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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JONATHAN BENNETT,  
Plaintiff,  
v.  
BURTON, et al.,  
Defendants.

No. 2:21-cv-1340 WBS KJN P

FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner, proceeding pro se, with a civil rights complaint pursuant to 42 U.S.C. § 1983. Defendants’ motion for judgment on the pleadings is before the court. As discussed below, the undersigned recommends that the motion be granted.

Plaintiff’s Amended Complaint<sup>1</sup>

This action proceeds on plaintiff’s amended complaint against defendants U. Garcia and F. Moreno. (ECF No. 43.) Plaintiff is a California state prisoner housed at the California Health Care Facility (“CHCF”) in Stockton. (ECF No. 43 at 2.) Plaintiff alleges as follows. On December 19, 2020, plaintiff was confirmed to be negative for COVID-19 based on a test administered on December 17, 2020.<sup>2</sup> Inmate Conwell, housed with plaintiff at the time in an

<sup>1</sup> Plaintiff’s claims against Warden Burton were dismissed on January 18, 2023. (ECF No. 50.)

<sup>2</sup> Plaintiff’s Exhibit D-3 shows that the COVID-19 test was administered at 5:00 a.m. on December 17, 2020, and the results were made available at 1:30 p.m. on December 19, 2020.

1 open dorm setting, was also tested on December 17, 2020, and his December 19, 2020 results  
2 were positive for COVID-19. (ECF No. 43 at 29-30.) Previously when inmates in the dorm  
3 tested positive, they were removed from the dorm and separately housed in isolation. (ECF No.  
4 43 at 33.) But on December 19, 2020, 34 of the 51 inmates housed in the dorm tested positive for  
5 COVID-19. (Id. at 34.) Staff were notified and informed of this situation on December 19, 2020.  
6 (Id.) Despite notifying defendants of these circumstances, defendants failed to intervene to  
7 remedy the situation. As a result, plaintiff was exposed to twice as many confirmed COVID-19  
8 positive inmates in an open dorm setting and required to use the same shower and restroom  
9 facilities. Plaintiff contracted COVID-19 and now suffers from “Post Acute COVID Syndrome,”  
10 or “Long COVID,” experiencing debilitating COVID-19 symptoms. Defendants allegedly  
11 violated plaintiff’s Eighth Amendment rights by allowing him to remain housed in an open dorm  
12 with inmates who tested positive for COVID-19, knowing that plaintiff was negative for COVID-  
13 19 at that time. Plaintiff seeks money damages.

#### 14 Legal Standard for Judgment on the Pleadings

15 Under Federal Rule of Civil Procedure 12(c), judgment on the pleadings may be granted  
16 when, accepting as true all material allegations contained in the nonmoving party’s pleadings, the  
17 moving party is entitled to judgment as a matter of law. Chavez v United States, 683 F.3d 1102,  
18 1108 (9th Cir. 2012). The applicable standard is essentially identical to the standard for a motion  
19 to dismiss under Rule 12(b)(6). United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.,  
20 637 F.3d 1047, 1055 n.4 (9th Cir. 2011). Thus, although the Court must accept well-pleaded  
21 facts as true, it is not required to accept mere conclusory allegations or conclusions of law. See  
22 Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009).

23 A motion for judgment on the pleadings should be granted “when there is no issue of  
24 material fact in dispute, and the moving party is entitled to judgment as a matter of law.”  
25 Fleming v. Pickard, 581 F.3d 922, 925 (9th Cir. 2009).

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28 (ECF No. 43 at 24.)

