cannot treat his obesity because
5 the prison at which he is confined does not provide nutritious food and he cannot leave his unit to
6 exercise. (*Id.*; Doc. No. 63 at 2.) Moreover, defendant reports that he tested positive for COVID-
7 19 on May 26, 2020, although he appears to have been asymptomatic. (Doc. No. 56 at 17, 19;
8 Doc. No. 63 at 4, 6.)

9 In support of his motion, defendant has filed the declaration of his counsel, Assistant
10 Federal Defender (“AFD”) Jaya C. Gupta, dated May 29, 2020. (Doc. No. 49-2.) Therein, AFD
11 Gupta states that defendant Mootz has reported the following: he is housed in an open-plan
12 dormitory filled with bunk beds spaced approximately two to three feet apart and without a
13 partition (*id.* at ¶ 2); approximately 180 prisoners, all of whom have tested positive for COVID-
14 19, reside in Unit J with him and prisoners are not allowed to leave to isolate themselves, get
15 fresh air, or exercise (*id.* at ¶¶ 2, 3); prisoners stand in line for sick call and to receive their
16 medication without distancing themselves (*id.* at ¶ 3); the ventilation in the housing unit is poor
17 and defendant believes he is breathing in the air and respiratory droplets of other prisoners in that
18 unit (*id.*); he receives a banana and cereal with milk for breakfast, macaroni and sometimes a
19 canned vegetable for lunch, and a peanut butter sandwich and either a cookie or cake for dinner
20 (*id.* at ¶ 5); and he had yet to receive the hand sanitizer, towels, and cleaning supplies promised
21 by the BOP (*id.* at ¶ 6). Defendant argues in conclusory fashion that these conditions make it
22 impossible for him to provide self-care with respect to re-infection with COVID-19. (Doc. No.
23 56 at 24.)

24 In opposition to the motion, the government asserts that defendant Mootz’s medical
25 records indicate that he suffers from essential (primary) hypertension, but that the Centers for
26 Disease Control and Prevention (“CDC”) only recognizes “pulmonary hypertension” as a high-
27 risk factor for serious complications from COVID-19. (Doc. No. 58 at 8.) The government adds
28 that because defendant’s BOP medical records do not indicate that his BMI is 40 or above, he

1 does not suffer from severe obesity which is recognized by the CDC as a high-risk factor with
2 respect to serious complications from COVID-19. (*Id.* at 9.) Since the government filed its
3 opposition, however, the CDC has updated its listings and now recognizes that a body mass index
4 of 30 or higher definitively increases one’s risk, and “high blood pressure (hypertension)” might
5 increase the risk for severe illness from COVID-19. *People with Certain Medical Conditions*,
6 Centers for Disease Control and Prevention, [https://www.cdc.gov/coronavirus/2019-ncov/need-](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html)
7 [extra-precautions/people-with-medical-conditions.html](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html) (last reviewed September 14, 2020). The
8 government also relies upon the May 21, 2020 declaration of Lawrence Cross, the Health
9 Services Administrator overseeing Federal Correctional Complex (FCC)⁴ Lompoc in contending
10 that FCC Lompoc inmates are provided access to cleaning supplies, including their own personal
11 bottle of disinfectant, and medical staff do daily symptom and temperature checks of every
12 housing unit. (Doc. No. 58 at 7.)⁵

13 In reply, defendant argues that to the extent there is a factual dispute between the Gupta
14 Declaration and the Cross Declaration, the court should credit defendant Mootz’s description as
15 recounted in his counsel’s declaration because defendant understood that lying regarding these
16 matters would harm his chances of being granted compassionate release. (Doc. No. 61 at 4.)
17 Defendant also argues that BOP has not provided him adequate medical treatment. In this regard,
18 defendant states that “[t]he most that BOP did to care for [him] was belatedly test him after the
19 virus had already spread throughout the facility, take his temperature and ask him his symptoms.”
20 (*Id.* at 7) (citing Doc. No. 54 at 2). Defendant further avers that he was not seen by a physician
21 following his positive COVID-19 diagnosis, (*id.*), although the court notes that his BOP medical
22 records reflect that in May of 2020 he was being screened and monitored for COVID-19
23 symptoms daily by FCI Lompoc medical staff. (*See* Doc. No. 54 at 2–3.) Lastly, defendant states

24 _____
25 ⁴ FCC Lompoc is divided into three facilities: FCI Lompoc; United States Penitentiary, Lompoc;
and a satellite prison camp. (Doc. No. 340-1 at ¶ 3.)

