

1 **WO**

2

3

4

5

6

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

7

8

9

Debra K. Stewart,

)

No. CV 11-00451-PHX-NVW

10

Plaintiff,

)

**ORDER**

11

vs.

)

12

Michael J. Astrue, Commissioner of  
Social Security,

)

13

Defendant.

)

14

15

\_\_\_\_\_

16

17

Debra K. Stewart seeks review under 42 U.S.C. §§ 405(g), 1383(c)(3), of the final decision of the Commissioner of Social Security (“the Commissioner”), which denied her supplemental security income under the Social Security Act. Because the decision of the Administrative Law Judge (“ALJ”) is supported by substantial evidence and is not based on legal error, the Commissioner’s decision will be affirmed.

22

**I. Background**

23

**A. Factual Background**

24

Stewart was born on March 17, 1959. She was 47 years old on the date her application was filed. She has an eighth grade education and is able to communicate in English. She does not have a history of past relevant work.

27

In 2005, Stewart was treated for low back pain and right upper extremity pain with swelling. In 2006, she was treated for carpal tunnel syndrome on both wrists, upper and

28

1 lower extremity neuropathy, burning sensations, numbness, and ongoing severe pain. In  
2 2007, she had carpal tunnel release surgery on her left wrist, but continued to experience  
3 pain, swelling, and numbness. In 2008, she was diagnosed with fibromyalgia and  
4 myofascial pain syndrome. In 2009, she continued to receive treatment for chronic pain.

#### 5 **B. Procedural History**

6 On June 22, 2006, Stewart applied for supplemental security income, alleging  
7 disability beginning January 2, 2002. The application was denied on initial review and  
8 again on reconsideration, after which Stewart requested that her claim be heard by an  
9 ALJ. On October 1, 2008, an administrative hearing was held at which Stewart testified  
10 and was represented by counsel. George J. Bluth, an impartial vocational expert, also  
11 appeared at the hearing. On June 22, 2009, a supplemental hearing was held. Stewart,  
12 through her attorney, moved to amend the alleged onset date to June 1, 2006. On  
13 September 18, 2009, the ALJ issued her decision that Stewart was not disabled within the  
14 meaning of the Social Security Act.

15 On January 7, 2011, the Appeals Council denied Stewart's request for review of  
16 the ALJ's unfavorable decision, making that decision the final decision of the  
17 Commissioner. On March 8, 2011, Stewart sought judicial review of the decision  
18 pursuant to 42 U.S.C. §§ 405(g), 1383(c)(3).

#### 19 **II. Standard of Review**

20 The district court reviews only those issues raised by the party challenging the  
21 ALJ's decision. *See Lewis v. Apfel*, 236 F.3d 503, 517 n.13 (9<sup>th</sup> Cir. 2001). The court  
22 may set aside the Commissioner's disability determination only if the determination is not  
23 supported by substantial evidence or is based on legal error. *Orn v. Astrue*, 495 F.3d 625,  
24 630 (9<sup>th</sup> Cir. 2007). Substantial evidence is more than a scintilla, less than a  
25 preponderance, and relevant evidence that a reasonable person might accept as adequate  
26 to support a conclusion considering the record as a whole. *Id.* In determining whether  
27 substantial evidence supports a decision, the court must consider the record as a whole  
28

1 and may not affirm simply by isolating a “specific quantum of supporting evidence.” *Id.*  
2 As a general rule, “[w]here the evidence is susceptible to more than one rational  
3 interpretation, one of which supports the ALJ’s decision, the ALJ’s conclusion must be  
4 upheld.” *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002) (citations omitted).

5 The ALJ is responsible for resolving conflicts in medical testimony, determining  
6 credibility, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9<sup>th</sup> Cir.  
7 1995). In reviewing the ALJ’s reasoning, the court is “not deprived of [its] faculties for  
8 drawing specific and legitimate inferences from the ALJ’s opinion.” *Magallanes v.*  
9 *Bowen*, 881 F.2d 747, 755 (9th Cir. 1989).

### 10 **III. Five-Step Sequential Evaluation Process**

11 To determine whether a claimant is disabled for purposes of the Social Security  
12 Act, the ALJ follows a five-step process. 20 C.F.R. § 404.1520(a). If the ALJ determines  
13 that the claimant is disabled or not disabled at any step, the ALJ does not continue to the  
14 next step. The claimant bears the burden of proof on the first four steps, but at step five,  
15 the burden shifts to the Commissioner. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir.  
16 1999).