1 The Parties' Arguments

2 Defendants U. Garcia and F. Moreno contend that plaintiff's allegations are vague, and  
3 that plaintiff failed to plead facts advising defendants what, if anything, they did wrong. Plaintiff  
4 is required to allege facts showing either direct, personal participation of each defendant in the  
5 alleged harm, or some sufficient causal connection between the defendant's conduct and the  
6 alleged deprivation. Defendants contend the amended complaint should be dismissed because it  
7 does not demonstrate "how each [defendant] was personally responsible for the conditions in  
8 plaintiff's housing unit." Hill v. Diaz, 2022 WL 2046204 at \*10 (C.D. Cal. Apr. 11, 2022).  
9 Absent such facts, defendants argue that plaintiff fails to show each defendant caused the  
10 violation, and therefore "fails to state a claim against any defendant." Id. The allegation that they  
11 "allowed" plaintiff's housing fails to describe any particular conduct or action taken by each  
12 defendant. Simply stating each defendant's rank is insufficient to demonstrate liability.

13 Similarly, plaintiff includes no facts demonstrating that each defendant acted with  
14 deliberate indifference, as required under the Eighth Amendment. Based on the absence of facts  
15 as to each named defendant, plaintiff fails to demonstrate that each defendant knew of yet  
16 intentionally disregarded a serious risk to plaintiff's health or safety. While COVID-19 is a  
17 serious health issue, plaintiff alleges no facts demonstrating that the conduct of defendants on  
18 December 19, 2020, was more likely than other factors to be the cause of plaintiff contracting the  
19 virus. Because it is likely that all of the inmates in the dorm were tested on December 17, along  
20 with plaintiff and inmate Conwell, it appears that plaintiff was housed with all of these inmates  
21 for about two and a half days before the test results revealed the positive results.

22 Further, plaintiff alleges no facts suggesting the other inmates' positive COVID status  
23 only began when tested on December 17. Plaintiff concedes that prior tests were administered on  
24 December 10. (ECF No. 43 at 22.) Thus, the 34 inmates who tested positive on December 19  
25 had to have contracted the virus at some point in the preceding seven days, but plaintiff could not  
26 allege any fact as to exactly when those 34 inmates became COVID-19 positive. Similarly, while  
27 plaintiff appears to contend he contracted the virus after December 19, there is no definitive way  
28 to know exactly when plaintiff contracted the virus but given that he was housed with 34 inmates

1 who were positive for the 2.5 days before the test results were known, it is just as likely that  
2 plaintiff contracted the virus before defendants became aware of the positive test results. Such  
3 vague time lines and causal connections are insufficient to state a claim. Also, defendants'  
4 alleged misconduct in "allowing" plaintiff to remain housed with other inmates after they had  
5 already been positive for at least 2.5 days, and possibly as many as 9.5 days, does not rise to the  
6 level of deliberate indifference.

7 In addition, defendants contend qualified immunity bars plaintiff's claim for damages,  
8 arguing that because plaintiff failed to establish defendants' actions were deliberately indifferent  
9 or caused plaintiff's injury, they are entitled to qualified immunity under the first prong. Saucier  
10 v. Katz, 533 U.S. 194, 201 (2001) (the alleged facts must show a violation of a federal statutory  
11 or constitutional right). As to the second prong, that the right in question was clearly established  
12 at the time defendants acted, id., defendants contend there is no current authority establishing that  
13 a reasonable correctional officer could have acted to prevent transmission of COVID-19 given the  
14 substantial exposure plaintiff had already experienced.

#### 15 Plaintiff's Position

16 Plaintiff opposes the motion on the grounds that he is only required to set forth a short and  
17 plain statement of facts, alleging only that a constitutional violation occurred and that it was  
18 committed by someone acting under color of state law, which is what he did. (ECF No. 56 at 5.)  
19 Plaintiff asserts that he was not afforded the opportunity to expound on the required nexus  
20 between defendants and the alleged facts because of "defendants' dilatory tactics and/or bad faith  
21 practices" to prevent plaintiff from using discovery to establish such nexus, pointing to their  
22 motion to stay discovery. (ECF No. 56 at 6.)

