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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

ANA M. LUGO,	)	NO. CV 09-01446-MAN
	)	
Plaintiff,	)	MEMORANDUM OPINION
	)	
v.	)	AND ORDER
	)	
MICHAEL J. ASTRUE,	)	
Commissioner of Social Security,	)	
	)	
Defendant.	)	
_____	)	

Plaintiff filed a Complaint on March 5, 2009, seeking review of the denial by the Social Security Commissioner ("Commissioner") of plaintiff's application for a period of disability and disability insurance benefits ("DIB"). On March 27, 2009, the parties consented to proceed before the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(c). The parties filed a Joint Stipulation on September 28, 2009, in which: plaintiff seeks an order reversing the Commissioner's decision and awarding benefits or, in the alternative, remanding the matter for further administrative proceedings; and defendant seeks an order affirming the Commissioner's decision. The Court has taken the parties' Joint Stipulation under submission without oral argument.







1 The Court will uphold the Commissioner's decision when the evidence  
2 is susceptible to more than one rational interpretation. Burch v.  
3 Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). However, the Court may  
4 review only the reasons stated by the ALJ in his decision "and may not  
5 affirm the ALJ on a ground upon which he did not rely." Orn, 495 F.3d  
6 at 630; see also Connett, 340 F.3d at 874. The Court will not reverse  
7 the Commissioner's decision if it is based on harmless error, which  
8 exists only when it is "clear from the record that an ALJ's error was  
9 'inconsequential to the ultimate nondisability determination.'" Robbins  
10 v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006)(quoting Stout v.  
11 Comm'r, 454 F.3d 1050, 1055 (9th Cir. 2006)); see also Burch, 400 F.3d  
12 at 679.

#### 13 14 **DISCUSSION**

15  
16 Plaintiff alleges the following four issues: (1) whether the ALJ  
17 properly considered the opinion of physician's assistant Edgar James  
18 Jackson; (2) whether the ALJ properly considered the type, dosage, and  
19 side effects of plaintiff's medications; (3) whether the ALJ properly  
20 considered the actual mental and physical demands of plaintiff's past  
21 relevant work; and (4) whether the ALJ properly considered the lay  
22 witness testimony. (Joint Stipulation ("Joint Stip.") at 2-3.)

#### 23 24 **I. The ALJ Was Not Required To Discuss The "Opinion" Of Physician's** 25 **Assistant Edgar James Jackson.**

26  
27 An ALJ is not required to discuss every piece of evidence in the  
28 record. See Howard v. Barnhart, 341 F.3d 1006, 1012 (9th Cir. 2003)

1 ("[I]n interpreting the evidence and developing the record, the ALJ does  
2 not need 'to discuss every piece of evidence.'")(citation omitted). The  
3 Social Security Administration's regulations state that, "[i]n addition  
4 to evidence from the acceptable medical sources . . . we may also use  
5 evidence from other sources to show the severity of your impairment(s)  
6 and how it affects your ability to work." 20 C.F.R. § 404.1513(d). An  
7 ALJ does not commit legal error by failing to incorporate a two-word  
8 diagnosis by a physician's assistant who has only examined plaintiff on  
9 one occasion. (A.R. 676-79.)

10  
11 On September 12, 2008, plaintiff visited the urgent care center at  
12 Kaiser Permanente ("Kaiser"). (A.R. 676.) A physician's assistant,  
13 Edgar James Jackson, examined plaintiff. (*Id.*) Mr. Jackson issued an  
14 after visit summary that lists plaintiff's vitals and medications and  
15 reflects a diagnosis of "anxiety disorder." (A.R. 676-79.) The after  
16 visit summary contains no other relevant information, including a  
17 description of what symptoms plaintiff was experiencing. The record  
18 reflects that Mr. Jackson only examined plaintiff on this occasion and  
19 does not indicate that a physician reviewed the summary.

