

O

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

11	HORTENCIA LARA,)	NO. EDCV 12-00693-MAN
)	
12	Plaintiff,)	
)	MEMORANDUM OPINION
13	v.)	
)	AND ORDER
14	CAROLYN W. COLVIN, ¹)	
15	Acting Commissioner of Social)	
16	Security,)	
)	
16	Defendant.)	
	_____)	

18 Plaintiff filed a Complaint on May 7, 2012, seeking review of the
19 denial of plaintiff's application for a period of disability, disability
20 insurance benefits ("DIB"), and supplemental security income benefits
21 ("SSI"). On June 15, 2012, the parties consented, pursuant to 28 U.S.C.
22 § 636(c), to proceed before the undersigned United States Magistrate
23 Judge. The parties filed a Joint Stipulation on January 30, 2013, in
24 which: plaintiff seeks an order reversing the Commissioner's decision

26
27 ¹ Carolyn W. Colvin became the Acting Commissioner of the Social
28 Security Administration on February 14, 2013, and is substituted in
place of former Commissioner Michael J. Astrue as the defendant in this
action. (See Fed. R. Civ. P. 25(d).)

1 and remanding this case for the payment of benefits or, alternatively,
2 for further administrative proceedings; and the Commissioner requests
3 that her decision be affirmed or, alternatively, remanded for further
4 administrative proceedings.

5
6 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**
7

8 On September 9, 2008, plaintiff filed an application for SSI, and
9 on October 10, 2008, she filed an application for a period of disability
10 and DIB. (Administrative Record ("A.R.") 28.) Plaintiff, who was born
11 on January 8, 1967 (A.R. 35),² claims to have been disabled since August
12 2, 2008 (A.R. 28) due to: neuropathy; arthritis; weakness; numbness in
13 her legs and arms; high blood pressure; depression; and an "inability to
14 walk" (A.R. 63, 73).

15
16 After the Commissioner denied plaintiff's claim initially and upon
17 reconsideration (A.R. 28, 63-68, 73-77), plaintiff requested a hearing
18 (A.R. 78). On June 22, 2010, plaintiff, who was represented by an
19 attorney, appeared and testified at a hearing before Administrative Law
20 Judge Mason D. Harrell, Jr. (the "ALJ"). (A.R. 28, 41-58.) Vocational
21 expert Corinne J. Porter also testified. (*Id.*) On August 13, 2010, the
22 ALJ denied plaintiff's claim (A.R. 28-37), and the Appeals Council
23 subsequently denied plaintiff's request for review of the ALJ's decision
24 (A.R. 1-4). That decision is now at issue in this action.

25
26
27

² On the alleged disability onset date, plaintiff was 41 years
28 old, which is defined as a younger individual. (A.R. 35; citing 20
C.F.R. §§ 404.1563, 416.963.)

1 **SUMMARY OF ADMINISTRATIVE DECISION**
2

3 The ALJ found that plaintiff met the insured status requirements of
4 the Social Security Act through September 30, 2010, and has not engaged
5 in substantial gainful activity since August 2, 2008, the alleged onset
6 date of her disability. (A.R. 30.) The ALJ determined that plaintiff
7 has the severe impairment of "sensory neuropathy," but she does not have
8 an impairment or combination of impairments that meets or medically
9 equals one of the listed impairments in 20 C.F.R. Part 404, Subpart P,
10 Appendix 1 (20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526, 416.920(d),
11 416.925, 416.926). (Id.)
12

13 After reviewing the record, the ALJ determined that plaintiff has
14 the residual functional capacity ("RFC") to perform a limited range of
15 sedentary work as defined in 20 C.F.R. §§ 404.1567(a) and 416.967(a).
16 (A.R. 30-31.) Specifically, the ALJ found that:

17
18 [Plaintiff] can lift and carry 10 pounds occasionally and 5-6
19 pounds frequently. She can stand and walk for 30 minutes at
20 a time with the use of a cane for a total of 2 hours out of an
21 8-hour workday. She can sit for 30 minutes after which she
22 has to stand and stretch for one minute for a total of 6 hours
23 out of an 8-hour workday. She cannot balance or perform fast
24 movements of the body when twisting or turning. She cannot
25 constantly use her hands, but she can reach with her hands.
26 She can occasionally perform activities requiring agility,
27 such a[s] walking on uneven terrain, climbing ladders, and
28 working at heights. She would miss work up to twice a month.