23 In terms of deliberate indifference, plaintiff highlights Judge Tigar's order requiring the  
24 CDCR to set aside isolation and quarantine bed space at every prison in response to the  
25 widespread COVID-19 outbreak at San Quentin resulting in 1437 active cases and 19+ deaths.  
26 (ECF No. 56 at 10.) Plaintiff argues that each and every prison official in California was put on  
27 notice of the high risk COVID-19 posed to inmates, and tents were placed at facilities to help  
28 with increased housing needs. Further, this demonstrates why discovery is important -- to

1 illuminate the role of each defendant and his participation and connection to the alleged  
2 violations. Without such discovery plaintiff is at a disadvantage. (ECF No. 56 at 13.)

3 Defendants' Reply

4 Defendants counter that plaintiff's argument that he need only allege that a constitutional  
5 violation occurred and that it was committed by someone acting under color of state law  
6 oversimplifies the pleading requirement. (ECF No. 58 at 2.) Plaintiff must provide facts  
7 plausibly demonstrating that he states a specific legal claim, and that liability attaches to the  
8 named defendants. (ECF No. 58 at 2) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555  
9 (2007); Ashcroft, 556 U.S. at 678.) Plaintiff's vague claim that defendants "allowed" plaintiff to  
10 be housed with inmates infected with the virus is insufficient to explain what each defendant did  
11 or did not do, what his role was, as well as the circumstances in which his action or omission took  
12 place. (ECF No. 58 at 2.)

13 Second, plaintiff's listing of legal authorities defining deliberate indifference and what is  
14 required to prove it fails to provide factual support as to how each of the named defendants were  
15 allegedly deliberately indifferent and fails to put defendants on notice of what each did wrong.

16 Third, plaintiff failed to address defendants' argument that it is speculation that plaintiff  
17 contracted COVID-19 as a result of the defendants' actions or inactions. Because for at least 2.5  
18 days plaintiff had already been housed with 34 inmates who eventually tested positive, plaintiff's  
19 contention that he contracted the virus only after December 19 is mere speculation for which the  
20 amended complaint contains no factual basis.

21 Finally, defendants argue that plaintiff concedes defendants are entitled to qualified  
22 immunity because plaintiff failed to address the issue.

23 Eighth Amendment Standards

24 Prison conditions violate the Eighth Amendment if they are incompatible with "the  
25 evolving standards of decency that mark the progress of a maturing society." Rhodes v.  
26 Chapman, 452 U.S. 337, 346 (1981). Prison officials may not deprive prisoners of the "minimal  
27 civilized measure of life's necessities." Farmer v. Brennan, 511 U.S. 825, 834 (1994) (internal  
28 quotations and citations omitted). The Eighth Amendment "requires that inmates be furnished

1 with the basic human needs, one of which is reasonable safety.” Helling v. McKinney, 509 U.S.  
2 25, 33 (1993) (citation and internal quotations omitted). In a “failure-to-protect” claim, a prisoner  
3 must show that a prison official’s act or omission (1) was objectively, sufficiently serious, and (2)  
4 the official was subjectively, deliberately indifferent to inmate’s health or safety. Farmer, 511  
5 U.S. at 834; Hearns v. Terhune, 413 F.3d 1036, 1042 (9th Cir. 2005).

6 In order to state an Eighth Amendment claim, a plaintiff must allege that prison officials’  
7 conduct was sufficiently harmful (the “objective” test), and that the officials acted with a  
8 sufficiently culpable state of mind (the “subjective” test). See Wilson v. Seiter, 501 U.S. 294,  
9 298 (1991); Johnson v. Lewis, 217 F.3d 726, 731 (9th Cir. 2000), cert. denied, 532 U.S. 1065  
10 (2001). The objective test looks to whether the deprivation was sufficiently serious, as  
11 determined by the conditions alleged. See Farmer, 511 U.S. at 834. The plaintiff must allege  
12 conditions so serious as to be outside the bounds of those which “today’s society chooses to  
13 tolerate.” Helling, 509 U.S. at 36.