20  
21 Plaintiff contends that the ALJ erred in failing to discuss this  
22 after visit summary and provide a "legally sufficient" reason for  
23 dismissing it. (Joint Stip. at 3.) As an initial matter, Mr. Jackson  
24 is not an acceptable medical source. 20 C.F.R. § 404.1513(a). He is a  
25 physician's assistant, and there is no evidence that he worked closely  
26 with any of plaintiff's doctors such that he was acting as a doctor's  
27 agent and could be considered an acceptable medical source. See Gomez  
28 v. Chater, 74 F.3d 967, 970-71 (9th Cir. 1996)(finding that a nurse

1 practitioner who worked in conjunction with, and under the supervision  
2 of, a physician could be considered an acceptable medical source).  
3 Thus, the after visit summary is not a medical opinion that the ALJ was  
4 required to discuss. 20 C.F.R. § 404.1527(a)(2) ("Medical opinions are  
5 statements from physicians or psychologists or other acceptable medical  
6 sources . . . ."). Instead, a physician's assistant constitutes an  
7 "other source," whose opinion the ALJ *may*, but is not required to,  
8 consider. 20 C.F.R. § 404.1513(d)(1).

9  
10 Here, the after visit summary reflects a mere two-word diagnosis by  
11 a physician's assistant followed by what appears to be a cut and paste  
12 summary of the standard treatment plan information Kaiser provides to  
13 any patient diagnosed with anxiety disorder. (A.R. 676-79.) Mr.  
14 Jackson's diagnosis was unsupported by any notes or evidence, and the  
15 summary failed to even list the reason for plaintiff's visit. In sum,  
16 the after visit summary is not an opinion from an acceptable medical  
17 source and provides no information as to plaintiff's symptoms,  
18 limitations, and daily functioning.<sup>5</sup>

19  
20 Accordingly, the ALJ was not required to discuss Mr. Jackson's  
21 after visit summary, and did not err in failing to do so.

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26 <sup>5</sup> The Court further notes that plaintiff never alleged that she  
27 suffered from anxiety in her initial application or on appeal. (A.R.  
28 43, 77.) Plaintiff alleged that she was unable to work due to her  
fibromyalgia and depression. (*Id.*) Indeed, plaintiff submitted  
hundreds of pages of her medical history, and none mention anxiety.  
(See A.R. 108-19, 136-603, 613-681.)

1 **II. There Is No Reversible Error With Respect To The ALJ's**  
2 **Consideration Of The Side Effects Of Plaintiff's Medications.**

3  
4 Pursuant to Social Security Ruling ("SSR") 96-7p, an ALJ must  
5 consider the "type, dosage, effectiveness, and side effects of any  
6 medication the individual takes or has taken to alleviate pain or other  
7 symptoms." However, an ALJ need only consider those medication side  
8 effects that have a "significant impact on an individual's ability to  
9 work." Erickson v. Shalala, 9 F.3d 813, 817-18 (9th Cir. 1993)(citation  
10 omitted). Side effects of medications not severe enough to interfere  
11 with a claimant's ability to work are properly excluded from  
12 consideration. See Osenbrock v. Apfel, 240 F.3d 1157, 1164 (9th Cir.  
13 2001)("There were passing mentions of the side effects of [the  
14 claimant's] medication in some of the medical records, but there was no  
15 evidence of side effects severe enough to interfere with [the  
16 claimant's] ability to work.").

17  
18 Plaintiff contends that the ALJ failed to consider the type,  
19 dosage, and side effects of plaintiff's medications properly. (Joint  
20 Stip. at 6-7.) Plaintiff, however, has not met her burden to show that  
21 the use of medications, and any side effects therefrom, had a negative  
22 effect on her ability to work. See Miller v. Heckler, 770 F.2d 845, 849  
23 (9th Cir. 1985)(stating that a claimant bears the burden of proving that  
24 her medication impairs her ability to work).

