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FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**Apr 20, 2018**

SEAN F. MCAVOY, CLERK

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON**

STEVEN LEE BROWN,  
  
Plaintiff,  
  
vs.  
  
COMMISSIONER OF SOCIAL  
  
SECURITY,  
  
Defendant.

No. 1:17-cv-03056-MKD  
  
ORDER DENYING PLAINTIFF’S  
MOTION FOR SUMMARY  
JUDGMENT AND GRANTING  
DEFENDANT’S MOTION FOR  
SUMMARY JUDGMENT  
  
ECF Nos. 15, 16

BEFORE THE COURT are the parties’ Cross-motions for Summary Judgment. ECF Nos. 15, 16. The parties consented to proceed before a magistrate judge. ECF No. 3. The Court, having reviewed the administrative record and the parties’ briefing, is fully informed. For the reasons discussed below, the Court denies Plaintiff’s Motion (ECF No. 15) and grants Defendant’s Motion (ECF No. 16).

1 **JURISDICTION**

2 The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g);  
3 1383(c)(3).

4 **STANDARD OF REVIEW**

5 A district court’s review of a final decision of the Commissioner of Social  
6 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is  
7 limited; the Commissioner’s decision will be disturbed “only if it is not supported  
8 by substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1153,  
9 1158 (9th Cir. 2012). “Substantial evidence” means “relevant evidence that a  
10 reasonable mind might accept as adequate to support a conclusion.” *Id.* at 1159  
11 (quotation and citation omitted). Stated differently, substantial evidence equates to  
12 “more than a mere scintilla[,] but less than a preponderance.” *Id.* (quotation and  
13 citation omitted). In determining whether the standard has been satisfied, a  
14 reviewing court must consider the entire record as a whole rather than searching  
15 for supporting evidence in isolation. *Id.*

16 In reviewing a denial of benefits, a district court may not substitute its  
17 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152,  
18 1156 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one  
19 rational interpretation, [the court] must uphold the ALJ’s findings if they are  
20 supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674

1 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an  
2 ALJ’s decision on account of an error that is harmless.” Id. An error is harmless  
3 “where it is inconsequential to the [ALJ’s] ultimate nondisability determination.”  
4 Id. at 1115 (quotation and citation omitted). The party appealing the ALJ’s  
5 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*  
6 *Sanders*, 556 U.S. 396, 409-10 (2009).

### 7 **FIVE-STEP EVALUATION PROCESS**

8 A claimant must satisfy two conditions to be considered “disabled” within  
9 the meaning of the Social Security Act. First, the claimant must be “unable to  
10 engage in any substantial gainful activity by reason of any medically determinable  
11 physical or mental impairment which can be expected to result in death or which  
12 has lasted or can be expected to last for a continuous period of not less than twelve  
13 months.” 42 U.S.C. §§ 423(d)(1)(A); 1382c(a)(3)(A). Second, the claimant’s  
14 impairment must be “of such severity that he is not only unable to do his previous  
15 work[,] but cannot, considering his age, education, and work experience, engage in  
16 any other kind of substantial gainful work which exists in the national economy.”  
17 42 U.S.C. §§ 423(d)(2)(A); 1382c(a)(3)(B).

18 The Commissioner has established a five-step sequential analysis to  
19 determine whether a claimant satisfies the above criteria. See 20 C.F.R. §§  
20 404.1520(a)(4)(i)-(v); 416.920(a)(4)(i)-(v). At step one, the Commissioner

1 considers the claimant's work activity. 20 C.F.R. §§ 404.1520(a)(4)(i);  
2 416.920(a)(4)(i). If the claimant is engaged in "substantial gainful activity," the  
3 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§  
4 404.1520(b); 416.920(b).

5 If the claimant is not engaged in substantial gainful activity, the analysis  
6 proceeds to step two. At this step, the Commissioner considers the severity of the  
7 claimant's impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii); 416.920(a)(4)(ii). If the  
8 claimant suffers from "any impairment or combination of impairments which  
9 significantly limits [his or her] physical or mental ability to do basic work  
10 activities," the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c);  
11 416.920(c). If the claimant's impairment does not satisfy this severity threshold,  
12 however, the Commissioner must find that the claimant is not disabled. 20 C.F.R.  
13 §§ 404.1520(c); 416.920(c).

14 At step three, the Commissioner compares the claimant's impairment to  
15 severe impairments recognized by the Commissioner to be so severe as to preclude  
16 a person from engaging in substantial gainful activity. 20 C.F.R. §§  
17 404.1520(a)(4)(iii); 416.920(a)(4)(iii). If the impairment is as severe or more  
18 severe than one of the enumerated impairments, the Commissioner must find the  
19 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d); 416.920(d).

1 If the severity of the claimant's impairment does not meet or exceed the  
2 severity of the enumerated impairments, the Commissioner must pause to assess  
3 the claimant's "residual functional capacity." Residual functional capacity (RFC),  
4 defined generally as the claimant's ability to perform physical and mental work  
5 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§  
6 404.1545(a)(1); 416.945(a)(1), is relevant to both the fourth and fifth steps of the  
7 analysis.

8 At step four, the Commissioner considers whether, in view of the claimant's  
9 RFC, the claimant is capable of performing work that he or she has performed in  
10 the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv); 416.920(a)(4)(iv).

11 If the claimant is capable of performing past relevant work, the Commissioner  
12 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f); 416.920(f).

13 If the claimant is incapable of performing such work, the analysis proceeds to step  
14 five.

15 At step five, the Commissioner considers whether, in view of the claimant's  
16 RFC, the claimant is capable of performing other work in the national economy.  
17 20 C.F.R. §§ 404.1520(a)(4)(v); 416.920(a)(4)(v). In making this determination,  
18 the Commissioner must also consider vocational factors such as the claimant's age,  
19 education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v);  
20 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the

1 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§  
2 404.1520(g)(1); 416.920(g)(1). If the claimant is not capable of adjusting to other  
3 work, analysis concludes with a finding that the claimant is disabled and is  
4 therefore entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1); 416.920(g)(1).