26 ⁵ This declaration addressing the COVID-19 related precautions being then taken at was FCC
27 Lompoc was filed in the case of *United States v. Eddings*, 2:09-cr-00074-JAM at Doc. No. 340-1.
28 The court, in that case, relied upon that declaration in denying defendant Eddings’ motion for
compassionate release. (Doc. No. 345 at 5.)

1 that after he tested positive for the virus, he was never re-tested to determine whether he was still
2 positive for COVID-19. (Doc. No. 61 at 7.)

3 The court finds that defendant Mootz has demonstrated that he suffers from serious
4 medical conditions. Defendant’s age (66) and body mass index of over 30 put him at higher risk
5 for suffering severe illness from COVID-19, and his high blood pressure may also increase his
6 risk in that regard. *See Older Adults*, Centers for Disease Control and Prevention,
7 <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html> (last
8 reviewed September 14, 2020); *People with Certain Medical Conditions*, Centers for Disease
9 Control and Prevention, [https://www.cdc.gov/coronavirus/2019-ncov/need-extra-](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html)
10 [precautions/people-with-medical-conditions.html](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html) (last reviewed September 14, 2020).

11 Nonetheless, defendant has not shown that his ability to provide self-care is substantially
12 diminished in light of his medical conditions and FCI Lompoc’s handling of the COVID-19
13 pandemic.⁶ *See United States v. Gorai*, No. 2:18-cr-00220-JCM, 2020 WL 1975372, at *3 (D.
14 Nev. April 24, 2020) (“[T]he presence of COVID 19 . . . necessitates a more expansive
15 interpretation of what self-care means” and thus the inability of individuals at high risk of
16 becoming severely ill from COVID-19 to practice appropriate hygiene, wear a mask and maintain
17 social distancing is an inability to provide self-care) (citation omitted). First, defendant Mootz
18 has failed to demonstrate that he cannot provide self-care despite his serious medical conditions.
19 For example, BOP has provided him access to treatment and medication for his high blood
20 pressure and high cholesterol, and defendant does not explain how—despite this care—his
21 imprisonment at FCI Lompoc diminishes his ability to provide self-care for these conditions.

22 ⁶ To support the assertion that it is unlikely he will receive adequate medical care at FCI Lompoc
23 if his condition worsens, defendant Mootz has attached to his motion the complaint filed in
24 *Torres v. Milusnic*, No. 20-cv-4450-CBM-PVC, a class action lawsuit brought against the warden
25 of FCI Lompoc on behalf of inmates challenging the conditions at that prison which is pending
26 before the U.S. District Court for the Central District of California. (*Id.* at 19–20; *see also* Doc.
27 No. 49-1.) Defendant contends that this lawsuit “details several instances of prisoners not
28 receiving adequate medical care after testing positive for COVID.” (Doc. No. 56 at 20.) The
relevant inquiry for purposes of resolving the motion pending before this court, however, is not
whether inmates at FCI Lompoc are generally receive adequate medical care, but rather whether,
specifically, defendant Mootz’s medical conditions have substantially diminished his ability to
provide self-care within FCI Lompoc. *See* 18 U.S.C. § 3582(c)(1)(A)(i) and (ii).