1 She is limited to simple, repetitive tasks due to pain
2 medications.

3
4 (A.R. 31.)
5

6 The ALJ found that plaintiff was unable to perform her past
7 relevant work as a machine presser. (A.R. 35.) However, based upon his
8 RFC assessment for plaintiff, and after having considered plaintiff's
9 age, education,³ and work experience, as well as the testimony of the
10 vocational expert, the ALJ found "there are jobs that exist in
11 significant numbers in the national economy that [plaintiff] can
12 perform," including that of "small items assembler" and "production
13 inspector of items." (A.R. 35-36.) Accordingly, the ALJ concluded that
14 plaintiff has not been under a disability, as defined in the Social
15 Security Act, from August 2, 2008, through August 13, 2010, the date of
16 the ALJ's decision. (A.R. 36-37.)
17

18 **STANDARD OF REVIEW**
19

20 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's
21 decision to determine whether it is free from legal error and supported
22 by substantial evidence in the record as a whole. Orn v. Astrue, 495
23 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is "'such relevant
24 evidence as a reasonable mind might accept as adequate to support a
25 conclusion.'" *Id.* (citation omitted). The "evidence must be more than
26 a mere scintilla but not necessarily a preponderance." Connett v.

27
28 ³ The ALJ found that plaintiff has a limited education and is
able to communicate in English. (A.R. 19.)

1 Barnhart, 340 F.3d 871, 873 (9th Cir. 2003). "While inferences from the
2 record can constitute substantial evidence, only those 'reasonably drawn
3 from the record' will suffice." Widmark v. Barnhart, 454 F.3d 1063,
4 1066 (9th Cir. 2006)(citation omitted).

5
6 Although this Court cannot substitute its discretion for that of
7 the Commissioner, the Court nonetheless must review the record as a
8 whole, "weighing both the evidence that supports and the evidence that
9 detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y of
10 Health and Hum. Servs., 846 F.2d 573, 576 (9th Cir. 1988); *see also*
11 Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is
12 responsible for determining credibility, resolving conflicts in medical
13 testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d
14 1035, 1039 (9th Cir. 1995).

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

1 DISCUSSION

2
3 Plaintiff claims the ALJ failed to consider properly: (1) her
4 subjective symptom testimony; and (2) the lay witness's statements.
5 (Joint Stipulation ("Joint Stip.") at 4-15, 20-24.)

6
7 I. The ALJ Failed To Give Clear And Convincing Reasons For
8 Rejecting Plaintiff's Testimony Regarding Her Symptoms
9 and Limitations.

10
11 Once a disability claimant produces objective medical evidence of
12 an underlying impairment that is reasonably likely to be the source of
13 claimant's subjective symptom(s), all subjective testimony as to the
14 severity of the symptoms must be considered. Moisa v. Barnhart, 367
15 F.3d 882, 885 (9th Cir. 2004); Bunnell v. Sullivan, 947 F.2d 341, 346
16 (9th Cir. 1991); see also 20 C.F.R. §§ 404.1529(a), 416.929(a)
17 (explaining how pain and other symptoms are evaluated). "[U]nless an
18 ALJ makes a finding of malingering based on affirmative evidence
19 thereof, he or she may only find an applicant not credible by making
20 specific findings as to credibility and stating clear and convincing
21 reasons for each." Robbins, 466 F.3d at 883. The factors to be
22 considered in weighing a claimant's credibility include: (1) the
23 claimant's reputation for truthfulness; (2) inconsistencies either in
24 the claimant's testimony or between the claimant's testimony and her
25 conduct; (3) the claimant's daily activities; (4) the claimant's work
26 record; and (5) testimony from physicians and third parties concerning
27 the nature, severity, and effect of the symptoms of which the claimant
28 complains. See Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir.