5 The claimant bears the burden of proof at steps one through four above.  
6 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to  
7 step five, the burden shifts to the Commissioner to establish that (1) the claimant is  
8 capable of performing other work; and (2) such work “exists in significant  
9 numbers in the national economy.” 20 C.F.R. §§ 404.1560(c)(2); 416.960(c)(2);  
10 *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

### 11 **ALJ’S FINDINGS**

12 In January 2014, Plaintiff applied for Title II disability insurance benefits  
13 and Title XVI supplemental security income, alleging an onset date of July 1,  
14 2009. Tr. 187-96. The applications were denied initially, Tr. 114-28, and on  
15 reconsideration, Tr. 130-39. Plaintiff appeared at a hearing before an  
16 administrative law judge (ALJ) on August 4, 2015. Tr. 30-68. On August 12,  
17 2015, the ALJ denied Plaintiff’s claim. Tr. 11-24.

18 At step one of the sequential evaluation process, the ALJ found Plaintiff has  
19 not engaged in substantial gainful activity since July 1, 2009. Tr. 13. At step two,  
20 the ALJ found Plaintiff has the following severe impairments: right ankle

1 impairment, organic cognitive disorder, affective disorder, anxiety disorder,  
2 personality disorder, and substance use disorder. Tr. 13. At step three, the ALJ  
3 found Plaintiff does not have an impairment or combination of impairments that  
4 meets or medically equals the severity of a listed impairment. Tr. 14. The ALJ  
5 then concluded that Plaintiff has the RFC to perform medium work with the  
6 following limitations:

7 [H]e cannot climb ladders, rope, or scaffolding. He can frequently handle  
8 and finger. He should avoid concentrated exposure to vibration, extreme  
9 cold, and workplace hazards. He should avoid concentrated exposure to  
10 pulmonary irritants. He can perform simple and routine tasks. He can have  
11 superficial interaction with coworkers. Interaction with the public should  
12 not be a required element of his job duties.

13 Tr. 16.

14 At step four, the ALJ found Plaintiff is unable to perform any past relevant  
15 work. Tr. 22. At step five, the ALJ found there are jobs that exist in significant  
16 numbers in the national economy that Plaintiff can perform, such as industrial  
17 cleaner, laundry worker II, store laborer, production assembler,  
18 cleaner/housekeeper, and hand packager. Tr. 23. On January 23, 2017, the  
19 Appeals Council denied review of the ALJ's decision, Tr. 1-6, making the ALJ's  
20 decision the Commissioner's final decision for purposes of judicial review. See 42  
21 U.S.C. § 1383(c)(3).

1 **ISSUES**

2 Plaintiff seeks judicial review of the Commissioner’s final decision denying  
3 him disability insurance benefits under Title II and supplemental security income  
4 benefits under Title XVI of the Social Security Act. Plaintiff raises the following  
5 issues for review:

- 6 1. Whether the ALJ properly evaluated Plaintiff’s symptom complaints; and  
7 2. Whether the ALJ properly evaluated the medical opinion evidence.

8 ECF No. 15 at 6.

9 **DISCUSSION**

10 **A. Plaintiff’s Symptom Testimony**

11 Plaintiff faults the ALJ for failing to rely on reasons that were clear and  
12 convincing in discrediting his symptom claims. ECF No. 15 at 6-17. An ALJ  
13 engages in a two-step analysis to determine whether a claimant’s testimony  
14 regarding subjective pain or symptoms is credible. “First, the ALJ must determine  
15 whether there is objective medical evidence of an underlying impairment which  
16 could reasonably be expected to produce the pain or other symptoms alleged.”  
17 Molina, 674 F.3d at 1112 (internal quotation marks omitted). “The claimant is not  
18 required to show that [his] impairment could reasonably be expected to cause the  
19 severity of the symptom [h]e has alleged; [h]e need only show that it could  
20



1 reasonably have caused some degree of the symptom.” *Vasquez v. Astrue*, 572  
2 F.3d 586, 591(9th Cir. 2009) (internal quotation marks omitted).

3         Second, “[i]f the claimant meets the first test and there is no evidence of  
4 malingering, the ALJ can only reject the claimant’s testimony about the severity of  
5 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the  
6 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (quoting  
7 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007)). “General findings are  
8 insufficient; rather, the ALJ must identify what testimony is not credible and what  
9 evidence undermines the claimant’s complaints.” *Id.* (quoting *Lester v. Chater*, 81  
10 F.3d 821, 834 (9th Cir. 1995)); *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir.  
11 2002) (“[T]he ALJ must make a credibility determination with findings sufficiently  
12 specific to permit the court to conclude that the ALJ did not arbitrarily discredit  
13 claimant’s testimony.”). “The clear and convincing [evidence] standard is the most  
14 demanding required in Social Security cases.” *Garrison v. Colvin*, 759 F.3d 995,  
15 1015 (9th Cir. 2014) (quoting *Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920,  
16 924 (9th Cir. 2002)).

17         In making an adverse credibility determination, the ALJ may consider, inter  
18 alia, (1) the claimant’s reputation for truthfulness; (2) inconsistencies in the  
19 claimant’s testimony or between his testimony and his conduct; (3) the claimant’s  
20 daily living activities; (4) the claimant’s work record; and (5) testimony from

1 physicians or third parties concerning the nature, severity, and effect of the  
2 claimant's condition. *Thomas*, 278 F.3d at 958-59.

3 The ALJ concluded that Plaintiff's medically determinable impairments  
4 could reasonably be expected to cause Plaintiff's alleged symptoms, but that  
5 Plaintiff's testimony about the intensity, persistence, and limiting effects of his  
6 symptoms was not credible. Tr. 17.