1 (See *id.* at 16) (listing the prescribed medications defendant Mootz takes for high blood pressure
2 and high cholesterol”); (Doc. No. 63 at 2) (suggesting the addition of calcium channel blockers to
3 lower his blood pressure). Nor has defendant shown how his placement at FCI Lompoc
4 diminishes his ability to provide self-care for his obesity. Defendant’s medical records reflect
5 that BOP doctors have advised him to reduce his weight through a heart healthy, reduced
6 carbohydrate diet since at least December 2019, and the presentence report prepared in his case
7 reflected that he has consistently been approximately 50 pounds overweight. (Doc. No. 58 at 6;
8 *see also* Doc. Nos. 28; 53 at 1.) The court is not persuaded that defendant cannot follow his
9 recommended weight loss and diet plan by declining to eat certain foods allegedly provided with
10 his prison meals, such as cookies and cake. Defendant also does not adequately explain why he is
11 unable to exercise in some form within the prison. Moreover, defendant’s medical records show
12 that medical staff adequately treated him when he tested positive for COVID-19. (See Doc. No.
13 63 at 6.) Defendant was monitored daily for signs of any symptoms or detrimental impacts on his
14 health. (See *id.*) According to the government, after showing no symptoms since testing positive,
15 defendant Mootz met the CDC criteria for release from isolation and has since been considered
16 recovered.⁷ (See *id.*)

17 Lastly, the court is unaware of whether *current* outbreak mitigation practices at FCI
18 Lompoc reflect those reported through the Gupta Declaration, the Cross Declaration, or neither,
19 given that those declarations were dated several months ago. Notably, conditions with respect to
20 the COVID-19 outbreak at FCI Lompoc appear to have improved significantly since the time

21
22 ⁷ The undersigned does not, however, discount the possibility of reinfection from the virus. As
23 one district court has observed: “Without scientific conclusions as to whether reinfection is
24 possible or how long COVID-19 immunity lasts, [courts have] err[ed] on the side of caution to
25 avoid potentially lethal consequences.” *States v. Yellin*, Case No. 3:15-cr-3181-BTM-1, 2020
26 WL 3488738, at *13 (S.D. Cal. June 26, 2020); *see also United States v. Hanson*, No. 6:13-cr-
27 00378-AA-1, 2020 WL 3605845, at *4 (D. Or. July 2, 2020) (“[T]here is no current scientific
28 evidence to indicate that a ‘recovered’ COVID-19 patient is immune from reinfection, as several
courts have recently acknowledged.”); *But see United States v. Molley*, No. CR15-0254-JCC,
2020 WL 3498482, at *3 (W.D. Wash. June 29, 2020) (concluding that the uncertainty
surrounding the danger of re-infection with COVID-19 “cuts against compassionate release,” in
part because it is the defendant’s burden to establish that “extraordinary and compelling” reasons
for release exist.).

1 addressed in those declarations. When defendant filed his motion on June 2, 2020, 900 of 939
2 inmates and 18 staff at FCI Lompoc had tested positive for the virus, and one inmate had died.
3 (Doc. No. 56 at 20.) By time the government filed its opposition to defendant’s motion on June
4 12, 2020, the BOP was reporting two deaths among prisoners and eight confirmed then–active
5 COVID-19 cases among prisoners or staff at FCI Lompoc. (Doc. No. 58 at 6.) As of September
6 25, 2020, however, the BOP reports that zero prisoners and only three staff members at that
7 prison are now confirmed as having active cases of COVID-19 cases, with no additional deaths.
8 See <https://www.bop.gov/coronavirus/> (last reviewed September 25, 2020). The court certainly
9 recognizes that FCI Lompoc initially failed to control the outbreak of COVID-19 at that
10 institution, as a high number of its inmates tested positive for the virus. See *United States v.*
11 *Schweder*, No. 2:11-cr-00449-KJM, 2020 WL 5257598, at *5 (E.D. Cal. Sept. 3, 2020) (“Other
12 district courts have found USP Lompoc to be suffering a particularly bad outbreak. Earlier this
13 year, another district court in the Ninth Circuit called FCI Lompoc ‘among the worst coronavirus
14 hotspots in the nation.’”) (citing *United States v. Robinson*, No. 18-cr-00597-RS-1, 2020 WL
15 1982872, at *1 (N.D. Cal. April 27, 2020)); (Doc. No. 56 at 20). That situation is obviously an
16 extremely serious one. But it appears that in the three and a half plus months since defendant
17 Mootz filed his motion on June 2, 2020, the active COVID-19 virus cases at FCI Lompoc have
18 decreased significantly.⁸

19 In light of all the above, the court concludes that defendant Mootz has not met his burden
20 of demonstrating extraordinary and compelling reasons for compassionate release under
21 § 3582(c)(1)(A). Therefore, his motion will be denied.