17 At the first step, the ALJ determines whether the claimant is engaging in  
18 substantial gainful activity. 20 C.F.R. § 404.1520(a)(4)(I). If so, the claimant is not  
19 disabled and the inquiry ends. *Id.* At the step two, the ALJ determines whether the  
20 claimant has a “severe” medically determinable physical or mental impairment.  
21 § 404.1520(a)(4)(ii). If not, the claimant is not disabled and the inquiry ends. *Id.* At step  
22 three, the ALJ considers whether the claimant’s impairment or combination of  
23 impairments meet or equal an impairment listed in Appendix 1 to Subpart P of 20 C.F.R.  
24 Pt. 404. § 404.1520(a)(4)(iii). If so, the claimant is automatically found to be disabled.  
25 *Id.* If not, the ALJ proceeds to step four. At step four, the ALJ assesses the claimant’s  
26 residual functional capacity and determines whether the claimant is still capable of  
27 performing past relevant work. § 404.1520(a)(4)(iv). If so, the claimant is not disabled  
28

1 and the inquiry ends. *Id.* If not, the ALJ proceeds to the fifth and final step, where he  
2 determines whether the claimant can perform any other work based on the claimant's  
3 residual functional capacity, age, education, and work experience. § 404.1520(a)(4)(v).  
4 If so, the claimant is not disabled. *Id.* If not, the claimant is disabled. *Id.*

#### 5 **IV. Analysis**

6 At step one, the ALJ found that Stewart has not engaged in substantial gainful  
7 activity since June 1, 2006, the alleged onset date of disability. At step two, the ALJ  
8 found that Stewart had the following severe impairments: “fibromyalgia, status post left  
9 carpal tunnel surgery (median nerve decompression); morbid obesity.” At step three, the  
10 ALJ found that Stewart did not have an impairment or combination of impairments that  
11 met or medically equaled one of the listed impairments in 20 C.F.R. Part 404, Subpart P,  
12 Appendix 1. Stewart does not raise any issues related to the ALJ's determinations at the  
13 first three steps of the five-step sequential evaluation process.

14 The ALJ determined that Stewart:

15 has the residual functional capacity to perform light work as defined in 20  
16 CFR 416.967(b) except the limitations outlined below in exhibit 19F.

17 At step four, the ALJ determined that Stewart does not have any past relevant work and  
18 therefore is unable to perform past relevant work. At step five, the ALJ concluded that,  
19 considering Stewart's age, education, work experience, and residual functional capacity,  
20 there are jobs that exist in significant numbers in the national economy that Stewart could  
21 perform.

#### 22 **A. Weighing Medical Source Evidence**

##### 23 **1. Legal Standard**

24 In weighing medical source opinions in Social Security cases, the Ninth Circuit  
25 distinguishes among three types of physicians: (1) treating physicians, who actually treat  
26 the claimant; (2) examining physicians, who examine but do not treat the claimant; and  
27 (3) non-examining physicians, who neither treat nor examine the claimant. *Lester v.*

1 *Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1995). Generally, more weight should be given to the  
2 opinion of a treating physician than to the opinions of non-treating physicians. *Id.* A  
3 treating physician’s opinion is afforded great weight because such physicians are  
4 “employed to cure and [have] a greater opportunity to observe and know the patient as an  
5 individual.” *Sprague v. Bowen*, 812 F.2d 1226, 1230 (9<sup>th</sup> Cir. 1987). Where a treating  
6 physician’s opinion is not contradicted by another physician, it may be rejected only for  
7 “clear and convincing” reasons, and where it is contradicted, it may not be rejected  
8 without “specific and legitimate reasons” supported by substantial evidence in the record.  
9 *Lester*, 81 F.3d at 830. Moreover, the Commissioner must give weight to the treating  
10 physician’s subjective judgments in addition to his clinical findings and interpretation of  
11 test results. *Id.* at 832-33.

12 Further, an examining physician’s opinion generally must be given greater weight  
13 than that of a non-examining physician. *Id.* at 830. As with a treating physician, there  
14 must be clear and convincing reasons for rejecting the uncontradicted opinion of an  
15 examining physician, and specific and legitimate reasons, supported by substantial  
16 evidence in the record, for rejecting an examining physician’s contradicted opinion. *Id.* at  
17 830-31.