7 1. Inconsistent with Medical Evidence

8 The ALJ found Plaintiff's symptom testimony was inconsistent with the  
9 longitudinal medical record. Tr. 17-18. An ALJ may not discredit a claimant's  
10 pain testimony and deny benefits solely because the degree of pain alleged is not  
11 supported by objective medical evidence. *Rollins v. Massanari*, 261 F.3d 853, 856  
12 (9th Cir. 2001); *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir. 1991); *Fair v.*  
13 *Bowen*, 885 F.2d 597, 601 (9th Cir. 1989). Medical evidence is a relevant factor,  
14 however, in determining the severity of a claimant's pain and its disabling effects.  
15 *Rollins*, 261 F.3d at 857; 20 C.F.R. §§ 404.1529(c), 416.929(c)(2). Minimal  
16 objective evidence is a factor which may be relied upon in discrediting a claimant's  
17 testimony, although it may not be the only factor. See *Burch v. Barnhart*, 400 F.3d  
18 676, 680 (9th Cir. 2005).

19 Here, the ALJ found Plaintiff's symptom testimony about his ankle pain was  
20 not supported by the medical evidence, which showed substantial improvement in

1 Plaintiff's condition and did not corroborate the level of impairment Plaintiff  
2 alleged. Tr. 17-18. At the hearing, Plaintiff testified that following his ankle  
3 surgery, he experienced sharp pains when he walked, numbness, swelling, and that  
4 he needed to elevate his leg over his heart several times per day to control the  
5 swelling. Tr. 42-43. As the ALJ noted, Plaintiff had successful ankle surgery in  
6 November 2013. Tr. 18, see Tr. 308-10. On March 4, 2014, Plaintiff reported he  
7 felt 75% improved. Tr. 370. The ALJ observed Plaintiff's treatment notes after  
8 the surgery show he was regularly observed to have normal gait and station,  
9 normal movement, and normal muscle strength. Tr. 18; see Tr. 399 (no abnormal  
10 movement, good station and gait, good muscle strength), Tr. 429 (no abnormal  
11 movement, station and gait unimpaired, good muscle strength), Tr. 435 (same), Tr.  
12 438 (same), Tr. 445 (same), Tr. 451 (same), Tr. 457 (same). In May 2015, three  
13 months before the hearing, Plaintiff specifically denied difficulty walking. Tr. 390.  
14 The ALJ also noted that Plaintiff's treatment records do not show a record of  
15 chronic swelling, numbness, or a need to elevate his leg. Tr. 18. The ALJ  
16 reasonably concluded that the medical record failed to support Plaintiff's  
17 subjective symptom testimony regarding his ankle impairment after surgery.

18       The ALJ similarly found the medical evidence did not support Plaintiff's  
19 mental health symptom complaints. Tr. 18. Plaintiff testified that he experienced  
20 constant anxiety, was prone to anxiety attacks around other people, that he had

1 several anxiety attacks per day lasting 30-40 minutes at a time, and that his  
2 depression caused him to break down and cry several times per week. Tr. 38-39.  
3 However, the ALJ observed the medical record regularly showed Plaintiff  
4 demonstrated alert and cooperative behavior, normal speech, normal thought  
5 process, and good concentration and attention span. Tr. 18; see Tr. 399-400, 425,  
6 429-30, 435-36, 438-39, 445-46, 451-52, 457-58. The record also shows Plaintiff  
7 demonstrating appropriate mood and affect. Tr. 298, 302, 306, 347, 360, 389-91,  
8 436, 446, 469. The ALJ noted the record did not show a diagnosis of mental  
9 impairment until 2013, despite Plaintiff's alleged onset date in 2009. Tr. 18.

10 Plaintiff can identify some evidence in the record that shows abnormal  
11 mental health observations. ECF No. 15 at 9-10; see Tr. 274 (abnormal affect), Tr.  
12 281-82 (abnormal mental status examination), Tr. 320-37 (observations of  
13 depressed mood). However, in reviewing a denial of benefits, a district court may  
14 not substitute its judgment for that of the Commissioner. *Edlund*, 253 F.3d at  
15 1156. If the evidence in the record "is susceptible to more than one rational  
16 interpretation, [the court] must uphold the ALJ's findings if they are supported by  
17 inferences reasonably drawn from the record." *Molina*, 674 F.3d at 1111. Even if  
18 Plaintiff can identify evidence that can be interpreted more favorably to Plaintiff's  
19 position, the evidence is susceptible to more than one rational interpretation, and  
20 therefore the ALJ's ultimate conclusion must be upheld. See *Burch*, 400 F.3d at

1 679. The lack of supporting medical evidence was a clear and convincing reason  
2 to discredit Plaintiff's subjective symptom testimony.

3 2. Failure to Follow Treatment Recommendations

4 The ALJ found Plaintiff's symptom testimony was inconsistent with  
5 Plaintiff's failure to follow treatment recommendations. Tr. 18. It is well-  
6 established that unexplained or inadequately explained non-compliance with  
7 treatment reflects on a claimant's credibility. See *Molina*, 674 F.3d at 1113-14;  
8 *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008); see also *Smolen v.*  
9 *Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996) (an ALJ may consider a claimant's  
10 unexplained or inadequately explained failure to follow a prescribed course of  
11 treatment when assessing a claimant's credibility).

12 The ALJ identified several instances where Plaintiff failed to follow  
13 treatment recommendations. Tr. 18. For example, Plaintiff was referred to  
14 physical therapy in March 2014, after his ankle surgery. Tr. 370-71. However, the  
15 ALJ observed the evidence shows no subsequent treatment record for Plaintiff's  
16 ankle impairment. Tr. 18. Plaintiff was referred to mental health counseling in  
17 April 2013 and declined the referral. Tr. 274-75. Plaintiff also reported ceasing to  
18 take prescribed medication because he felt it did not help him, and he failed to  
19 follow up for further care after ceasing the medication. Tr. 273.

