

1 22, 2009, Plaintiff timely requested a hearing before an administrative law judge
2 (“ALJ”). (Tr. 108-09.) A hearing was held before ALJ Moira Ausems on
3 December 2, 2010. (Tr. 36-80.) At that hearing, testimony was taken from
4 vocational expert Scott Whitmer; psychological expert, Margaret Moore, Ph. D.
5 and the claimant, Ms. Hughes. (Tr. 37.) The Plaintiff was represented by Attorney
6 James D. Tree at the hearing. (Tr. 36.) On May 6, 2011, the ALJ issued a decision
7 finding Plaintiff not disabled. (Tr. 16-30.) The Appeals Council denied review.
8 (Tr. 1-3.) This matter is properly before this Court under 42 U.S.C. § 405(g).

9 **STATEMENT OF THE CASE**

10 The facts of this case are set forth in the administrative hearing transcripts
11 and record and will only be summarized here. The Plaintiff was thirty-two years
12 old when she applied for benefits and was thirty-four years old when the ALJ
13 issued the decision. The Plaintiff currently is unemployed and lives with her
14 fiancé, his grandson, and her three children. The Plaintiff has not worked since
15 working as a caregiver in 2007. The Plaintiff describes being unable to find work
16 due to a variety of conditions, including parasomnia and headaches.

17 **STANDARD OF REVIEW**

18 Congress has provided a limited scope of judicial review of a
19 Commissioner’s decision. 42 U.S.C. § 405(g). A court must uphold the
20 Commissioner’s decision, made through an ALJ, when the determination is not

1 based on legal error and is supported by substantial evidence. *See Jones v.*
2 *Heckler*, 760 F.2d 993, 995 (9th Cir. 1985) (citing 42 U.S.C. § 405(g)). “The
3 [Commissioner’s] determination that a claimant is not disabled will be upheld if
4 the findings of fact are supported by substantial evidence.” *Delgado v. Heckler*,
5 722 F.2d 570, 572 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial
6 evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,
7 1119 n.10 (9th Cir. 1975), but less than a preponderance. *McCallister v. Sullivan*,
8 888 F.2d 599, 601-02 (9th Cir. 1989) (citing *Desrosiers v. Secretary of Health and*
9 *Human Services*, 846 F.2d 573, 576 (9th Cir. 1988)). Substantial evidence “means
10 such evidence as a reasonable mind might accept as adequate to support a
11 conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citations omitted).
12 “[S]uch inferences and conclusions as the [Commissioner] may reasonably draw
13 from the evidence” will also be upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293
14 (9th Cir. 1965). On review, the court considers the record as a whole, not just the
15 evidence supporting the decisions of the Commissioner. *Weetman v. Sullivan*, 877
16 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir.
17 1980)).

18 It is the role of the trier of fact, not this court, to resolve conflicts in
19 evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one
20 rational interpretation, the court may not substitute its judgment for that of the

1 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
2 (9th Cir. 1984). Nevertheless, a decision supported by substantial evidence will
3 still be set aside if the proper legal standards were not applied in weighing the
4 evidence and making a decision. *Browner v. Sec’y of Health and Human Services*,
5 839 F.2d 432, 433 (9th Cir. 1988). Thus, if there is substantial evidence to support
6 the administrative findings, or if there is conflicting evidence that will support a
7 finding of either disability or nondisability, the finding of the Commissioner is
8 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-30 (9th Cir. 1987).

9 SEQUENTIAL PROCESS

10 The Social Security Act (the “Act”) defines “disability” as the “inability to
11 engage in any substantial gainful activity by reason of any medically determinable
12 physical or mental impairment which can be expected to result in death or which
13 has lasted or can be expected to last for a continuous period of not less than 12
14 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a
15 Plaintiff shall be determined to be under a disability only if his impairments are of
16 such severity that Plaintiff is not only unable to do his previous work but cannot,
17 considering Plaintiff’s age, education and work experiences, engage in any other
18 substantial gainful work which exists in the national economy. 42 U.S.C.
19 §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists of both

1 medical and vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
2 (9th Cir. 2001).