1 2002); see also 20 C.F.R. §§ 404.1529(c), 416.929(c).

2
3 At the June 22, 2010 administrative hearing, plaintiff testified
4 that she became disabled in August 2008, when her hands and legs became
5 numb. (A.R. 44.) Plaintiff testified, *inter alia*, that she: does not
6 have any sensation in her hands and “[f]rom the knees down[ward]”; has
7 vision problems; has pain in her elbows, wrists, knees, and ankles;
8 loses her balance “very often” and, thus, uses a cane or a walker to
9 ambulate longer distances; can stand for 30 minutes at a time, after
10 which time she gets numb from the waist down and her “feet get weak and
11 they give in”; can sit for 20 minutes at a time before experiencing back
12 pain; and can lift a maximum of 2-3 pounds. (A.R. 44, 49, 51-52.)
13 Plaintiff also testified that she cannot perform fine manipulations or
14 engage in repetitive work with her hands. (A.R. 49-51, 53-54.)
15 Plaintiff testified that she can perform some chores without assistance,
16 but she performs them in sections with breaks. (A.R. 54.) Plaintiff
17 also can drive for approximately one mile before her legs begin to
18 cramp. (*Id.*) When asked if she could perform a “sit-down job” where
19 she could stand and stretch every 30 minutes and lift no more than five
20 pounds at a time, plaintiff testified that she “maybe . . . could do it”
21 if she were trained, but she fears her pain would be too much for her to
22 keep her job. (A.R. 52.)

23
24 As noted *supra*, the ALJ found that plaintiff has the severe
25 impairment of sensory neuropathy. (A.R. 30.) The ALJ also found that
26 “[plaintiff]’s medically determinable impairments could reasonably be
27 expected to cause the alleged symptoms.” (A.R. 32.) Further, the ALJ
28 cited no evidence of malingering by plaintiff. Accordingly, the ALJ’s

1 reason for discrediting plaintiff's subjective complaints must be clear
2 and convincing.

3
4 In his decision, the ALJ found that "[plaintiff]'s statements
5 concerning the intensity, persistence and limiting effects of [her]
6 symptoms are not credible to the extent they are inconsistent with [the
7 ALJ's RFC assessment for plaintiff]." (A.R. 32.) The ALJ found
8 plaintiff's testimony regarding her subjective symptoms to be not
9 credible, because: (1) the medical evidence does not support
10 plaintiff's allegations of totally disabling limitations; (2) plaintiff
11 gave "inconsistent" responses regarding her double vision; (3) plaintiff
12 demonstrated give-away weakness during motor testing; (4) plaintiff's
13 treating physician, Idermohan Luthra, M.D., questioned whether plaintiff
14 has true left upper extremity dysmetria; and (5) plaintiff was "more
15 concerned about her inability to obtain disability [benefits] rather
16 than [her medical] examination." (A.R. 33.)

17
18 With respect to the ALJ's first ground, even assuming *arguendo* that
19 the medical evidence did not corroborate the degree of plaintiff's
20 allegations of disabling limitations, this factor cannot form the sole
21 basis for discounting plaintiff's subjective symptom testimony. Burch,
22 400 F.3d at 681; see Bunnell, 947 F.2d at 347 (noting that "[i]f an
23 adjudicator could reject a claim of disability simple because
24 [plaintiff] fails to produce evidence supporting the severity of the
25 pain, there would be no reason for an adjudicator to consider anything
26 other than medical findings"). Accordingly, because the ALJ's first
27 ground cannot, by itself, constitute a clear and convincing reason for
28 discrediting plaintiff's testimony, the ALJ's credibility determination

1 rises or falls with the ALJ's other grounds for discrediting plaintiff.