1 Plaintiff argues that his failure to seek treatment was due to his lack of  
2 medical insurance. ECF No. 15 at 8. Disability benefits may not be denied  
3 because of the claimant's failure to obtain treatment he cannot obtain for lack of  
4 funds. *Gamble v. Chater*, 68 F.3d 319, 321 (9th Cir. 1995). Plaintiff cites one  
5 instance in the record where Plaintiff reported he did not seek medical attention  
6 after being hit by a car some time in 2012 because he did not have insurance. Tr.  
7 318. However, Plaintiff's lack of insurance in 2012 does not explain his  
8 subsequent failure to follow treatment recommendations. Furthermore, the record  
9 shows Plaintiff was able to obtain medical treatment throughout the relevant time  
10 period despite his lack of insurance in 2012. See, e.g., Tr. 308-10 (ankle surgery),  
11 Tr. 316-17 (MRI imaging), Tr. 393 (hand surgery).

12 Plaintiff argues that his failure to pursue treatment is attributable to his  
13 anxiety. ECF No. 15 at 7-8. In some cases, it may be inappropriate to consider a  
14 claimant's lack of treatment as evidence of a lack of credibility. See *Nguyen v.*  
15 *Chater*, 100 F.3d 1462, 1465 (9th Cir. 1996). However, when there is no evidence  
16 suggesting a failure to seek treatment is attributable to a mental impairment, it is  
17 reasonable for the ALJ to conclude that the level or frequency of treatment is  
18 inconsistent with the level of complaints. *Molina*, 674 F.3d at 1113-14. Here, the  
19 record fails to support Plaintiff's argument. The supporting evidence Plaintiff cites  
20 does not attribute Plaintiff's lack of treatment to anxiety. See Tr. 42 (Plaintiff does

1 not attribute failure to seek treatment due to anxiety), Tr. 304 (does not indicate  
2 why Plaintiff failed to seek earlier treatment), Tr. 354 (does not indicate why  
3 Plaintiff failed to seek earlier treatment), Tr. 465 (does not indicate why Plaintiff  
4 failed to seek treatment at time of hand injury). The only supporting evidence in  
5 the record is Plaintiff's own testimony that Plaintiff "couldn't calm [himself] down  
6 to go" seek medical treatment after having a gun pulled on him and escaping by  
7 running into traffic. Tr. 49. However, this one instance does not adequately  
8 explain Plaintiff's consistent history of failing to seek medical treatment. The ALJ  
9 reasonably concluded that Plaintiff's failure to seek treatment undermined the  
10 severity of his subjective symptom testimony. This was a clear and convincing  
11 reason to discredit Plaintiff's symptom testimony.

### 12 3. Activities of Daily Living

13 The ALJ found Plaintiff's daily activities were inconsistent with the level of  
14 impairment he alleged. Tr. 19. A claimant's reported daily activities can form the  
15 basis for an adverse credibility determination if they consist of activities that  
16 contradict the claimant's "other testimony" or if those activities are transferable to  
17 a work setting. *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007); see also *Fair*,  
18 885 F.2d at 603 (daily activities may be grounds for an adverse credibility finding  
19 "if a claimant is able to spend a substantial part of his day engaged in pursuits  
20 involving the performance of physical functions that are transferable to a work

1 setting.”). “While a claimant need not vegetate in a dark room in order to be  
2 eligible for benefits, the ALJ may discredit a claimant’s testimony when the  
3 claimant reports participation in everyday activities indicating capacities that are  
4 transferable to a work setting” or when activities “contradict claims of a totally  
5 debilitating impairment.” Molina, 674 F.3d at 1112-13 (internal quotation marks  
6 and citations omitted).

7 Plaintiff testified that he experienced constant anxiety, that being in public  
8 or around other people caused anxiety attacks, and he could not stay in public  
9 places when he has anxiety attacks. Tr. 38. He further testified that his anxiety  
10 attacks lasted for thirty to forty minutes at a time and occurred several times per  
11 day. Tr. 38-39. The ALJ noted that these limitations were inconsistent with  
12 Plaintiff’s travel. Plaintiff reported taking a three-week trip to Alaska to visit his  
13 brother. Tr. 46. Plaintiff reported taking a shuttle from Yakima to Seattle-Tacoma  
14 International Airport and flying from Seattle to Alaska. Tr. 45-46. While in  
15 Alaska, Plaintiff spent time with his brother and visited a bar. Tr. 46. The ALJ  
16 reasonably concluded that these activities were inconsistent with Plaintiff’s  
17 testimony that he was unable to be around others without experiencing debilitating  
18 panic attacks. Tr. 19.

19 Plaintiff’s function self-report also describes limitations in memory,  
20 completing tasks, concentration, understanding, following instructions, and getting



1 along with others, and states Plaintiff cannot pay attention for more than three  
2 minutes at a time. Tr. 234. The ALJ observed these limitations were inconsistent  
3 with Plaintiff's ability to complete his high school diploma through online classes,  
4 for which he worked over the course of several months. Tr. 19; see Tr. 463.  
5 Plaintiff's alleged inability to pay attention for more than three minutes at a time is  
6 also inconsistent with Plaintiff's hobby of playing multiplayer video games. Tr.  
7 19; see Tr. 53-54. The inconsistencies between Plaintiff's testimony regarding his  
8 symptoms and his daily activities were a clear and convincing reason for the ALJ  
9 to discredit Plaintiff's symptom testimony.

#### 10 4. Inconsistent Statements

11 The ALJ found Plaintiff's credibility was undercut by Plaintiff's inconsistent  
12 statements in the record. Tr. 19. In evaluating the credibility of symptom  
13 testimony, the ALJ may utilize ordinary techniques of credibility evaluation,  
14 including prior inconsistent statements. See *Smolen*, 80 F.3d at 1284. Conflicting  
15 or inconsistent reporting of alcohol or drug use can also contribute to an adverse  
16 credibility finding. See *Thomas*, 278 F.3d at 959; *Verduzco v. Apfel*, 188 F.3d  
17 1087, 1090 (9th Cir. 1999).