18 The opinion of a non-examining physician is not itself substantial evidence that  
19 justifies the rejection of the opinion of either a treating physician or an examining  
20 physician. *Id.* at 831. “The opinions of non-treating or non-examining physicians may  
21 also serve as substantial evidence when the opinions are consistent with independent  
22 clinical findings or other evidence in the record.” *Thomas*, 278 F.3d at 957. Factors that  
23 an ALJ may consider when evaluating any medical opinion include “the amount of  
24 relevant evidence that supports the opinion and the quality of the explanation provided;  
25 the consistency of the medical opinion with the record as a whole; [and] the specialty of  
26 the physician providing the opinion.” *Orn*, 495 F.3d at 631.

1           Moreover, Social Security Rules expressly require a treating source’s opinion on  
2 an issue of a claimant’s impairment be given controlling weight if it is well-supported by  
3 medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent  
4 with the other substantial evidence in the record. 20 C.F.R. § 404.1527(d)(2). If a  
5 treating source’s opinion is not given controlling weight, the weight that it will be given is  
6 determined by length of the treatment relationship, frequency of examination, nature and  
7 extent of the treatment relationship, relevant evidence supporting the opinion, consistency  
8 with the record as a whole, the source’s specialization, and other factors. *Id.*

9           Finding that a treating physician’s opinion is not entitled to controlling weight  
10 does not mean that the opinion should be rejected:

11                   [A] finding that a treating source medical opinion is not well-  
12 supported by medically acceptable clinical and laboratory diagnostic  
13 techniques or is inconsistent with the other substantial evidence in the case  
14 record means only that the opinion is not entitled to “controlling weight,”  
15 not that the opinion should be rejected. Treating source medical opinions  
are still entitled to deference and must be weighed using all of the factors  
provided in 20 C.F.R. §404.1527. . . . In many cases, a treating source’s  
medical opinion will be entitled to the greatest weight and should be  
adopted, even if it does not meet the test for controlling weight.

16 *Orn*, 495 F.3d at 631-32 (quoting Social Security Ruling 96-2p). Where there is a  
17 conflict between the opinion of a treating physician and an examining physician, the ALJ  
18 may not reject the opinion of the treating physician without setting forth specific,  
19 legitimate reasons supported by substantial evidence in the record. *Id.* at 632.

20                   **2. The ALJ Did Not Err in Weighing Medical Source Opinion**  
21                   **Evidence.**

22           Stewart contends the ALJ erred by rejecting the opinion of treating physician  
23 Vijayabhanu Mahadevan, M.D. The ALJ stated that she accepted the conclusions of  
24 examining physician Marisa Sosinsky, M.D., in Exhibit 19F, which included the opinion  
25 that Stewart was able to perform at least light work on a sustained basis with certain  
26 limitations, and rejected the medical assessment of Dr. Mahadevan because it was not  
27 supported by the overall medical evidence of record, including Dr. Mahadevan’s notes.

1 In December 2007, Dr. Mahadevan began treating Stewart, and in February 2008,  
2 he diagnosed her with fibromyalgia. On September 23, 2008, Dr. Mahadevan completed  
3 a medical assessment in which he opined that Stewart could sit, stand, or walk less than  
4 one hour each in an eight-hour work day and she could not perform sustained work eight  
5 hours a day, five days a week. Exhibit 19F indicates that Stewart can sit without  
6 interruption for 4 hours, stand without interruption for 3 hours, walk without interruption  
7 for 3 hours, sit for a total of 6 hours in an 8-hour work day, stand for a total of 4 hours in  
8 an 8-hour work day, and walk for a total of 4 hours in an 8-hour work day.