2
3 The ALJ's second ground for finding plaintiff to be not credible is
4 not clear and convincing. In his decision, the ALJ found plaintiff to
5 be not credible, because despite normal ocular examinations, she gave
6 "inconsistent responses" to Dr. Luthra regarding her double vision.
7 (A.R. 33.) In his September 18, 2008 treatment note, Dr. Luthra
8 reported that plaintiff complains of "double vision some time." (A.R.
9 294.) Dr. Lutra also reported that plaintiff "states she sees double,
10 but it was inconsistent response." (A.R. 295.) Contrary to the ALJ's
11 finding, however, it appears that Dr. Luthra attributed plaintiff's
12 intermittent or "inconsistent" double vision to a possible defect in
13 plaintiff's neuromuscular junction, rather than to a lack of candor or
14 credibility on plaintiff's part. (See A.R. 296 -- finding that
15 plaintiff "has diplopia [(double vision)], which is inconsistent which
16 raises a suspicion whether it is a neuromuscular junction defect.") As
17 such, the ALJ's reasoning does not constitute a clear and convincing
18 reason for finding plaintiff to be not credible.

19
20 The ALJ's third ground for finding plaintiff to be not credible --
21 *i.e.*, because she "demonstrated give-away weakness during motor testing
22 . . . , which indicates exaggeration of her condition" (A.R. 33) -- is
23 unavailing. While "give-away" weakness can be a result of poor effort,
24 it can also be a result of pain. See Benner v. Astrue, 2012 U.S. Dist.
25 LEXIS 30022, at *35 n.25 (M.D. Pa. Mar. 6, 2012)(noting that "give-away
26 weakness can be a sign of either lack of effort or pain"). Because Dr.
27 Luthra's treatment notes do not provide any insight into the cause of
28 plaintiff's give-away weakness -- *i.e.*, pain or exaggeration -- the

1 ALJ's presumption that plaintiff's give-away weakness results from an
2 "exaggeration of her condition" is not supported by substantial evidence
3 and, thus, does not constitute a clear and convincing reasoning for
4 finding plaintiff to be not credible.

5
6 The ALJ's fourth reason for finding plaintiff to be not credible --
7 *i.e.*, because Dr. Luthra "questioned whether [plaintiff] has true left
8 upper extremity dysmetria" (A.R. 33) -- is also unavailing. In his
9 treatment notes, Dr. Luthra noted that plaintiff's coordination was
10 normal and reported the following: "May be questionable left upper
11 extremity dysmetria." (A.R. 292.) However, Dr. Luthra's statement,
12 with nothing more, does not implicate plaintiff's credibility. As such,
13 it cannot constitute a clear and convincing reason for finding plaintiff
14 to be not credible.

15
16 The ALJ also found plaintiff to be not credible because she was
17 benefit-seeking, noting that one of Dr. Luthra's treatment notes
18 indicated that plaintiff was concerned about her inability to obtain
19 disability benefits. (A.R. 33, 274.) "Generally speaking, however,
20 every claimant who applies for benefits seeks pecuniary gain, and this
21 fact does not indicate a lack of credibility." Bell v. Colvin, 2013
22 U.S. Dist. LEXIS 43877, at *14 (C.D. Cal. March 20, 2013)(citing Ratto
23 v. Sec'y, Dept. of Health & Hum. Servs., 839 F. Supp. 1415, 1428-29 (D.
24 Or. 1993)(noting that "[i]f the desire or expectation of obtaining
25 benefits were by itself sufficient to discredit a claimant's testimony,
26 then no claimant . . . would be found credible")); see also Yang v.
27 Comm'r of SSA, 488 Fed. Appx. 203, 205 (9th Cir. 2012)(same). Thus, the
28 ALJ's assertion on this point does not constitute a clear and convincing

1 reason for finding plaintiff to be not credible.