14 The subjective test requires “more than ordinary lack of due care for the prisoner’s interest  
15 or safety.” Farmer, 511 U.S. at 835 (quotation omitted). “[D]eliberate indifference” is the  
16 minimum showing of culpability necessary to state a claim. See id. at 834; Estelle v. Gamble,  
17 429 U.S. 97, 104 (1976). To be liable for “deliberate indifference,” a prison official must “both  
18 be aware of facts from which the inference could be drawn that a substantial risk of serious harm  
19 exists, and he must also draw the inference.” Farmer, 511 U.S. at 837. “[A]n official’s failure to  
20 alleviate a significant risk that he should have perceived but did not, while no cause for  
21 commendation, cannot . . . be condemned as the infliction of punishment.” Id. at 838. A prison  
22 official may be liable for an Eighth Amendment violation if the plaintiff plausibly alleges that  
23 such official, acting with “deliberate indifference,” caused actionable harm. See Castro v. Cnty.  
24 of Los Angeles, 833 F.3d 1060, 1068 (9th Cir. 2016) (en banc) (distinguishing Eighth  
25 Amendment and Fourteenth Amendment deliberate indifference standards); Ashcroft, 556 U.S. at  
26 678.

27 Prison officials have a constitutional obligation to protect inmates from serious  
28 communicable diseases. See Helling, 509 U.S. at 33; Fuller v. Houston, 2021 WL 6496742, at \*3

1 (C.D. Cal. Nov. 19, 2021), report and recommendations adopted, 2022 WL 225671 (C.D. Cal.  
2 Jan. 25, 2022); Maney v. Brown, 516 F. Supp. 3d 1161, 1179 (D. Or. 2021) (collecting cases  
3 recognizing prison officials’ duty to protect inmates from exposure to communicable diseases  
4 under the Eighth Amendment).

5 As to the risks posed by COVID-19, “no one questions that [COVID-19] poses a  
6 substantial risk of serious harm to [prisoners].” Plata v. Newsom, 445 F. Supp. 3d 557, 559 (N.D.  
7 Cal. 2020); see also Martinez v. Sherman, 2022 WL 126054, at \*6 (E.D. Cal. Jan. 13, 2022) (“It  
8 is clear that COVID-19 poses a substantial risk of serious harm.”) (citations omitted); Fuller,  
9 2021 WL 6496742, at \*4 (“There is absolutely no question that COVID-19 is a serious  
10 communicable disease.”) (citations omitted).

11 In examining whether a prison official subjectively acted with deliberate indifference to  
12 the risk of COVID-19, the key inquiry is not whether the official responded perfectly, complied  
13 with every CDC guideline, or completely averted the risk; instead, the key inquiry is whether the  
14 official “responded reasonably to the risk.” Benitez v. Sierra Conservation Ctr., Warden, 2021  
15 WL 4077960, at \*5 (E.D. Cal. Sept. 8, 2021); see also Plata, 445 F. Supp. 3d at 564 (“The  
16 question is whether [p]laintiffs have demonstrated that [d]efendants’ response to the COVID-19  
17 epidemic is unreasonable.”). A prison official responds reasonably to the risk when he has “not  
18 disregarded a known risk or failed to take any steps to address the risk,” even if the prison’s  
19 response has been inadequate. Benitez, 2021 WL 4077960, at \*6.

20 To state a claim under 42 U.S.C. § 1983, plaintiff must allege, among other things, a  
21 causal link between the defendants’ action or inaction and his alleged constitutional harm. The  
22 requisite causal connection can be established when a person (1) “does an affirmative act,  
23 participates in another’s affirmative acts, or omits to perform an act which he is legally required  
24 to do that causes the deprivation;” or (2) “set[s] in motion a series of acts by others which the  
25 actor knows or reasonably should know would cause others to inflict the constitutional injury.”  
26 Lacey v. Maricopa Cnty., 693 F.3d 896, 915 (9th Cir. 2012) (en banc) (internal citation omitted).  
27 Allegations regarding causation must be individualized and must focus on the duties and  
28 responsibilities of the defendant “whose acts or omissions are alleged to have caused a

1 constitutional deprivation.” Leer v. Murphy, 844 F.2d 628, 633 (9th Cir. 1988) (citations  
2 omitted).