25  
26 The only evidence regarding plaintiff's alleged side effects are  
27 from her own statements to the Social Security Administration in the  
28 Disability Report - Appeal. (A.R. 79-80.) See Thomas v. Barnhart, 278



1 F.3d 947, 960 (9th Cir. 2002)(finding that the ALJ properly excluded  
2 claimant's allegations of side effects, because "[t]he only evidence  
3 regarding [side effects were the claimant's] own statements to her  
4 doctor and her testimony at the hearing"); see also Moore v. Astrue,  
5 2009 WL 497503, \*7 (C.D. Cal. Feb. 26, 2009)("References to side effects  
6 made only to the social security administration are not alone evidence  
7 that the side effects of the medications are severe enough to affect  
8 [the claimant's] ability to work."). The passing references to side  
9 effects from plaintiff's medications are inadequate to establish a  
10 disabling condition, because there is no evidence to show that  
11 plaintiff's purported side effects resulted in functional limitations  
12 that were severe enough to interfere with her ability to work. See  
13 Osenbrock, 240 F.3d at 1164 (finding that side effects not severe enough  
14 to impair ability to work are not relevant).

15  
16 Further, plaintiff's statements in the Disability Report - Appeal  
17 (A.R. 79-80) about side effects are contradicted by her prior statements  
18 in the Disability Report - Adult (A.R. 43-49). Plaintiff alleges, among  
19 other things, that she experiences the side effects of sleepiness and  
20 dry mouth from her usage of Fluxetine, Meloxicam, Metformin, and Prozac.  
21 (A.R. 79-80.) In a previously submitted Disability Report, however,  
22 plaintiff stated that she experienced no side effects from these  
23 medications. (A.R. 47.) In addition, although plaintiff has reported  
24 some side effects from certain medications to her physicians, plaintiff  
25 is no longer taking those medications. (Compare A.R. 79-80 and 112,  
26 197.)

27  
28 Thus, plaintiff did not meet her burden of demonstrating that her

1 use of medications impaired her ability to work. Accordingly, the ALJ  
2 did not err in his consideration of the side effects of plaintiff's  
3 medication.

4  
5 **III. The ALJ Failed To Properly Consider The Opinion Of Anna Lugo.**

6  
7 In evaluating the credibility of a claimant's assertions of  
8 functional limitations, the ALJ must consider lay witnesses' reported  
9 observations of the claimant. Stout, 454 F.3d at 1053. "[F]riends and  
10 family members in a position to observe a claimant's symptoms and daily  
11 activities are competent to testify as to [the claimant's] condition."  
12 Dodrill v. Shalala, 12 F.3d 915, 918-19 (9th Cir. 1993); 20 C.F.R. §  
13 404.1513(d)(4) ("[W]e may also use evidence from other sources to show  
14 the severity of your impairment(s). . . . Other sources include, but  
15 are not limited to . . . spouses, parents and other care-givers,  
16 siblings, other relatives, friends, neighbors, and clergy."). "If an  
17 ALJ disregards the testimony of a lay witness, the ALJ must provide  
18 reasons 'that are germane to each witness.'" Bruce v. Astrue, 557 F.3d  
19 1113, 1115 (9th Cir. 2009)(citation omitted). Further, the reasons  
20 "germane to each witness" must be specific. Stout, 454 F.3d at 1053-54  
21 (explaining that "the ALJ, not the district court, is required to  
22 provide specific reasons for rejecting lay testimony").

23  
24 An ALJ may "properly discount lay testimony that conflict[s] with  
25 the available medical evidence," Vincent v. Heckler, 739 F.2d 1393, 1395  
26 (9th Cir. 1984), particularly, when, as in Vincent, "lay witnesses [are]  
27 making medical *diagnoses*," because "[s]uch medical diagnoses are beyond  
28 the competence of lay witnesses and therefore do not constitute

1 competent evidence." Nguyen v. Chater, 100 F.3d 1462, 1467 (9th Cir.  
2 1996)(original emphasis). When, as here, however, a lay witness  
3 testifies about a claimant's symptoms, such testimony is competent  
4 evidence and cannot be disregarded without comment. *Id.* "[W]here the  
5 ALJ's error lies in a failure to properly discuss competent lay  
6 testimony favorable to the claimant, a reviewing court cannot consider  
7 the error harmless unless it can confidently conclude that no reasonable  
8 ALJ, when fully crediting the testimony, could have reached a different  
9 disability determination." Stout, 454 F.3d at 1056.