9 In order to reject treating physician Dr. Mahadevan's contradicted opinion, the  
10 ALJ was required to provide specific and legitimate reasons supported by substantial  
11 evidence in the record. *See Lester*, 81 F.3d at 830. The ALJ stated:

12 The claimant was given a diagnosis of fibromyalgia, which was based  
13 mainly on subjective statements by the claimant, as in exhibit 17F, by Dr.  
14 Mahadevan. His medical assessment was rejected as [it was] not supported  
15 by the overall medical evidence of record, including his own notes. There  
16 was no edema, with mild degenerative lumbar disc disease and no  
17 significant joint disease and normal strength. There was no numbness down  
18 the legs. There was no right hip joint pain and some wrist pain. There was  
19 no cervical pain and no neurological symptoms in the record to support  
20 fibromyalgia. Most examinations in the medical record were basically  
21 normal, with normal strength, bulk and tone. There were no herniated discs  
22 an[d] the State agency evaluations supported a finding of medium work.  
23 The findings in exhibit 18F supported a conclusion that wrist pain, and arm  
24 pain, plus a history of carpal tunnel syndrome release, do not limit  
25 functional limitations beyond light work activity. There was no atrophy in  
26 the hands and strength was normal. The neurological examination was also  
27 normal in exhibit 11F. An EMG in exhibit [6F] in January 2007 and nerve  
28 conduction study were normal, with no evidence of neuropathy. Grip  
strength was normal.

These reasons are specific, legitimate, and supported by substantial evidence in the  
record.

## **B. Subjective Symptom Testimony**

### **1. Legal Standard**

In evaluating the credibility of a claimant's testimony regarding subjective pain or  
other symptoms, the ALJ is required to engage in a two-step analysis: (1) determine

1 whether the claimant presented objective medical evidence of an impairment that could  
2 reasonably be expected to produce some degree of the pain or other symptoms alleged;  
3 and, if so with no evidence of malingering, (2) reject the claimant’s testimony about the  
4 severity of the symptoms only by giving specific, clear, and convincing reasons for the  
5 rejection. *See Vasquez v. Astrue*, 572 F.3d 586, 591 (9<sup>th</sup> Cir. 2009).<sup>1</sup> To support a lack of  
6 credibility finding, the ALJ is required to point to specific facts in the record that  
7 demonstrate that Stewart’s symptoms are less severe than she claims. *Id.* at 592.  
8 “Factors that an ALJ may consider in weighing a claimant’s credibility include reputation  
9 for truthfulness, inconsistencies in testimony or between testimony and conduct, daily  
10 activities, and unexplained, or inadequately explained, failure to seek treatment or follow  
11 a prescribed course of treatment.” *Orn v. Astrue*, 495 F.3d 625, 636 (9th Cir. 2007)  
12 (internal quotation marks and citations omitted).

13 To be found credible regarding subjective pain or fatigue, a claimant is not  
14 required to: (1) produce objective medical evidence of the pain or fatigue itself, or the  
15 severity thereof; (2) produce objective medical evidence of the causal relationship  
16 between the medically determinable impairment and the symptom; or (3) show that his  
17 impairment could reasonably be expected to cause the severity of the alleged symptom,  
18 only that it could reasonably have caused some degree of the symptom. *Smolen v.*  
19 *Chater*, 80 F.3d 1273, 1282 (9<sup>th</sup> Cir. 1996).

---

23 <sup>1</sup>Contrary to the Commissioner’s contention, *Bunnell v. Sullivan*, 947 F.2d 341 (9th  
24 Cir. 1991), does not permit finding subjective symptom testimony not credible without  
25 articulating clear and convincing reasons. The Commissioner correctly quotes *Bunnell* as  
26 stating an ALJ must make specific findings, supported by the record, to support his  
27 conclusion that a claimant’s allegations of severity are not credible. *See id.* at 345. But  
28 *Bunnell* does not address whether the reasons must be clear and convincing. Rather, it  
addresses whether an ALJ may discredit a claimant’s allegations of the severity of pain solely  
on the ground that the allegations are unsupported by objective medical evidence.

1                                   **2.     The ALJ Did Not Err by Finding Stewart’s Subjective Symptom**  
2                                   **Testimony Not Fully Credible.**

3                                   Stewart contends that the ALJ erred by failing to set forth specific, clear, and  
4                                   convincing reasons to reject Stewart’s testimony about the severity of her subjective  
5                                   symptoms. Stewart testified that she can stand, sit, or walk for no more than 40 minutes  
6                                   at a time because doing so for more than 40 minutes causes her back to hurt and burn.  
7                                   She has difficulty sleeping during the night and naps during the afternoon, but has an  
8                                   average energy level. She did not testify that she is too tired to work full-time. She also  
9                                   testified that she has swelling in her hands and feet, which is caused by her prescription  
10                                  medication for fibromyalgia. She said she drives, cleans her room, does her own laundry,  
11                                  and does quick cooking. In an average week, she stays home about four days. She lives  
12                                  with her son, his wife, and their three children.