### 3 Discussion

4 The undersigned is persuaded that the amended complaint is devoid of specific facts  
5 identifying what each defendant did or did not do that demonstrates that each was deliberately  
6 indifferent to a substantial risk of harm to plaintiff or was responsible for plaintiff’s injuries. It is  
7 public knowledge that COVID-19 poses a substantial risk of harm. But here, plaintiff alleges  
8 only that defendants “allowed” plaintiff to remain in the housing unit after learning 34 inmates  
9 tested positive. He includes no specific facts demonstrating that each was responsible for housing  
10 decisions, either to retain plaintiff in the dorm or not to move plaintiff from the dorm, or that each  
11 had the ability to alter plaintiff’s housing. Plaintiff provides no facts showing that each defendant  
12 was deliberately indifferent.

13 Further, as argued by defendants, there are no specific facts making the required causal  
14 connection between the acts or omissions of defendants and plaintiff’s contraction of COVID-19.  
15 The question is whether plaintiff’s asserted injury is “fairly traceable” to each defendant’s  
16 conduct. Ecological Rights Foundation v. Pacific Lumber Co., 230 F.3d 1141, 1152 (9th Cir.  
17 2000). In other words, “whether the alleged injury can be traced to the defendant’s challenged  
18 conduct, rather than to that of some other actor not before the court.” Id. (citation omitted). A  
19 causal connection “cannot be too speculative, or rely on conjecture about the behavior of other  
20 parties, but need not be so airtight at this stage . . . as to demonstrate plaintiff[ ] would succeed on  
21 the merits.” Id.

22 Here, plaintiff includes no facts as to each defendant’s duties and responsibilities in  
23 connection with the alleged constitutional deprivation. Leer, 844 F.2d at 633. Thus, it is not  
24 clear they were responsible for plaintiff’s housing, or whether someone else, not named as a  
25 defendant, was responsible.

26 Further, plaintiff’s amended complaint demonstrates that there was a two and a half day  
27 gap between the administration of the COVID-19 test and December 19, 2020, the date the results  
28 were available. Thus, at a minimum, plaintiff was already exposed to COVID-19 during this two



1 and a half day period when no one knew 34 inmates had contracted the virus. Plaintiff includes  
2 no facts showing that had he been immediately removed from the dorm it is likely he would not  
3 have contracted the virus.

4 Plaintiff appended the policy for quarantine of patients who have been exposed to  
5 COVID-19, highlighting “[e]xposed persons shall not be housed in dorms with those who are not  
6 known to be exposed.” (ECF No. 43 at 18.) However, by December 19, 2020, apparently  
7 unbeknownst to prison staff, the 17 inmates housed in plaintiff’s dorm had already been exposed  
8 to the 34 inmates who were provided positive test results the afternoon of December 19, 2020,  
9 based on COVID-19 tests administered on December 17, 2020. In addition, because the prior test  
10 was administered on December 11, 2020 (ECF No. 43 at 33), and it is possible that some of those  
11 34 inmates had contracted COVID-19 sometime after December 11, 2020, plaintiff’s exposure  
12 could have been longer than 2.5 days. In any event, because 34 of the inmates had contracted  
13 COVID-19 by December 19, 2020, plaintiff had already been exposed. Therefore, actions or  
14 omissions that took place after December 19, 2020 could not be based on an allegation that  
15 plaintiff was wrongfully housed with inmates who tested positive for COVID-19 when he tested  
16 negative on December 19, because he had been housed with such inmates since December 11,  
17 2020. Moreover, he cannot allege, with a degree of certitude, what day he contracted COVID-19.  
18 Because plaintiff had already been exposed to COVID-19, any failure of either defendant to  
19 transfer plaintiff after December 19, 2020, would not have certainly prevented him from  
20 contracting the virus.