3 The Commissioner has established a five-step sequential evaluation process
4 for determining whether a claimant is disabled. 20 C.F.R. § 416.920. Step one
5 determines if he or she is engaged in substantial gainful activities. If the claimant
6 is engaged in substantial gainful activities, benefits are denied. 20 C.F.R. §§
7 404.1520(a)(4)(i), 416.920(a)(4)(i).

8 If the claimant is not engaged in substantial gainful activities, the decision
9 maker proceeds to step two and determines whether the claimant has a medically
10 severe impairment or combination of impairments. 20 C.F.R.

11 §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the claimant does not have a severe
12 impairment or combination of impairments, the disability claim is denied.

13 If the impairment is severe, the evaluation proceeds to the third step, which
14 compares the claimant's impairment with a number of listed impairments
15 acknowledged by the Commissioner to be so severe as to preclude substantial
16 gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii); *see also* 20
17 C.F.R. § 404, Subpt. P, App. 1. If the impairment meets or equals one of the listed
18 impairments, the claimant is conclusively presumed to be disabled.

19 If the impairment is not one conclusively presumed to be disabling, the
20 evaluation proceeds to the fourth step, which determines whether the impairment

1 prevents the claimant from performing work he or she has performed in the past.
2 If the plaintiff is able to perform his or her previous work, the claimant is not
3 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, the
4 claimant’s residual functional capacity (“RFC”) assessment is considered.

5 If the claimant cannot perform this work, the fifth and final step in the
6 process determines whether the claimant is able to perform other work in the
7 national economy in view of his or her residual functional capacity and age,
8 education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
9 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

10 The initial burden of proof rests upon the claimant to establish a prima facie
11 case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921
12 (9th Cir. 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial
13 burden is met once the claimant establishes that a physical or mental impairment
14 prevents him from engaging in his or her previous occupation. The burden then
15 shifts, at step five, to the Commissioner to show that (1) the claimant can perform
16 other substantial gainful activity, and (2) a “significant number of jobs exist in the
17 national economy” which the claimant can perform. *Kail v. Heckler*, 722 F.2d
18 1496, 1498 (9th Cir. 1984).

19 **ALJ’S FINDINGS**

1 The Plaintiff argues that the ALJ's decision is not supported by substantial
2 evidence or free of legal error because (1) the ALJ erred by rejecting Ms. Hughes
3 subjective complaint testimony, (2) the ALJ failed to appropriately address the
4 medical evidence, and (3) the Defendant failed to meet its burden to establish at
5 that jobs exist in significant numbers that Ms. Hughes can perform.

6 DISCUSSION

7 Claimant's Subjective Complaints

8 When the ALJ finds a claimant's statements as to the severity of
9 impairments, pain, and functional limitations are not credible, the ALJ must make
10 a credibility determination with findings sufficiently specific to permit the court to
11 conclude the ALJ did not arbitrarily discredit claimant's allegations. *Thomas*, 278
12 F.3d at 958-959; *Bunnell v. Sullivan*, 947 F.2d 341, 345-46 (9th Cir. 1991) (en
13 banc). It is well settled, however, that an ALJ cannot be required to believe every
14 allegation of disabling pain, even when medical evidence exists that a claimant's
15 condition may produce pain. "Many medical conditions produce pain not severe
16 enough to preclude gainful employment." *Fair v. Bowen*, 885 F.2d 597, 603(9th
17 Cir. 1989). Although an adjudicator may not reject a claimant's extreme symptom
18 complaints solely on a lack of objective medical evidence, medical evidence is a
19 relevant factor to consider. SSR 96-7p.