18 The ALJ noted Plaintiff made inconsistent statements about his drug use  
19 history. Tr. 19. On August 6, 2013, Plaintiff reported a history of drug use but no  
20 current drug use. Tr. 318. On December 19, 2013, Plaintiff similarly reported a

1 history of drug use in his teens but no current drug use. Tr. 278. On April 22,  
2 2014, Plaintiff reported smoking three to four marijuana joints daily. Tr. 399.  
3 However, on May 28, 2014, Plaintiff denied any history of substance abuse. Tr.  
4 457. The ALJ reasonably concluded that this denial of substance abuse was  
5 inconsistent with Plaintiff's prior admissions of substance abuse.<sup>1</sup>

6 The ALJ also noted Plaintiff gave inconsistent reasons for why he was fired  
7 from his job at Dollar Tree. Tr. 19. During a 2013 therapy session, Plaintiff  
8 reported he lost his job because he was using his cell phone too frequently at work.  
9 Tr. 332-33. However, during the hearing, Plaintiff testified that he left his job at  
10 Dollar Tree because of mental health symptoms. Tr. 39. Upon further questioning  
11 by the ALJ, Plaintiff admitted he was fired from that job because he spent too

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13 <sup>1</sup> Plaintiff argues the ALJ improperly considered Plaintiff's substance abuse itself  
14 as a reason to discredit Plaintiff's credibility. ECF No. 15 at 13. However, the  
15 ALJ did not find Plaintiff not credible because of Plaintiff's history of substance  
16 abuse. Tr. 19. Rather, the ALJ's credibility determination was limited to  
17 Plaintiff's inconsistent statements about his substance use. *Id.* Defendant's  
18 discussion of Plaintiff's lack of status as a Washington medical marijuana patient  
19 is similarly nonresponsive to the ALJ's finding. ECF No. 16 at 9-10.

1 much time texting his friends. Tr. 48. Plaintiff offers a series of hypothetical  
2 explanations for Plaintiff's inconsistent statements, but these explanations do not  
3 have any basis in the record. ECF No. 15 at 14. The ALJ reasonably concluded  
4 that this inconsistent reporting undermined Plaintiff's credibility. Even if Plaintiff  
5 can identify an interpretation of the evidence that is more favorable to Plaintiff's  
6 position, the evidence is susceptible to more than one rational interpretation, and  
7 therefore the ALJ's ultimate conclusion must be upheld. See *Burch*, 400 F.3d at  
8 679. This was a clear and convincing reason to discredit Plaintiff's subjective  
9 symptom testimony.

#### 10 5. Source of Anxiety

11 Finally, the ALJ observed Plaintiff's alleged fear of public settings was "not  
12 irrational" and "due to the situational consequences of his criminal history." Tr.  
13 20. The ALJ failed to explain how the rationality of Plaintiff's fears is relevant to  
14 the ALJ's credibility analysis. See *Wilson v. Comm'r, Soc. Sec. Admin.*, 2016 WL  
15 1598867, at \*9 (D. Or. Apr. 20, 2016).

16 Any error based on this observation is harmless. A district court "may not  
17 reverse an ALJ's decision on account of an error that is harmless." *Molina*, 674  
18 F.3d at 1111. An error is harmless "where it is inconsequential to the [ALJ's]  
19 ultimate nondisability determination." *Id.* at 1115 (quotation and citation omitted).  
20 Here, the ALJ identified several other clear and convincing reasons to discredit

1 Plaintiff's symptom testimony. Consequently, any error is harmless and not  
2 grounds for reversal. *Id.* at 1111.

### 3 **B. Medical Opinion Evidence**

4 Plaintiff challenges the ALJ's consideration of the medical opinions of  
5 Robert Bernardez-Fu, M.D.; Dan Donahue, Ph.D.; John Gilbert, Ph.D.; Philip  
6 Barnard, Ph.D.; Steven Johansen, Ph.D.; and Doyle Hardy, LMHC. ECF No. 15 at  
7 17-21.

8 There are three types of physicians: "(1) those who treat the claimant  
9 (treating physicians); (2) those who examine but do not treat the claimant  
10 (examining physicians); and (3) those who neither examine nor treat the claimant  
11 [but who review the claimant's file] (nonexamining [or reviewing] physicians)." *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (citations omitted).  
12 Generally, a treating physician's opinion carries more weight than an examining  
13 physician's, and an examining physician's opinion carries more weight than a  
14 reviewing physician's. *Id.* at 1202. "In addition, the regulations give more weight  
15 to opinions that are explained than to those that are not, and to the opinions of  
16 specialists concerning matters relating to their specialty over that of  
17 nonspecialists." *Id.* (citations omitted).

18  
19 If a treating or examining physician's opinion is uncontradicted, the ALJ  
20 may reject it only by offering "clear and convincing reasons that are supported by

1 substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).  
2 “However, the ALJ need not accept the opinion of any physician, including a  
3 treating physician, if that opinion is brief, conclusory and inadequately supported  
4 by clinical findings.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228  
5 (9th Cir. 2009) (internal quotation marks and brackets omitted). “If a treating or  
6 examining doctor’s opinion is contradicted by another doctor’s opinion, an ALJ  
7 may only reject it by providing specific and legitimate reasons that are supported  
8 by substantial evidence.” *Bayliss*, 427 F.3d at 1216 (citing *Lester*, 81 F.3d at 830-  
9 831).

10 1. State Reviewers – Dr. Donahue, Dr. Gilbert, Dr. Bernardez-Fu

11 Dr. Donahue reviewed the record and opined Plaintiff was capable of simple  
12 and routine tasks; that Plaintiff could adhere to basic work structure and  
13 expectations despite variation in concentration, persistence, and pace; that Plaintiff  
14 would work best with simple and superficial social interactions; and that Plaintiff  
15 had no limitation in adaptation. Tr. 88-90. Dr. Gilbert reviewed the record and  
16 rendered the same opinions, and also opined Plaintiff did not have a medically  
17 determinable psychological impairment through his date of last insured in June  
18 2010. Tr. 102-04, 111. Dr. Bernardez-Fu reviewed the record and opined Plaintiff  
19 was capable of performing medium work, except he should avoid concentrated  
20 exposure to vibration and extreme cold; that Plaintiff should avoid even moderate

1 exposure to workplace hazards; that Plaintiff had no postural or manipulative  
2 limitations; and that there was insufficient evidence of any physical impairment  
3 through Defendant's date of last insured. Tr. 101-02, 111. The ALJ gave each of  
4 these reviewers' opinions significant weight. Tr. 20, 22.