22
23 ⁸ The undersigned does not necessarily accept these reported numbers at face value given the
24 manner in which the CDC guidelines apparently allow for individuals to be counted as recovered
25 from the virus without confirming test results. Other judges have recently expressed similar
26 concerns regarding reporting at FCI Lompoc. See *Schweder*, 2020 WL 5257598, at *5 (“More
27 recently, this court has noted serious concerns about the government’s methods for tabulating the
28 numbers of inmates infected versus those recovered at Lompoc in granting compassionate release
for a co-defendant in this case.”) Similarly, defendant reports that BOP deems inmates recovered
at FCI Lompoc if they either do not show symptoms or report that they do not have symptoms.
(Doc. No. 56 at 21) (citing Doc. No. 49-2 at ¶ 7.) However, there is also no evidence before the
court contradicting the numbers of active cases currently being reported by the BOP.

1 **C. Consistency With the § 3553(a) Factors**

2 Finally, even if defendant Mootz's motion was supported by a showing of extraordinary
3 and compelling reasons for his compassionate release, the undersigned is not persuaded that the
4 requested reduction in his sentence would be consistent with consideration of the sentencing
5 factors set forth at 18 U.S.C. § 3553(a).⁹ See *Parker*, 2020 WL 2572525, at *11.

6 As noted above, on August 23, 2017, defendant was sentenced to 108 months in the
7 custody of the BOP for receipt and distribution of material involving the sexual exploitation of
8 minors. (See Doc. Nos. 38, 39.) Forensic examinations of the devices seized from the
9 defendant's residence identified approximately 8,537 images of child pornography and 4 videos
10 of child pornography, for which the defendant was held accountable in calculating his offense
11 level, as well as 33,181 images of child erotica and 1 child erotica video. (Doc. No. 28 at 5–6.)
12 In light of this evidence, the nature of those depictions, the age of those depicted, and with
13 defendant's acceptance of responsibility acknowledged, it was determined that his total offense
14 level was 34 and his lack of criminal history placed him in category I. (*Id.* at 4–9.) This resulted
15 in an advisory sentencing guideline range calling for a term of imprisonment of 151 to 188. (*Id.*
16 at 3, 17.) The probation officer recommended a slightly below guideline sentence of 132 months
17 in BOP custody in light of consideration of the sentencing factors set forth in 18 U.S.C. §
18 3553(a). (*Id.* at 3) The undersigned varied downward to an even greater degree after considering
19 those factors and sentenced defendant Mootz to a 108-month term of imprisonment to be
20 followed by a 180-month term of supervised release with the mandatory penalty assessment and

21 _____
22 ⁹ Title 18 U.S.C. § 3553(a) provides that, in determining the sentence to be imposed, the court
23 shall consider: the nature and circumstances of the offense and the history and characteristics of
24 the defendant; the need for the sentence imposed to reflect the seriousness of the offense, promote
25 respect for the law, provide just punishment for the offense, afford adequate deterrence, protect
26 the public from further crimes of the defendant and provide the defendant with needed
27 educational or vocational training, medical care, or other correctional treatment in the most
28 effective manner; the kinds of sentences available; the kinds of sentence and the sentencing range
established for the applicable category of offense committed by the applicable category of
defendant as set forth in the guidelines; any pertinent policy statement issued by the Sentencing
Commission; the need to avoid unwarranted sentence disparities among defendants with similar
records who have been found guilty of similar conduct; and the need to provide restitution to any
victims of the offense.

1 imposed a restitution order in the amount of \$8,000. (Doc. No. 44.)