10  
11 Plaintiff contends that the ALJ improperly ignored the lay witness  
12 statements of her daughter, Anna Jessica Lugo. (Joint Stip. at 11-12.)  
13 In a Function Report - Adult Third Party Questionnaire dated July 15,  
14 2008 (the "Questionnaire"), Ms. Lugo provided observations regarding  
15 plaintiff's alleged impairments and their impact on plaintiff's daily  
16 activities and ability to work. (A.R. 56-63.) Ms. Lugo stated that she  
17 visits plaintiff four to five times a week for two to three hours each  
18 time. (A.R. 56.) Ms. Lugo further stated that, prior to plaintiff's  
19 alleged disability, plaintiff used to be "very active and lively," "cook  
20 daily," and perform household chores. (A.R. 57, 58, 60.) Ms. Lugo also  
21 stated that plaintiff is now limited in her ability to: perform  
22 household chores; cook; handle money; perform physical activities, such  
23 as lifting, walking, and sitting; concentrate; and follow instructions.  
24 (A.R. 58-61.) In addition, plaintiff's pain will wake her up throughout  
25 the night and makes it "uncomfortable to be out or travel." (A.R. 57,  
26 61.) Ms. Lugo explained that plaintiff is no longer the "happy person  
27 she used to be," and her "condition has made her very emotional." (A.R.  
28 60, 62.)

1 The Questionnaire corroborates the symptoms alleged by plaintiff  
2 allegations and mentioned in her medical history. Yet, the ALJ fails to  
3 even mention the Questionnaire in the decision, much less provide  
4 germane reasons for rejecting Anna Lugo's observations of her mother's  
5 impairments. The ALJ's failure to do so constitutes error.  
6 Specifically, the ALJ should have addressed Ms. Lugo's observations  
7 regarding plaintiff's daily activities, memory lapses, difficulty  
8 concentrating, and difficulty following instructions (A.R. 58-61),  
9 because such observations are neither medical diagnoses nor do they  
10 conflict with medical evidence, as defendant contends (Joint Stip. at  
11 13). See Nguyen, 100 F.3d at 1467 (finding it was error for the ALJ to  
12 reject lay testimony concerning claimant's symptoms); Dodrill, 12 F.3d  
13 at 918-19 (remanding, in part, because the ALJ failed to provide germane  
14 reasons for rejecting lay testimony concerning claimant's fatigue and  
15 inability to perform household chores).

16  
17 Further, contrary to defendant's assertion, the ALJ's failure to  
18 discuss Ms. Lugo's testimony is not harmless error. The Court cannot  
19 confidently conclude that if Ms. Lugo's observations are fully credited,  
20 "no reasonable ALJ . . . could have reached different determination."  
21 Stout, 454 F.3d at 1056. In particular, if the ALJ failed to reject  
22 the observation of Ms. Lugo for proper reasons, such failure by itself  
23 or in combination with the ALJ's improper rejection of the opinions of  
24 plaintiff's treating physicians<sup>6</sup> may require the ALJ to reach a different  
25 conclusion as to which impairments are severe, to reassess plaintiff's  
26

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27 <sup>6</sup> As discussed *infra*, the ALJ failed to properly discuss the opinion  
28 of plaintiff's treating physicians and provide specific and legitimate  
reasons for rejecting them.

1 RFC, and to reach a different disability determination.

2  
3 On remand, the ALJ must provide germane reasons, if they exist, for  
4 rejecting Ms. Lugo's statements regarding her observations of the nature  
5 and extent of plaintiff's alleged impairments and limitations, so that  
6 a reviewing court may know the basis for the ALJ's decision and have the  
7 ability to assess the propriety of that decision.

8  
9 **IV. The Resolution Of The Outstanding Issues May Require A New**  
10 **Determination Regarding Plaintiff's Ability To Perform Her Past**  
11 **Relevant Work.**

12  
13 At step four of the disability evaluation process, "claimants have  
14 the burden of showing that they can no longer perform their past  
15 relevant work." Pinto v. Massanari, 249 F.3d 840, 844 (9th Cir. 2001).  
16 Although the burden is on the claimant, SSR 82-62 requires that the ALJ  
17 make findings of facts as to the claimant's RFC, the physical and mental  
18 demands of the past relevant work, and whether the claimant can return  
19 to her past relevant work.