1 If there is no affirmative evidence that the claimant is malingering, the ALJ
2 must provide “clear and convincing” reasons for rejecting the claimant's symptom
3 testimony. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998). The ALJ
4 engages in a two-step analysis in deciding whether to admit a claimant’s subjective
5 symptom testimony. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36 (9th Cir.
6 2007); *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996). Under the first step,
7 the ALJ must find the claimant has produced objective medical evidence of an
8 underlying “impairment,” and that the impairment, or combination of impairments,
9 could reasonably be expected to cause “some degree of the symptom.”
10 *Lingenfelter*, 504 F.3d at 1036. Once the first test is met, the ALJ must evaluate
11 the credibility of the claimant and make specific findings supported by “clear and
12 convincing” reasons. *Id.*

13 In addition to ordinary techniques of credibility evaluation, the ALJ may
14 consider the following factors when weighing the claimant's credibility: the
15 claimant’s reputation for truthfulness; inconsistencies either in his allegations of
16 limitations or between his statements and conduct; daily activities and work record;
17 and testimony from physicians and third parties concerning the nature, severity,
18 and effect of the alleged symptoms. *Light v. Social Sec. Admin.*, 119 F.3d 789, 792
19 (9th Cir. 1997); *Fair*, 885 F.2d at 597 n.5.

1 The ALJ may also consider an unexplained failure to follow treatment
2 recommendations and testimony by the claimant “that appears less than candid.”
3 *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008). As explained by the
4 Commissioner in a policy ruling, the ALJ need not totally reject a claimant's
5 statements; he or she may find the claimant's statements about pain to be credible
6 to a certain degree, but discount statements based on his interpretation of evidence
7 in the record as a whole. SSR 96-7p. The ALJ may find a claimant’s abilities are
8 affected by the symptoms alleged, but “find only partially credible the individual’s
9 statements as to the extent of the functional limitations.” *Id.*

10 Although credibility determinations are the province of the ALJ, and “the
11 court may not engage in second-guessing,” *Thomas*, 278 F.3d at 959, the court has
12 imposed on the Commissioner a requirement of specificity. *Connett v. Barnhart*,
13 340 F.3d 871, 873 (9th Cir. 2003); *Dodrill v. Shalala*, 12 F.3d 915, 917 (9th Cir.
14 1993). Even if the record includes evidence to support a credibility determination,
15 the reasons must be articulated with specificity by the ALJ in his decision. The
16 court cannot infer lack of credibility or affirm credibility findings “based on
17 evidence the ALJ did not discuss.” *Connett*, 340 F.3d at 874. Further, the
18 reviewing court cannot make independent findings to support the ALJ’s decision.
19 *Id.*

1 At the December 2, 2010, hearing, Ms. Hughes testified that she suffers
2 from a condition where she sleepwalks and binge eats. As a result of this
3 condition, Ms. Hughes has trouble controlling her diabetes, has suffered extreme
4 weight gain, and is severely fatigued throughout the day. The combination of these
5 impairments, particularly the fatigue, prevents Ms. Hughes from working.

6 The ALJ found that the medically determinable impairments could
7 reasonably be expected to cause Ms. Hughes' symptoms. (Tr. 26.) As there is no
8 affirmative evidence of malingering in the record, the ALJ may only discount Ms.
9 Hughes' subjective complaint testimony if the ALJ provides clear and convincing
10 reasons to support an adverse credibility finding.

11 ALJ Ausems provided several reasons for finding Ms. Hughes not credible.
12 First, Ms. Hughes' statements have been inconsistent. For example, ALJ Ausems
13 noted discrepancies in Ms. Hughes' statements as to when her sleepwalking began.
14 (Tr. 27, 586, 690, 735.) Additionally, Ms. Hughes claimed that her nocturnal
15 eating has caused her to gain nearly 100 pounds over two years, (Tr. 62); however,
16 Ms. Hughes medical records show that her weight has been high for several years
17 and actually decreased in the two years prior to Ms. Hughes' hearing. (Tr. 500,
18 505, 511, 519, 547, 684.)