5 Plaintiff contends the ALJ erred by giving significant weight to the opinions  
6 of Dr. Donahue, Dr. Gilbert, and Dr. Bernardez-Fu, all reviewing physicians, and  
7 some or minimal weight to Plaintiff's treating or examining providers. ECF No.  
8 15 at 17-18. The opinion of a nonexamining physician may serve as substantial  
9 evidence if it is supported by other evidence in the record and is consistent with it.  
10 *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995). Other cases have upheld  
11 the rejection of an examining or treating physician based in part on the testimony  
12 of a non-examining medical advisor when other reasons to reject the opinions of  
13 examining and treating physicians exist independent of the non-examining doctor's  
14 opinion. *Lester*, 81 F.3d at 831 (citing *Magallanes v. Bowen*, 881 F.2d 747, 751-  
15 55 (9th Cir. 1989) (reliance on laboratory test results, contrary reports from  
16 examining physicians and testimony from claimant that conflicted with treating  
17 physician's opinion)); *Roberts v. Shalala*, 66 F.3d 179, 184 (9th Cir. 1995)  
18 (rejection of examining psychologist's functional assessment which conflicted with  
19 his own written report and test results). Thus, case law requires not only an  
20 opinion from the consulting physician but also substantial evidence (more than a

1 mere scintilla but less than a preponderance), independent of that opinion which  
2 supports the rejection of contrary conclusions by examining or treating physicians.  
3 *Andrews*, 53 F.3d at 1039.

4       The ALJ found the opinions of Dr. Donahue and Dr. Gilbert were consistent  
5 with Plaintiff's medical records, examination findings, and Plaintiff's reported  
6 activities. Tr. 22. The ALJ similarly found Dr. Bernardez-Fu's opinions were  
7 supported by Plaintiff's examination findings and treatment records. Tr. 21-22.  
8 Plaintiff suggests the ALJ should have credited the opinions of Plaintiff's treating  
9 and examining providers over the opinions of the reviewing doctors. However, as  
10 discussed *infra*, the ALJ provided legally sufficient reasons for giving less weight  
11 to the treating and examining providers and for giving more weight to the  
12 reviewing doctors' opinions.

## 13       2. Dr. Barnard

14       Dr. Barnard examined Plaintiff on December 19, 2013, and opined  
15 Plaintiff's anxiety would affect his ability to work on a daily basis to a moderate  
16 extent; that Plaintiff would have moderate limitations in his ability to understand,  
17 remember, and persist, to learn new tasks by following very short and simple  
18 instructions, to perform routine tasks without special supervision, be aware of  
19 normal hazards and take precautions, ask simple questions or request assistance,  
20 and set realistic goals and plan independently; that Plaintiff would have marked

1 limitations in his ability to understand, remember, and persist, to learn new tasks  
2 by following detailed instructions, perform activities within a schedule, and make  
3 simple work related decisions; and that Plaintiff would have severe limitations in  
4 his ability to communicate and perform effectively in a work setting, complete a  
5 normal workday without interruptions from psychologically based symptoms, and  
6 maintain appropriate behavior in a work setting. Tr. 279-80. Because Dr.  
7 Barnard's opinion was contradicted by Dr. Donahue, Tr. 88-90, and Dr. Gilbert,  
8 Tr. 101-02, the ALJ was required to provide specific and legitimate reasons for  
9 rejecting the opinion. Bayliss, 427 F.3d at 1216.

10 First, the ALJ found Dr. Barnard did not adequately explain his opinion. Tr.  
11 21. Factors relevant to evaluating any medical opinion include the amount of  
12 relevant evidence that supports the opinion and the quality of the explanation  
13 provided in the opinion. 20 C.F.R. §§ 404.1527(c), 416.927(c); Lingenfelter, 504  
14 F.3d at 1042; Orn, 495 F.3d at 631. Dr. Barnard opined a series of moderate,  
15 marked, and severe limitations in Plaintiff's ability to perform basic work  
16 activities. Tr. 280. However, Dr. Barnard's only clinical finding was anxiety,  
17 which Dr. Barnard opined "would affect [Plaintiff's] ability to work on a daily  
18 basis to a moderate extent." Tr. 279. The ALJ found Dr. Barnard did not explain  
19 how a clinical finding of anxiety causing moderate impact on Plaintiff's ability to  
20 work justified the diverse range of moderate, marked, and severe findings Dr.



1 Barnard made. Tr. 21. This was a specific and legitimate reason to reject Dr.  
2 Barnard's opinion.

3 Second, the ALJ found Dr. Barnard's opinion was inconsistent with the  
4 longitudinal medical record. Tr. 21. Relevant factors to evaluating any medical  
5 opinion include the amount of relevant evidence that supports the opinion, the  
6 quality of the explanation provided in the opinion, and the consistency of the  
7 medical opinion with the record as a whole. *Lingenfelter*, 504 F.3d at 1042; *Orn*,  
8 495 F.3d at 631. As discussed *supra*, the ALJ observed the medical record  
9 regularly showed Plaintiff demonstrated alert and cooperative behavior, normal  
10 speech, normal thought process, and good concentration and attention span. Tr.  
11 18; see Tr. 399-400, 425, 429-30, 435-36, 438-39, 445-46, 451-52, 457-58. The  
12 record also showed Plaintiff demonstrating appropriate mood and affect. Tr. 298,  
13 302, 306, 347, 360, 389-91, 436, 446, 469. Even if Plaintiff can identify evidence  
14 that can be interpreted more favorably to Plaintiff's position, the evidence is  
15 susceptible to more than one rational interpretation, and therefore the ALJ's  
16 ultimate conclusion must be upheld. See *Burch*, 400 F.3d at 679.