21 Plaintiff’s amended complaint also demonstrates that prison officials at CSP-SAC were  
22 taking steps to protect the inmate population from COVID-19. It appears they were testing  
23 inmates on a weekly basis and, initially, would move an inmate who tested positive. Here,  
24 however, a large number of inmates tested positive and by the time the results were known, it is  
25 likely the uninfected inmates had been exposed to the virus. Thus, it is unclear at this juncture  
26 what reasonable steps could or should be taken; plaintiff contends he should have been moved,  
27 but should all 17 of the inmates who did not receive positive results have been moved? Or was it  
28 reasonable to permit such inmates to remain in the dorm given their obvious exposure? Such

1 unanswerd questions suggest that any failure to act after December 19, 2020, constitutes  
2 negligence, not deliberate indifference, particularly absent facts not pled in the amended  
3 complaint or provided in plaintiff’s opposition and given the contemporary uncertainty regarding  
4 not only the nature of the virus but also the efficacy of various containment or mitigation  
5 strategies. See Hope v. Warden York Cty. Prison, 972 F.3d 310, 330 (3d Cir. 2020) (“Although  
6 the District Court criticized the Government for the lack of ‘effective containment measures,’ and  
7 for not doing ‘nearly enough’ to combat COVID-19, those critiques are not tantamount to  
8 establishing the Government’s deliberate indifference.”) (citation omitted); Wilson v. Williams,  
9 961 F.3d 829, 841 (6th Cir. 2020) (Bureau of Prisons’ early efforts to curtail the spread of  
10 COVID-19 demonstrated “the opposite of a disregard of a serious health risk”); Dawson v. Asher,  
11 2020 WL 1704324, at \*12 (W.D. Wash. Apr. 8, 2020) (“No one can entirely guarantee safety in  
12 the midst of a global pandemic.”).

13 As to plaintiff’s objection that a short and plain statement of allegations is proper, while  
14 detailed factual allegations are not required, “[t]hreadbare recitals of the elements of a cause of  
15 action, supported by mere conclusory statements, do not suffice.” Ashcroft, 556 U.S. at 678  
16 (citing Bell Atlantic Corp., 550 U.S. at 555). Plaintiff must set forth “sufficient factual matter,  
17 accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft, 556 U.S. at 678  
18 (quoting Bell Atlantic Corp., 550 U.S. at 570).

19 A claim has facial plausibility when the plaintiff pleads factual  
20 content that allows the court to draw the reasonable inference that the  
21 defendant is liable for the misconduct alleged. The plausibility  
22 standard is not akin to a “probability requirement,” but it asks for  
23 more than a sheer possibility that a defendant has acted unlawfully.  
Where a complaint pleads facts that are merely consistent with a  
defendant’s liability, it stops short of the line between possibility and  
plausibility of entitlement to relief.

24 Ashcroft, 556 U.S. at 678 (citations and quotation marks omitted). Although legal conclusions  
25 can provide the framework of a complaint, they must be supported by facts, and are not entitled to  
26 the assumption of truth. Id. at 1950. Here, plaintiff failed to provide specific facts demonstrating  
27 either defendant was deliberately indifferent to or responsible for plaintiff’s injuries.

28 ///

1 Plaintiff also argues that discovery is necessary to “illuminate the role each defendant  
2 played in [his] claim.” (ECF No. 56 at `1.)