19 Furthermore, Ms. Hughes' gave varying reports of her drug use. For
20 example, at the hearing before the ALJ, Ms. Hughes testified that she relapsed into

1 methamphetamine use because of the death of her grandmother. (Tr. 54.)
2 However, in 2009, Ms. Hughes told Lisa Vickers, ARNP, that she had relapsed
3 three weeks prior to her grandmother's death. (Tr. 624.) Ms. Hughes also reported
4 a single methamphetamine relapse to Psychologist Jorge Torres-Sáenz that she
5 stated occurred in approximately March of 2009, (Tr. 589), but had reported
6 relapses to Sandy Birdlebough, Ph.D., ARNP, occurring prior to January 2009.
7 (Tr. 546.) Similarly, Ms. Hughes reported being free of drug use in April 2009 to
8 Dr. Torres-Sáenz but reported using in April 2009 to Nurse Birdlebough. (Tr. 587,
9 624.) Then in 2010, Ms. Hughes denied that she abused drugs. (Tr. 772.) Both
10 treating physician Christian L. Dinescu, MD, and psychological reviewing source
11 noted a risk of secondary gain motivation for Ms. Hughes' symptom testimony.
12 (Tr. 607, 870.) Given the plethora of inconsistencies in Ms. Hughes' testimony,
13 the Court finds that clear and convincing reasons support the ALJ's adverse
14 credibility finding.

15 **Medical Evidence**

16 In evaluating a disability claim, the adjudicator must consider all medical
17 evidence provided. A treating or examining physician's opinion is given more
18 weight than that of a non-examining physician. *Benecke v. Barnhart*, 379 F.3d
19 587, 592 (9th Cir. 2004). If the treating physician's opinions are not contradicted,
20 they can be rejected by the decision-maker only with clear and convincing reasons.

1 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). If contradicted, the ALJ may
2 reject the opinion with specific, legitimate reasons that are supported by substantial
3 evidence. *See Flaten v. Secretary of Health and Human Serv.*, 44 F.3d 1453, 1463
4 (9th Cir. 1995). In addition to medical reports in the record, the testimony of a
5 non-examining medical expert selected by the ALJ may be helpful in her
6 adjudication. *Andrews*, 53 F.3d at 1041 (*citing Magallanes v. Bowen*, 881 F.2d
7 747, 753 (9th Cir. 1989)). Testimony of a medical expert may serve as substantial
8 evidence when supported by other evidence in the record. *Id.*

9 Historically, the courts have recognized conflicting medical evidence, the
10 absence of regular medical treatment during the alleged period of disability, and
11 the lack of medical support for doctors' reports based substantially on a claimant's
12 subjective complaints of pain as specific, legitimate reasons for disregarding the
13 treating physician's opinion. *Flaten*, 44 F.3d at 1463-64; *Fair v. Bowen*, 885 F.2d
14 597, 604 (9th Cir 1989). The ALJ need not accept a treating source opinion that is
15 "brief, conclusory and inadequately supported by clinical finding." *Lingenfelter v.*
16 *Astrue*, 504 F.3d 1028, 1044-45 (*citing Thomas v. Barnhart*, 278 F.3d 947, 957 (9th
17 Cir. 2002)). Where an ALJ determines a treating or examining physician's stated
18 opinion is materially inconsistent with the physician's own treatment notes,
19 legitimate grounds exist for considering the purpose for which the doctor's report
20 was obtained and for rejecting the inconsistent, unsupported opinion. *Nguyen v.*

1 *Chater*, 100 F.3d 1462, 1464 (9th Cir. 1996.) Rejection of an examining medical
2 source opinion is specific and legitimate where the medical source's opinion is not
3 supported by his or her own medical records and/or objective data. *Tommasetti v.*
4 *Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008).

5 Ms. Hughes asserts that ALJ Ausems failed to properly consider the
6 evidence in the record from Paul Tompkins, MD, and Bonny Alkofer, ARNP. Ms.
7 Hughes asserts that when the medical evidence is properly credited, the record
8 supports a finding of disability.