17 In light of the inconsistencies between Dr. Barnard's observations and the  
18 record as a whole, the ALJ suggested Plaintiff may have exaggerated his symptoms  
19 during Dr. Barnard's examination. Tr. 19, 21. Evidence that a claimant  
20 exaggerated his symptoms is a clear and convincing reason to reject the doctor's

1 conclusions. Thomas, 278 F.3d at 958. The ALJ noted Plaintiff generally  
2 displayed normal psychological functioning “except when seeking state  
3 assistance.” Tr. 18. A review of the record supports the ALJ’s conclusion. The  
4 longitudinal record of Plaintiff’s mental status examinations is inconsistent with  
5 the findings of Dr. Barnard’s mental status examination. Compare Tr. 281-82 with  
6 Tr. 298, 302, 306, 347, 360, 389-91, 399-400, 425, 429-30, 435-36, 438-39, 445-  
7 46, 451-52, 457-58, 469. The ALJ reasonably concluded that Dr. Barnard’s  
8 opinion was not supported by the longitudinal medical evidence.

9 Third, the ALJ found Dr. Barnard’s opinion was based heavily on Plaintiff’s  
10 self-reports. Tr. 21. A physician’s opinion may be rejected if it based on a  
11 claimant’s subjective complaints which were properly discounted. *Tonapetyan v.*  
12 *Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001); *Morgan v. Comm’r of Soc. Sec.*  
13 *Admin.*, 169 F.3d 595, 602 (9th Cir. 1999); *Fair*, 885 F.2d at 604. “[W]hen an  
14 opinion is not more heavily based on a patient’s self-reports than on clinical  
15 observations, [this] is no evidentiary basis for rejecting the opinion.” *Ghanim*, 763  
16 F.3d at 1162. Here, Dr. Barnard conducted a clinical interview that was based  
17 entirely on Plaintiff’s self-reports. Tr. 278. Dr. Barnard also performed a mental  
18 status examination, but the ALJ discredited the results because the inconsistencies  
19 with the record suggested Plaintiff exaggerated his performance on this  
20 examination. Tr. 21. As discussed supra, the ALJ gave several legally sufficient

1 reasons for rejecting Plaintiff's symptom testimony. Plaintiff argues that because  
2 Dr. Barnard performed a mental status examination, the ALJ unreasonably  
3 concluded that Dr. Barnard "relied heavily" on Plaintiff's self-reports. ECF No. 15  
4 at 18-19. However, in light of the ALJ's observations of Plaintiff's mental status  
5 examination results being inconsistent with the longitudinal evidence and  
6 Plaintiff's activities, the ALJ reasonably concluded that the level of impairment Dr.  
7 Barnard observed was not reflective of Plaintiff's capabilities and therefore based  
8 heavily on Plaintiff's self-reports. Because the ALJ provided legally sufficient  
9 reasons to discredit Plaintiff's symptom complaints, Dr. Barnard's reliance on  
10 Plaintiff's subjective symptom complaints was a specific and legitimate reason to  
11 discredit Dr. Barnard's opinions. The ALJ's conclusion is supported by substantial  
12 evidence.

13 Fourth, the ALJ found Dr. Barnard's opinion was inconsistent with  
14 Plaintiff's reported activities. Tr. 21. An ALJ may discount an opinion that is  
15 inconsistent with a claimant's reported functioning. Morgan, 169 F.3d at 601-02.  
16 For example, Dr. Barnard opined Plaintiff would have moderate to marked  
17 impairments in his ability to understand, remember, and persist in tasks following  
18 instructions. Tr. 280. However, the ALJ observed Plaintiff was able to complete  
19 his high school diploma online and persisted in this task over the course of several  
20 months. Tr. 19; see Tr. 463. Dr. Barnard also opined Plaintiff would be unable to

1 communicate in a regular competitive environment or outside of a sheltered  
2 workshop. Tr. 280. However, the ALJ observed Plaintiff was able to travel to  
3 Alaska by himself. Tr. 19; see Tr. 45-46. The ALJ reasonably concluded that Dr.  
4 Barnard's opinion was inconsistent with Plaintiff's activities. This was a specific  
5 and legitimate reason to discredit Dr. Barnard's opinion.

6 3. Dr. Johansen

7 Dr. Johansen reviewed Dr. Barnard's report on December 30, 2013, and  
8 opined Plaintiff would have moderate limitations in his ability to understand,  
9 remember, and persist, to learn new tasks by following very short and simple  
10 instructions, to perform routine tasks without special supervision, be aware of  
11 normal hazards and take precautions, ask simple questions or request assistance,  
12 and set realistic goals and plan independently; that Plaintiff would have marked  
13 limitations in his ability to understand, remember, and persist, to learn new tasks  
14 by following detailed instructions, perform activities within a schedule, and make  
15 simple work related decisions; and that Plaintiff would have severe limitations in  
16 his ability to communicate and perform effectively in a work setting, complete a  
17 normal workday without interruptions from psychologically based symptoms, and  
18 maintain appropriate behavior in a work setting. Tr. 379. Because Dr. Johansen's  
19 opinion was contradicted by Dr. Donahue, Tr. 88-90, and Dr. Gilbert, Tr. 101-02,

1 the ALJ was required to provide specific and legitimate reasons for rejecting the  
2 opinion. Bayliss, 427 F.3d at 1216.

3 The ALJ discredited Dr. Johansen’s opinion for relying on Dr. Barnard’s  
4 discredited opinion. Tr. 21. An ALJ may reject an opinion that is based heavily on  
5 another physician’s properly discredited opinion. Paulson v. Astrue, 368 Fed.  
6 App’x 758, 760 (9th Cir. 2010) (unpublished). The ALJ observed Dr. Johansen  
7 reviewed only Dr. Barnard’s report, and offered no independent objective findings  
8 for his affirmation of Dr. Barnard’s report. Tr. 21-22. Because the Court found  
9 supra that the ALJ provided legally sufficient reasons to discredit Dr. Barnard’s  
10 opinion, this was a specific and legitimate reason to discredit Dr. Johansen’s  
11 opinion.