3 “District courts need not condone the use of discovery to engage in ‘fishing  
4 expedition[s].’” Rivera v. NIBCO, Inc., 364 F.3d 1057, 1072 (9th Cir. 2004) (quoting Exxon  
5 Corp. v. Crosby-Miss. Ress., Ltd., 40 F.3d 1474, 1487 (5th Cir.1995)). “[F]air notice pleading  
6 under Rule 8 is not intended to give parties free license to engage in unfounded fishing  
7 expeditions on matters for which they bear the burden of proof at trial.” Perez v. Gordon &  
8 Wong Law Grp., P.C., 2012 WL 1029425, at \*8 (N.D. Cal. Mar. 26, 2012). Thus, “litigants are  
9 not permitted to ‘unlock the doors of discovery . . . armed with nothing more than conclusions;  
10 [t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory  
11 statements, do not suffice.’” Riley v. Modesto Irrigation Dist., 2011 WL 5828195, at \*3 (E.D.  
12 Cal. Nov. 18, 2011) (citing Bell Atlantic Corp., 550 U.S. at 555) (internal citations omitted).  
13 Here, plaintiff’s allegation that defendants “allowed” plaintiff to remain in the dorm is a mere  
14 conclusion rather than providing specific facts explaining their roles and what they did or did not  
15 do. Thus, plaintiff has not pleaded enough to warrant discovery, as the amended complaint lacks  
16 more than just a “missing link.”

17 It is true that discovery helps litigants adduce evidence in support of their claims. But at  
18 the pleading stage, plaintiff is required to allege specific facts that establish liability of each  
19 individual named as a defendant. Ashcroft, 556 U.S. at 678. Here, plaintiff identifies the  
20 defendants as a sergeant and a lieutenant, but such labels offer no insight to their roles, actions, or  
21 inactions, if any, related to plaintiff’s housing on or after December 19, 2020. The undersigned is  
22 persuaded that plaintiff’s sole allegation -- by “allowing” plaintiff to remain in the dorm -- is too  
23 general and vague to ascribe personal liability to each defendant. The “sheer possibility that a  
24 defendant has acted unlawfully” is not sufficient to state a cognizable claim, and “facts that are  
25 merely consistent with a defendant’s liability” fall short. Ashcroft, 556 U.S. at 678 (internal  
26 quotation marks & citation omitted).

27 Finally, litigants, including pro se litigants, are charged with conducting reasonable  
28 inquiry prior to bringing their claims to federal court:

1 (b) Representations to the Court. By presenting to the court a  
2 pleading, written motion, or other paper--whether by signing, filing,  
3 submitting, or later advocating it--an attorney or unrepresented party  
certifies that to the best of the person's knowledge, information, and  
belief, formed after an inquiry reasonable under the circumstances:

4 (1) it is not being presented for any improper purpose, such as to  
5 harass, cause unnecessary delay, or needlessly increase the cost of  
litigation;

6 (2) the claims, defenses, and other legal contentions are warranted by  
7 existing law or by a nonfrivolous argument for extending, modifying,  
or reversing existing law or for establishing new law;

8 (3) the factual contentions have evidentiary support or, if specifically  
9 so identified, will likely have evidentiary support after a reasonable  
opportunity for further investigation or discovery; and

10 (4) the denials of factual contentions are warranted on the evidence  
11 or, if specifically so identified, are reasonably based on belief or a  
lack of information.

12 Fed. R. Civ. P. 11(b). By signing an amended complaint, plaintiff certifies he made reasonable  
13 inquiry and has evidentiary support for his allegations, and for violation of this rule the court may  
14 impose sanctions sufficient to deter repetition by plaintiff or others. Fed. R. Civ. P. 11.

15 In conclusion, taking plaintiff's allegations as true, that Lt. Garcia and Sgt. Moreno  
16 "allowed" plaintiff to remain housed in a dorm setting with 34 inmates who were positive for  
17 COVID-19 on December 19, 2020, and plaintiff tested negative on December 19, 2020, such  
18 allegations are insufficient to demonstrate each defendant's individual participation in plaintiff's  
19 housing, their deliberate indifference, or a causal connection between each of their specific  
20 actions or omissions and plaintiff contracting COVID-19.