9 ***Dr. Tompkins***

10 Specifically, Ms. Hughes relies on two reports written by Dr. Tompkins. In
11 the first report, dated December 17, 2009, Dr. Tompkins diagnosed Ms. Hughes
12 with parasomnia that expressed itself in sleep-eating episodes. (Tr. 647.) Dr.
13 Tompkins opined that Ms. Hughes would need to lie down four to six hours per
14 day. (Tr. 647.) Dr. Tompkins further opined that work would exacerbate Ms.
15 Hughes' ailments and that Ms. Hughes would miss four or more days of work per
16 month due to her condition. (Tr. 648.)

17 In the second report, dated September 15, 2010, Dr. Tompkins retains his
18 diagnosis of parasomnia with sleep-eating. (Tr. 668.) Dr. Tompkins opined that
19 Ms. Hughes would need to lie down one to two hours per day. (Tr. 668.) Again
20 Dr. Tompkins opined that work would exacerbate Ms. Hughes' condition but in the

1 second report found that Ms. Hughes would miss two to three days of work per
2 month. (Tr. 669.)

3 ALJ Ausems rejected Dr. Tompkins opinion primarily because Dr.
4 Tompkins “appeared to place undue reliance on the claimant’s unsupported
5 allegations.” (Tr. 27.) The reports themselves give little evidence of the source for
6 Dr. Tompkins conclusions. (See Tr. 647-48, 668-69.) However, Dr. Tompkins
7 treated Ms. Hughes for nearly one and half years at Cornerstone Medical Clinic,
8 and the clinic treatment notes, including Dr. Tompkins’ notes, are in the record.
9 ((Tr. 696-888.) However, a review of Dr. Tompkins treatment notes reveals that
10 Dr. Tompkins has no objective evidence of the frequency and duration of Ms.
11 Hughes’ parasomnia episodes; instead, the Ms. Hughes simply reports her episodes
12 to Dr. Tompkins. (E.g. Tr. 766, 783, 792-93, 794.) The only evidence of Ms.
13 Hughes’ parasomnia are videos she showed to Dr. Hughes. (Tr. 792, 797.) Those
14 videos show Ms. Hughes sleepwalking and eating “various sugary cereals, bread,
15 cheese, [and] crackers.” (Tr. 797.) However, while the videos provide examples
16 Ms. Hughes’ behavior during an episode, nothing in the videos shows the
17 frequency of her episodes nor the repercussions from those episodes. (See Tr.
18 792.)

19 “A physician’s opinion of disability ‘premised to a large extent upon the
20 claimant’s own accounts of [her] symptoms and limitations’ may be disregarded

1 where those complaints have been ‘properly discounted.’” *Morgan v. Comm’r of*
2 *Soc. Sec. Admin.*, 169 F.3d 595, 602 (9th Cir. 1999) (quoting *Fair v. Bowen*, 885
3 F.2d 595, 605 (9th Cir. 1989)). As the Court has already found that the ALJ’s
4 adverse credibility determination is supported by the record, and as Dr. Tompkins’
5 opinions as to the severity of Ms. Hughes daytime fatigue and physical injuries is
6 based almost exclusively upon Ms. Hughes’ self-reports, the Court finds that the
7 ALJ provided a sufficient basis for discounting Dr. Tompkins’ opinions.

8 The Court also notes that in addition to Ms. Hughes’ credibility, the ALJ
9 also recognized that Dr. Tompkins’ opinions show improvement in Ms. Hughes’
10 condition. (Tr. 27.) Indeed, as the ALJ points out, around the time of Dr.
11 Tompkins’ second opinion, (Tr. 668-69), Ms. Hughes was noted by both Dr.
12 Tompkins and sleep specialist Jason Coles, MD, to be “more alert” and responding
13 well to her medication, (Tr. 768), and to not be having as many parasomnia
14 episodes, (Tr. 685). (Tr. 22-24.) Furthermore, ALJ Ausems noted that Ms.
15 Hughes has suffered parasomnia from her teens or twenties and has performed
16 substantial gainful activity since her teens and twenties. (Tr. 27.) Thus, alternative
17 bases also support the ALJ’s conclusion.