2 The Presentence Report noted that although defendant Mootz lacked any prior criminal
3 history, his first commission of a serious federal crime at the age of 61 could mean that there was
4 an increased risk of recidivism, despite statistical evidence that the risk of recidivism for other
5 types of offenses usually decreases as a person ages. (Doc. No. 28 at 19–21.) The Presentence
6 Report also reflected concern for recidivism based upon the defendant’s breach of the conditions
7 of his Pretrial Release supervision only one month after being released on supervision by
8 possessing a cellphone with access to the internet, resulting in his remand back into custody. (*Id.*
9 at 20.) In light of the probation officer’s expressed concerns in this regard, consideration of the
10 risk of recidivism on the part of the defendant weighs to some degree against the granting of
11 compassionate release. *See United States v. Diaz-Diaz*, No. 15-cr-02982-BAS-1, 2020 WL
12 5257872, at *4 (S.D. Cal. Sept. 3, 2020) (denying compassionate release and finding credence in
13 probation’s determination at sentencing that defendant was at a high risk for recidivism).

14 The government argues that defendant Mootz continues to present a danger to the
15 community. The government points to the decision in *United States v. Mitchell*, 2:12-cr-00401-
16 KJM, 2020 WL 2770070, at *3 (E.D. Cal. May 28, 2020), a case in which the court denied a
17 compassionate release motion and recognized the inherent dangerousness of child pornography
18 offenses. (Doc. No. 58 at 10.) In finding that the defendant in that case posed a danger to the
19 community, the court noted that the defendant (1) committed his crime at home, which is where
20 he wished to be released on home confinement; (2) had only served about one-third of his term of
21 imprisonment; (3) and provided no information showing he had engaged in any sort of
22 rehabilitation while incarcerated. *Mitchell*, 2020 WL 2770070, at *4.

23 Here, if the requested relief were granted, defendant Mootz too would be released to the
24 same place¹⁰ at which he committed the crime for which he was convicted and sentenced, and the

25 ¹⁰ Defendant requests that the court either reduce his sentence to time served or amend the
26 conditions of his supervised release to require him to serve what would have been the remaining
27 portion of his custodial term on home confinement. (Doc. No. 56 at 28.) First, the CARES Act
28 “‘authorizes the BOP—not courts—to expand the use of home confinement’ under 18 U.S.C. §
3624(c)(2).” *United States v. Fantz*, No. 5:14-cr-32-BR, 2020 WL 3492028, at *1 (E.D.N.C.
June 26, 2020) (quoting *United States v. Nash*, No. 19-cr-40022-01-DDC, 2020 WL 1974305, at

1 government persuasively argues that defendant has, through his conduct on pretrial release,
2 already cast some doubt on his ability to comply with the court's orders. (Doc. No. 58 at 11.)
3 Additionally, as of the date of this order, defendant Mootz has served only about 41 months of his
4 108-month sentence, or approximately 38 percent. *See United States v. Lonich*, No. 1:14-cr-
5 00139-SI-1, 2020 WL 26148743, at *3 (N.D. Cal. May 21, 2020) (denying motions for
6 compassionate release, noting, "the Court finds it significant that defendants have served far less
7 than half of their sentences"); *United States v. Shayota*, No. 1:15-cr-00264-LHK-1, 2020 WL
8 2733993 at *6 (N.D. Cal. May 26, 2020) ("The length of the sentence remaining is an additional
9 factor to consider in any compassionate release analysis,' with a longer remaining sentence
10 weighing against granting any such motion.") (quoting *Connell*, 2020 WL 2315858, at *6).¹¹

11 Although defendant has admittedly not completed any rehabilitative programming, he
12 argues that this is because sex offender treatment is not offered to prisoners confined at FCI
13 Lompoc. (Doc. No. 61 at 11–12.) Here, defendant has, appropriately, offered a proposed release
14 plan that includes participation in an emotional support group and Sharper Future, a program in
15 Sacramento that provides specialized treatment and counseling services to clients who are under