2
3 Accordingly, for the aforementioned reasons, the ALJ failed to give
4 clear and convincing reasons, as required, for finding plaintiff to be
5 not credible. This constitutes error.⁴

6
7 **II. The ALJ Failed To Consider Properly The Lay Witness's**
8 **Description Of Plaintiff's Limitations And Daily**
9 **Activities.**

10
11 In evaluating the credibility of a claimant's assertions of
12 functional limitations, the ALJ must consider lay witnesses' reported
13 observations of the claimant. Stout, 454 F.3d at 1053. "[F]riends and
14 family members in a position to observe a claimant's symptoms and daily
15 activities are competent to testify as to [the claimant's] condition."
16 Dodrill v. Shalala, 12 F.3d 915, 918-19 (9th Cir. 1993); 20 C.F.R. §§
17 404.1513(d), 416.913(d) ("[W]e may also use evidence from other sources
18 to show the severity of your impairment(s). . . . Other sources
19 include, but are not limited to . . . spouses, parents and other
20 caregivers, siblings, other relatives, friends, neighbors, and

21
22 ⁴ To the extent the Commissioner attempts to absolve the ALJ of
23 any error by stating that he included "all the limitations [plaintiff]
24 described at the hearing [in his RFC assessment]," this attempt is
25 unavailing. (A.R. 33.) Not all plaintiff's alleged limitations were
26 included in the ALJ's RFC assessment. For example, at the
27 administrative hearing, plaintiff testified that she may be able to
28 perform a job that required her to lift no more than 5 pounds at a time.
In his RFC assessment for plaintiff, however, the ALJ found plaintiff
capable of lifting and carrying 10 pounds occasionally and 5-6 pounds
frequently. (A.R. 31.) Clearly, the ALJ's RFC assessment for plaintiff
exceeds her alleged limitation of being able to lift no more than 5
pounds a time. Further, the ALJ's RFC assessment does not appear to
include any accommodation for plaintiff's alleged double vision problem.

1 clergy."). "If an ALJ disregards the testimony of a lay witness, the
2 ALJ must provide reasons 'that are germane to each witness.'" Bruce v.
3 Astrue, 557 F.3d 1113, 1115 (9th Cir. 2009)(citation omitted).
4 Additionally, "the reasons 'germane to each witness' must be specific."
5 Stout, 454 F.3d at 1054.

6
7 In his decision, the ALJ found that "[m]ost of the limitations and
8 activities of daily living . . . described [by plaintiff's daughter,
9 Jazmin Lara, we]re actually consistent with [his RFC assessment]."
10 (A.R. 34.) Nevertheless, the ALJ gave little weight to some of Jazmin
11 Lara's descriptions of plaintiff's limitations and activities of daily
12 living, because they were "inconsistent." (*Id.*) For example, the ALJ
13 found Jazmin's statement that her mother can "shop[] for groceries on a
14 weekly basis" to be inconsistent with Jazmin's statement that her mother
15 "cannot shop for clothes." (*Id.*) The ALJ noted that "[t]he only reason
16 which comes to mind that [plaintiff] cannot shop for clothing is that it
17 might be difficult for her to try on clothing; however, this should not
18 be a major obstacle if [plaintiff] knows her size." (*Id.*) The Court
19 does not find these two statements to be inconsistent. As the ALJ
20 noted, trying on clothes likely would be difficult for plaintiff,
21 particularly in view of her sensory neuropathy and stability problems.
22 Further, contrary to the ALJ's suggestion, even if plaintiff "knows her
23 size," it is likely that she would still try on the clothing before
24 purchasing it. Thus, the ALJ's rationale is unconvincing.

25
26 The ALJ also gave little weight to Jazmin Lara's observations,
27 because her description of plaintiff's limitations ostensibly were not
28 supported by the evidence of record. Specifically, the ALJ took issue

1 with Jazmin Lara's claims that plaintiff: (1) was precluded from
2 attending events with large crowds; (2) could not walk for more than
3 half of a block without needing to rest; and (3) had weakness in her
4 hands. (A.R. 34.) The Ninth Circuit has held, however, that an ALJ may
5 not discredit lay witness testimony, because it is "not supported by the
6 medical evidence in the record." Bruce, 557 F.3d at 1116. Moreover,
7 there is medical evidence that supports Jazmin Lara's statements
8 regarding her mother's limitations, including, *inter alia*, plaintiff's
9 sensory neuropathy diagnosis and findings that she has "slow and
10 cautious" gait and "tends to lose her balance." (A.R. 292.) Thus, the
11 ALJ erred in rejecting Jazmin Lara's statements regarding plaintiff's
12 limitations on this basis.