18 ***Nurse Alkofer***

19 Nurse Alkofer opined that Ms. Hughes would be limited in “her ability to
20 work more than 20 hours per week” and checked boxes asserting that Ms. Hughes

1 was limited to working eleven to twenty hours per week at a medium exertion level
2 due to fatigue. (Tr. 580, 583.) Nurse Alkofer is an “other source” for the
3 purposes of the social security regulations. 20 C.F.R. § 416.913(d)(4). Such
4 “other source” testimony may be rejected if the ALJ gives reasons germane to each
5 witness. *Stout v. Comm’r of Soc. Sec. Admin.*, 454 F.3d 1050, 1053 (9th Cir.
6 2006).

7 ALJ Ausems rejected Nurse Alkofer’s opinion on the grounds that it was
8 based on Ms. Hughes’ subjective complaints and contradicted the opinion of Ms.
9 Hughes’ treating physician. (Tr. 27.) Nurse Alkofer produced two reports: one
10 dated October 9, 2007, and the other dated April 3, 2008. (Tr. 580-84.) The
11 record contains Nurse Alkofer’s treatment notes for those same days. (Tr. 480-82.)
12 Nothing in those treatment notes suggests any tests or direct observations of Ms.
13 Hughes’ fatigue. (*See* Tr. 480-82.) In fact, on April 3, 2008, Nurse Alkofer noted
14 that Ms. Hughes was “alert, oriented, well groomed, and in no apparent distress
15 and ambulates well.” (Tr. 480.) Given the lack of objective evidence before Nurse
16 Alkofer to support her conclusion that fatigue limits Ms. Hughes’ ability to work,
17 the ALJ was correct to discount Nurse Alkofer’s opinion as based on Ms. Hughes’
18 unreliable subjective complaints.

19 In addition, Nurse Alkofer’s opinion contradicts the opinion of treating
20 physician Christian Dinescu, MD. Dr. Dinescu examined Ms. Hughes on

1 December 11, 2008, and concluded that Ms. Hughes was not limited in her ability
2 to work. (Tr. 572-73, 575.) Accordingly, the ALJ provided two reasons that were
3 germane for rejecting Nurse Alkofer's opinion.

4 **Step Five Burden**

5 The Plaintiff argues that the Commissioner failed to meet her burden at step
6 five. At step five, the burden of proof shifts to the Commissioner to show there are
7 a significant number of jobs in the national economy that Plaintiff can still
8 perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984). The ALJ may rely
9 on vocational expert testimony if the hypothetical presented to the expert includes
10 all functional limitations supported by the record and found credible by the ALJ.
11 *Bayliss v. Barnhart*, 427 F.3d 1211, 1217 (9th Cir. 2005).

12 Ms. Hughes argues that the ALJ failed to provide a proper hypothetical to
13 the vocational expert because the hypothetical failed to include all of Ms. Hughes'
14 limitations. However, the limitations Ms. Hughes asserts should have been
15 included are those limitations identified by Ms. Hughes' subjective testimony and
16 the discounted opinions of Dr. Tompkins and Nurse Alkofer. As the Court has
17 determined that the ALJ's treatment of Ms. Hughes' testimony and the opinions of
18 Dr. Tompkins and Nurse Alkofer were supported by the record and free of legal
19 error, the Court concludes that the hypothetical given to the vocational expert
20 accurately reflected those limitations that are supported by the record.

1 Accordingly, the Defendant met the burden of showing that substantial jobs exist
2 in the national community that the Plaintiff is capable of performing.

3 Accordingly, **IT IS HEREBY ORDERED:**

4 1. The Plaintiff's motion for summary judgment, ECF No. 18, is DENIED.

5 2. The Defendant's motion for summary judgment, ECF No. 21, is
6 GRANTED.

7 3. JUDGMENT shall be entered for the Defendant.

8 **IT IS SO ORDERED.**

9 The District Court Executive is hereby directed to enter this Order, to
10 provide copies to counsel, and to close this file.

11 **DATED** this 4th day of February, 2014.

12
13 *s/Fred Van Sickle*

14 Fred Van Sickle
Senior United States District Judge