20  
21 Plaintiff contends that the ALJ erred by failing to discuss the  
22 actual mental demands of plaintiff's past relevant work.<sup>7</sup> (Joint Stip.  
23 at 9.) The ALJ discussed the physical demands of plaintiff's past  
24 relevant work as an electronics assembler and found that, based on

25  
26 <sup>7</sup> Although Plaintiff argues in one sentence that the ALJ failed to  
27 discuss the physical demands of her past relevant work, this appears to  
28 be an inadvertent argument as plaintiff only makes this argument once  
and it is directly contradicted by plaintiff's inclusion of the ALJ's  
discussion of the physical demands of plaintiff's past relevant work.  
(Joint Stip. at 9.)

1 plaintiff's own description of her past relevant work and his RFC  
2 assessment, she was capable of performing such work. (A.R. 14.)  
3 Because the ALJ concluded that plaintiff did not have a severe mental  
4 impairment, the Court is inclined to find plaintiff's contention without  
5 merit. However, in light of the Court's conclusion that the ALJ must  
6 consider the testimony of lay witness Anna Lugo and discuss the treating  
7 physicians' opinions, *see infra*, the ALJ's RFC determination may change  
8 on remand. As such, the Court cannot undertake an analysis as to the  
9 propriety of the ALJ's determination at this time.

10  
11 **V. Remand Is Required.**

12  
13 The decision whether to remand for further proceedings or order an  
14 immediate award of benefits is within the district court's discretion.  
15 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no  
16 useful purpose would be served by further administrative proceedings, or  
17 where the record has been fully developed, it is appropriate to exercise  
18 this discretion to direct an immediate award of benefits. *Id.* at 1179  
19 ("[T]he decision of whether to remand for further proceedings turns upon  
20 the likely utility of such proceedings."). However, where there are  
21 outstanding issues that must be resolved before a determination of  
22 disability can be made, and it is not clear from the record that the ALJ  
23 would be required to find the claimant disabled if all the evidence were  
24 properly evaluated, remand is appropriate. *Id.* at 1179-81.

25  
26 Although plaintiff failed to raise these issues, the Court notes  
27 that the ALJ completely failed to discuss plaintiff's fibromyalgia and  
28 improperly rejected the opinions of her treating physicians. Despite

1 the fact that plaintiff listed fibromyalgia as a basis for her  
2 application and her medical records are replete with references to it,  
3 the ALJ failed to even mention fibromyalgia once in the decision.  
4 Rather, the ALJ stated that plaintiff alleged "shoulder and neck  
5 problems" and "arthritis of the knees" in her application, and made one  
6 passing reference to "pain in [plaintiff's] muscles and joints" at step  
7 four. (A.R. 10, 13.) In fact, the ALJ completely ignored plaintiff's  
8 fibromyalgia allegations in his step two determination. (A.R. 12-13.)  
9

10 In failing to discuss plaintiff's fibromyalgia allegation, the ALJ  
11 also improperly rejected the opinions of plaintiff's treating  
12 physicians. A treating physician's conclusions "must be given  
13 substantial weight." Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir.  
14 1988). Where a treating physician's opinion is uncontradicted, the ALJ  
15 may only reject it for "clear and convincing" reasons. Lester v.  
16 Chater, 81 F.3d 821, 830 (9th Cir. 1996). Even when the treating  
17 physician's opinions are contradicted, "'if the ALJ wishes to disregard  
18 the opinion[s] of the treating physician he . . . must make findings  
19 setting forth specific, legitimate reasons for doing so that are based  
20 on substantial evidence in the record.'" Winans v. Bowen, 853 F.2d 643,  
21 647 (9th Cir. 1987) (quoting Murray v. Heckler, 722 F.2d 499, 502 (9th  
22 Cir. 1983); see also McAllister v. Sullivan, 888 F.2d 599 602 (9th Cir.  
23 1989)("broad and vague" reasons for rejecting the treating physician's  
24 opinion do not suffice). The ALJ can meet this burden "by setting out  
25 a detailed and thorough summary of the facts and conflicting clinical  
26 evidence, stating his interpretation thereof, and making findings."  
27 Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989).