12 4. Mr. Hardy

13 Mr. Hardy provided mental health counseling to Plaintiff between August 5,  
14 2013, and April 27, 2015. Tr. 386, 404. On April 7, 2015, opined Plaintiff’s  
15 anxiety rendered him unable “to work in a normal work environment at this time  
16 and [he did] not have skills that would allow him to work at home.” Tr. 386. Mr.  
17 Hardy does not qualify as an acceptable medical source. 20 C.F.R. §§ 404.1502,

1 416.902<sup>2</sup> (Acceptable medical sources are licensed physicians, licensed or certified  
2 psychologists, licensed optometrists, licensed podiatrists, qualified speech-  
3 language pathologists, licensed audiologists, licensed advanced practice registered  
4 nurses, and licensed physician assistants). An ALJ is required to consider evidence  
5 from non-acceptable medical sources. 20 C.F.R. §§ 404.1527(f), 416.927(f).<sup>3</sup> An  
6 ALJ must give reasons “germane” to each source in order to discount evidence  
7 from non-acceptable medical sources. Ghanim, 763 F.3d at 1161.

8 First, the ALJ found Mr. Hardy’s opinion was heavily based on Plaintiff’s  
9 subjective reporting. Tr. 22. A physician’s opinion may be rejected if it is based  
10 on a claimant’s subjective complaints which were properly discounted.  
11 Tonapetyan, 242 F.3d at 1149; Morgan, 169 F.3d at 602; Fair, 885 F.2d at 604. A  
12 review of Mr. Hardy’s treatment notes shows the notes largely contain Plaintiff’s  
13 self-reports, and little to no objective observation. Tr. 318-37, 366-69, 404, 410-  
14 23, 433-34, 444, 450, 462-64. Because the ALJ provided legally sufficient reasons

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16 <sup>2</sup> Prior to March 27, 2017, the definition of an acceptable medical source was  
17 located at 20 C.F.R. § 416.913.

18 <sup>3</sup> Prior to March 27, 2017, the requirement that an ALJ consider evidence from  
19 non-acceptable medical sources was located at 20 C.F.R. §§ 404.1513(d),  
20 416.913(d).

1 to discredit Plaintiff's symptom complaints, Mr. Hardy's reliance on Plaintiff's  
2 subjective symptom complaints was a germane reason to discredit Mr. Hardy's  
3 opinion.

4       Second, the ALJ found Mr. Hardy's opinion was not based on any  
5 documented examination of Plaintiff's psychological functioning. Tr. 22. A  
6 medical opinion from a non-acceptable source is entitled to more weight if it is  
7 supported by medical evidence. 20 C.F.R. §§ 404.1527(f), 416.927(f). Mr.  
8 Hardy's treatment notes do not show mental status examinations or other objective  
9 observations of Plaintiff's psychological functioning. Tr. 318-37, 366-69, 404,  
10 410-23, 433-34, 444, 450, 462-64. This was a germane reason to discredit Mr.  
11 Hardy's opinion.

12       Third, the ALJ found Mr. Hardy's opinion was inconsistent with Plaintiff's  
13 reported activities. Tr. 22. Inconsistency with a claimant's daily activities is a  
14 germane reason to reject lay testimony. *Carmickle v. Comm'r, Soc. Sec. Admin.*,  
15 533 F.3d 1155, 1163-64 (9th Cir. 2008); *Lewis v. Apfel*, 236 F.3d 503, 512 (9th  
16 Cir. 2001). For example, Mr. Hardy noted Plaintiff "rarely leaves his home and  
17 never without the support of a family member." Tr. 386. However, the ALJ  
18 observed Plaintiff was able to travel by himself from Yakima, Washington to  
19 Alaska. Tr. 19. Indeed, many of Mr. Hardy's treatment notes document Plaintiff  
20 attending his sessions without a family member accompanying him. Tr. 404, 410,

1 414-423. Despite Mr. Hardy's extensive treatment history with Plaintiff, and thus  
2 longer-term ability to observe Plaintiff's functioning, Mr. Hardy's opined  
3 limitations are so extreme that they are clearly inconsistent with Plaintiff's  
4 activities. This was a germane reason to discredit Mr. Hardy's opinion.

5 Fourth, the ALJ found Mr. Hardy's opinion was inconsistent with the  
6 longitudinal medical evidence. Tr. 22. Inconsistency with the medical evidence is  
7 a germane reason for rejecting lay witness testimony. See Bayliss, 427 F.3d at  
8 1218; Lewis, 236 F.3d at 511. Although Mr. Hardy opined Plaintiff's anxiety was  
9 severely limiting, the longitudinal record shows Plaintiff demonstrated alert and  
10 cooperative behavior, normal speech, normal thought process, and good  
11 concentration and attention span. Tr. 18; see Tr. 399-400, 425, 429-30, 435-36,  
12 438-39, 445-46, 451-52, 457-58. The record also shows Plaintiff demonstrating  
13 appropriate mood and affect. Tr. 298, 302, 306, 347, 360, 389-91, 436, 446, 469.  
14 The ALJ reasonably concluded that this record was inconsistent with Mr. Hardy's  
15 opinion. This was a germane reason to discredit Mr. Hardy's opinion.

## 16 CONCLUSION

17 After review, the Court finds that the ALJ's decision is supported by  
18 substantial evidence and free of harmful legal error.

### 19 IT IS ORDERED:

- 20 1. Plaintiff's motion for summary judgment (ECF No. 15) is **DENIED**.



1           2. Defendant's motion for summary judgment (ECF No. 16) is **GRANTED.**

2 The District Court Executive is directed to file this Order, enter **JUDGMENT**  
3 **FOR THE DEFENDANT**, provide copies to counsel, and **CLOSE THE FILE.**

4           DATED April 20, 2018.

5                               s/Mary K. Dimke  
6                               MARY K. DIMKE  
7                               UNITED STATES MAGISTRATE JUDGE