### 21 Qualified Immunity

22 The defense of qualified immunity protects government officials from liability for civil  
23 damages as long as their conduct does not violate clearly established constitutional or statutory  
24 rights of which a reasonable official would have known. Pearson v. Callahan, 555 U.S. 223, 231  
25 (2009); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). "The protection of qualified immunity  
26 applies regardless of whether the government official's error is a mistake of law, a mistake of  
27 fact, or a mistake based on mixed questions of law and fact." Pearson, 555 U.S. at 231 (citation  
28 and internal quotations omitted).

1 In Saucier v. Katz, 533 U.S. 194 (2001), the Supreme Court established a two-step  
2 sequence for determining qualified immunity claims. The initial inquiry is whether, taken in the  
3 light most favorable to the party asserting the injury, the facts alleged show the officer’s conduct  
4 were the allegations established, there is no necessity for further inquiries concerning qualified  
5 immunity. On the other hand, if a violation could be made out on a favorable view of the parties’  
6 submissions, the next sequential step is to ask whether the right was clearly established.” Id.  
7 Courts may exercise their “sound discretion” in deciding which of the two steps to address first,  
8 “in light of the circumstances in the particular case at hand.” Pearson, 555 U.S. at 236.

9 At least one district court has stated that “the law is clearly established that individuals in  
10 government custody have a constitutional right to be protected against a heightened exposure to  
11 serious, easily communicable diseases,” and found that such “clearly established right extends to  
12 protection from COVID-19.” Jones v. Sherman, 2022 WL 783452, at \*10 (E.D. Cal. Mar. 11,  
13 2022), report and recommendation adopted, 2022 WL 4238875 (E.D. Cal. Sept. 14, 2022). The  
14 undersigned finds such reasoning persuasive.

15 That said, because plaintiff fails to provide adequate facts concerning the involvement of  
16 defendants, the court is unable to evaluate the second prong of qualified immunity at this time and  
17 declines to do so. Defendants’ request is denied without prejudice.

#### 18 Leave to Amend

19 Federal Rule of Civil Procedure 15 provides that leave to amend should be freely given  
20 “when justice so requires.” Fed. R. Civ. P. 15(a)(2). The Court may not dismiss a complaint  
21 without leave to amend unless “it is absolutely clear that the deficiencies of the complaint could  
22 not be cured by amendment.” Akhtar v. Mesa, 698 F.3d at 1212 (citation omitted); see also  
23 Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc) (district court should grant leave  
24 to amend “unless it determines that the pleading could not possibly be cured by the allegation of  
25 other facts”) (citation and internal quotations omitted).

26 Plaintiff has been provided one opportunity to amend his complaint. However, it appears  
27 that plaintiff misunderstood his pleading obligations under Rule 8 and Ashcroft. Moreover, while  
28 it appears unlikely plaintiff can amend to state a claim concerning his continued housing after

1 December 19, 2020, it is not absolutely clear, particularly given plaintiff's failure to provide  
2 specific facts. In addition, some of the interrogatories and requests for admissions propounded to  
3 defendants suggest that plaintiff is aware of facts that might meet the pleading standard, at least  
4 with regard to his claims of deliberate indifference. (See, e.g., ECF No. 60 at 43-44, 70, 72.)  
5 Thus, the undersigned recommends that, in an abundance of caution, plaintiff be granted one final  
6 opportunity to amend.


7 Conclusion

8 Accordingly, IT IS HEREBY RECOMMENDED that:

- 9 1. Defendants' motion for judgment on the pleadings (ECF No. 52) be granted;  
10 2. Plaintiff's amended complaint be dismissed; and  
11 3. Plaintiff be granted thirty days to file a second amended complaint.

12 These findings and recommendations are submitted to the United States District Judge  
13 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
14 after being served with these findings and recommendations, any party may file written  
15 objections with the court and serve a copy on all parties. Such a document should be captioned  
16 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the  
17 objections shall be filed and served within fourteen days after service of the objections. The  
18 parties are advised that failure to file objections within the specified time may waive the right to  
19 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

20 Dated: April 18, 2023

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23 KENDALL J. NEWMAN  
24 UNITED STATES MAGISTRATE JUDGE

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