16 _____
17 *2 (D. Kan. Apr. 24, 2020) (collecting cases)); *see also United States v. Rice*, No. 12-cr-818-PJH,
18 2020 WL 3402274, at *4 (N.D. Cal. June 19, 2020) (denying a defendant's request for release to
19 home confinement made in conjunction with his motion for compassionate release because "the
20 court has no authority to designate the place of confinement" because the "Bureau of Prisons has
21 the statutory authority to choose the locations where prisoners serve their sentence."); *United*
22 *States v. Gray*, No. 4:12-cr-54-FL-1, 2020 WL 1943476, at *3 (E.D.N.C. Apr. 22, 2020) (holding
23 that the CARES Act "does not authorize the court to order defendant's placement in home
24 confinement"). The district court may only impose home detention as a condition of supervised
25 release, rather than as part of a sentence of imprisonment. *See Connell*, 2020 WL 2315858, at *5,
26 n.6 & *7. Accordingly, to do as defendant requests, the court would be required to reduce his
sentence to one of time served (i.e. 41 months) and modify the conditions of supervised release to
require home confinement for 67 months. The court is unwilling to do so for the reasons set forth
above. The BOP knows its capabilities to effectively and appropriately care for defendant Mootz
in a custodial setting. If the BOP determines that the defendant should be released to home
confinement to serve his sentence under the Attorney General's expanded authority in that regard
(*see fn. 2, above*) the court trusts it will do so. The issue that this court resolves is merely
whether in its view, under the applicable legal standards, defendant's sentence should be reduced.

27 ¹¹ The government emphasizes that the statutory mandatory minimum sentence for defendant's
28 offense of conviction was a five-year prison term and that he has not even completed serving that
much time. (Doc. No. 58 at 9–10) (citing 18 U.S.C. § 2252(a)(2)).

1 supervision in the Eastern District of California. (Doc. No. 55 at 4.) It is the case that some
2 courts have granted compassionate release and included in the conditions of supervised release a
3 specific sex offender treatment program. *See United States v. Hanson*, No. 6:13-cr-00378-AA-1,
4 2020 WL 3605845, at *6 (D. Or. July 2, 2020) (noting that defendant “had no plan for a sex
5 offender treatment assessment and no treatment provider in mind” and directing defendant to
6 participate in a specific, well-established treatment program in close proximity to defendant’s
7 home); *Mitchell*, 2020 WL 2770070, at *4 (“Absent any evidence supporting defendant’s
8 rehabilitation or a detailed release plan imposing conditions to prevent the likelihood of
9 defendant’s reoffending from his home where he requests placement, defendant has not met his
10 burden to show releasing him to home confinement will not pose a danger to the public.”). While
11 acknowledging defendant’s proposal to participate in a rehabilitation program if released, the
12 court recognizes that even actual rehabilitation alone is not enough to warrant compassionate
13 release. *See* 28 U.S.C. § 994(t); U.S.S.G. § 1B1.13, cmt. n.3.

14 In conclusion, the court finds that a reduction of defendant’s 108-month sentence
15 effectively to one of less than three and a half years would not adequately reflect the seriousness
16 of his offense of conviction, promote respect for the law, provide just punishment, or afford
17 adequate deterrence to criminal conduct. *See United States v. Purry*, No. 2:14-cr-00332-JAD-
18 VCF, 2020 WL 2773477, at *2 (D. Nev. May 28, 2020); *Shayota*, 2020 WL 2733993 at *5; 18
19 U.S.C. § 3553(a).

20 CONCLUSION

21 Because defendant Mootz has failed to demonstrate that “extraordinary and compelling”
22 reasons exist justifying his release under 18 U.S.C. § 3582(c)(1)(A) or that his release from
23 imprisonment at this time would be consistent with consideration of the sentencing factors set
24 forth in 18 U.S.C. § 3553(a), his motion for compassionate release (Doc. No. 56) is denied.

25 IT IS SO ORDERED.

26 Dated: September 27, 2020

27 
28 _____
UNITED STATES DISTRICT JUDGE