13
14 Lastly, the ALJ gave little weight to Jazmin Lara's lay
15 observations, because "she is the daughter of [plaintiff] and has the
16 usual familial devotion." (A.R. 34.) An ALJ may discredit the
17 statements of a lay witness if the ALJ finds the witness to be biased.
18 *See, e.g., Greger v. Barnhart*, 464 F.3d 968, 972 (9th Cir. 2006)(finding
19 the ALJ's consideration of the claimant's prior girlfriend's "close
20 relationship" with the claimant and desire to help him as a germane
21 reason for disregarding her testimony). However, "[t]he fact that a lay
22 witness is a family member cannot be a ground for rejecting his or her
23 testimony. To the contrary, testimony from lay witnesses who see the
24 claimant every day is of particular value . . . ; such lay witnesses
25 will often be family members." Smolen, 80 F.3d at 1289; *see also*
26 Valentine v. Astrue, 574 F.3d 685, 694 (9th Cir. 2009)(finding that
27 being an interested party in the abstract was insufficient to reject a
28 spouse's testimony). Here, the ALJ discredited Jazmin Lara simply

1 because she was plaintiff's daughter. As such, the ALJ's reasoning does
2 not constitute a specific and germane reason for discrediting Jazmin
3 Lara's observations.

4
5 Accordingly, for the aforementioned reasons, the ALJ failed to set
6 forth specific and germane reasons, as required, for affording Jazmin
7 Lara's description of plaintiff's limitations little weight. This
8 constitutes reversible error.

9
10 **III. Remand Is Required.**

11
12 The decision whether to remand for further proceedings or order an
13 immediate award of benefits is within the district court's discretion.
14 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no
15 useful purpose would be served by further administrative proceedings, or
16 where the record has been fully developed, it is appropriate to exercise
17 this discretion to direct an immediate award of benefits. *Id.* at 1179
18 ("[T]he decision of whether to remand for further proceedings turns upon
19 the likely utility of such proceedings."). However, where there are
20 outstanding issues that must be resolved before a determination of
21 disability can be made, and it is not clear from the record that the ALJ
22 would be required to find the claimant disabled if all the evidence were
23 properly evaluated, remand is appropriate. *Id.* at 1179-81.

24
25 Remand is the appropriate remedy to allow the ALJ the opportunity
26 to remedy the above-mentioned deficiencies and errors. See, e.g.,
27 Dodrill, 12 F.3d at 918 (ordering remand so that the ALJ could
28 articulate specific and appropriate findings, if any existed, for

1 rejecting the claimant's subjective pain testimony). On remand, the ALJ
2 must correct the above-mentioned deficiencies and errors. After doing
3 so, the ALJ may need to reassess plaintiff's RFC, in which case
4 additional testimony from a vocational expert likely will be needed to
5 determine what work, if any, plaintiff can perform.

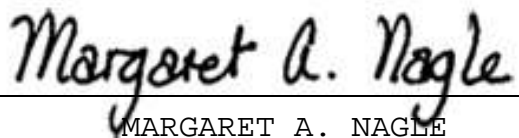
6
7 **CONCLUSION**
8

9 Accordingly, for the reasons stated above, IT IS ORDERED that the
10 decision of the Commissioner is REVERSED, and this case is REMANDED for
11 further proceedings consistent with this Memorandum Opinion and Order.
12

13 IT IS FURTHER ORDERED that the Clerk of the Court shall serve
14 copies of this Memorandum Opinion and Order and the Judgment on counsel
15 for plaintiff and for defendant.
16

17 **LET JUDGMENT BE ENTERED ACCORDINGLY.**
18

19 DATED: September 4, 2013

20 
21 _____
22 MARGARET A. NAGLE
23 UNITED STATES MAGISTRATE JUDGE
24
25
26
27
28