1 Here, three treating physicians diagnosed plaintiff with  
2 fibromyalgia. (See, e.g., A.R. 196-99, 203-04, 206.) Yet, the ALJ,  
3 without discussion, summarily dismissed their notes and opinions,  
4 stating that they "reported very little in objective findings, and  
5 primarily, reported only a list of [plaintiff's] numerous complaints."  
6 (A.R. 13.) Instead, the ALJ appeared to rely solely on a State agency  
7 review physician's assessment, which, by itself, is not substantial  
8 evidence. Lester, 81 F.3d at 831 ("The opinion of a nonexamining  
9 physician cannot by itself constitute substantial evidence that  
10 justifies the rejection of either an examining or a treating  
11 physician.")(emphasis in original). (A.R. 13-14; 604-05.) Further, in  
12 rejecting the treating physicians' opinions, the ALJ mischaracterized  
13 the record as to plaintiff's treatment records. See Regennitter v.  
14 Comm'r, 166 F.3d 1294, 1297-98 (9th Cir. 1999)(finding that the  
15 "inaccurate characterization" of evidence was error). The ALJ stated  
16 that plaintiff's treatment notes "cover the period of June 12, 2008  
17 through August 29, 2008" and that "[n]one of the attending physicians at  
18 Kaiser Permanente gives any opinions regarding the claimant's physical  
19 limitations, if any." (A.R. 13-14.) In actuality, the record reflects  
20 that plaintiff's medical records, which number in the hundreds of pages,  
21 include treatment notes from as early as November 1989. (A.R. 459.)  
22 Moreover, plaintiff's primary care physician, Dr. Katherine Lehman,  
23 provided a letter dated August 29, 2008, and opined that plaintiff "is  
24 being treated for fibromyalgia and depression," before stating  
25 plaintiff's physical limitations<sup>8</sup>. (A.R. 613.) On remand, the ALJ must

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26  
27 <sup>8</sup> Specifically, Dr. Lehman opined that plaintiff "could likely do  
28 sedentary work up to four hours per day, sitting no more than one hour  
at a time, up to four hours per shift, standing no more than [ten]



1 provide specific and legitimate reasons, if any, for rejecting the  
2 treating physicians' opinions. If no proper reasons exist, this may  
3 require the ALJ to reassess plaintiff's impairments and RFC, and to  
4 reach a different conclusion as to plaintiff's ability to perform her  
5 past relevant work.

6  
7 Remand is the appropriate remedy to allow the ALJ the opportunity  
8 to correct the above-mentioned deficiencies and errors. See, e.g.,  
9 Benecke v. Barnhart, 379 F.3d 587, 593 (9th Cir. 2004)(remand for  
10 further proceedings is appropriate if enhancement of the record would be  
11 useful); McAllister, 888 F.2d at 603 (remand appropriate to remedy  
12 defects in the record). Specifically, remand is necessary so that the  
13 ALJ may consider the severity of plaintiff's fibromyalgia and its impact  
14 on her RFC, if any.

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25 minutes at a time, no more than [four] times per shift. [Plaintiff]  
26 could carry no more than [ten] pounds, up to [ten] minutes a time, no  
27 more than [four] times per shift. She cannot do any stooping, kneeling,  
28 twisting, climbing, or operating machinery. She cannot lift above  
shoulder level. She cannot push or pull." (A.R. 613.) In addition,  
Dr. Lehman stated that plaintiff has memory and concentration  
impairments and expressed suicidal ideation. (*Id.*)

1 **CONCLUSION**

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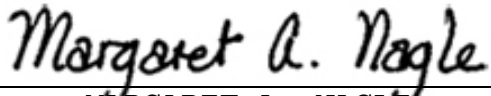
3 Accordingly, for the reasons stated above, IT IS ORDERED that the  
4 decision of the Commissioner is REVERSED, and this case is REMANDED for  
5 further proceedings consistent with this Memorandum Opinion and Order.  
6 IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of  
7 this Memorandum Opinion and Order and the Judgment on counsel for  
8 plaintiff and for defendant.

9

10 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

11

12 DATED: August 18, 2010

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15 MARGARET A. NAGLE  
16 UNITED STATES MAGISTRATE JUDGE