13                                  The administrative hearing decision states:

14                                  After careful consideration of the evidence, the undersigned finds that the  
15                                  claimant’s medically determinable impairments could reasonably be  
16                                  expected to cause the alleged symptoms; however, the claimant’s  
17                                  statements concerning the intensity, persistence and limiting effects of these  
18                                  symptoms are not credited to the extent they are inconsistent with the above  
19                                  residual functional capacity assessment. The claimant stated she could  
20                                  drive 3 times a week and keeps her room clean. She lives with her son and  
21                                  their children. The claimant had treatment for carpal tunnel syndrome, but  
22                                  in exhibit 18F, p. 8, it was noted the pain was no longer there after surgery.  
23                                  The claimant stated in exhibit 19F, p. 2 that the left carpal tunnel surgery  
24                                  did not help and she had more wrist pain after surgery. Dr. Flitman, in  
25                                  exhibit 22F, indicated there was no evidence of carpal tunnel syndrome in  
26                                  August 2008. Thus, she is precluded from repetitively using her hands but  
27                                  can frequently use them at light levels.

28                                  There are no records indicating significant side effect from medication.

                                  In exhibit 24F, the claimant alleged a new symptom, left shoulder pain,  
                                  which was present in January 2009. The claimant was given exercises  
                                  because she was leaving town for several weeks. The left shoulder is an  
                                  acute problem that may not impose limits that would cause her to be  
                                  disabled for 12 continuous months. However, there is no evidence that the  
                                  claimant would be prevented from performing at least light work on a  
                                  sustained basis for a 12-month period of time. The left shoulder issue is not  
                                  resolved, it is a possible rotator cuff tear.

1 The claimant was obese, but had normal neurological status and a normal  
2 gait to this point. The obesity and lumbar disc disease and fibromyalgia do  
limit her to light work.

3 Exhibit 18F, page 8, dated September 19, 2007, indicates that six weeks following  
4 carpal tunnel release surgery, Stewart reported that she occasionally has shooting pains  
5 into her wrist and arm, has swelling about her hand and wrist, and still has numbness, but  
6 “she acknowledges that the pain that she was having before surgery, particularly at night,  
7 was no longer there.” She reported having no pain with combined wrist and finger  
8 extension, but did have a pulling sensation with individual finger motion.

9 Exhibit 19F, page 2, dated February 4, 2009, indicates that Stewart reported having  
10 more wrist pain than prior to the carpal tunnel surgery and that she did not think the  
11 surgery reduced the numbness and tingling in her hands. Exhibit 22F, dated March 2,  
12 2009, shows that upon examination by an independent neurologist, there was “no  
13 evidence for reactivation of left carpal tunnel syndrome.”

14 The ALJ did not reject Stewart’s subjective symptom testimony entirely. She  
15 found Stewart’s testimony not fully credible to the extent that Stewart said she was unable  
16 to perform light work full-time. The ALJ’s determination of Stewart’s residual functional  
17 capacity limits use of her hands and feet and requires that uninterrupted walking,  
18 standing, and sitting be limited to three or four hours per day. The ALJ identified  
19 evidence in the record that indicated Stewart can make frequent but not unrestricted use  
20 of her hands and that Stewart is physically able to do many life activities.

21 Thus, the ALJ provided specific, clear, and convincing reasons for rejecting  
22 Stewart’s testimony about the severity of her symptoms.

### 23 **C. Residual Functional Capacity**

24 Stewart contends the ALJ’s residual functional capacity assessment does not meet  
25 legal standards because it includes the term “light work.” The use of the term “light  
26 work” here does not violate legal standards because it is coupled with function-by-  
27

1 function assessment and is not used at step four to find that Stewart is able to perform  
2 past relevant work.

3 A claimant's residual functional capacity is "what an individual can still do despite  
4 his or her limitations." Social Security Ruling 96-8p. The residual functional capacity  
5 determination is "a function-by-function assessment based upon all of the relevant  
6 evidence of an individual's ability to do work-related activities." *Id.*

7 Social Security Ruling 96-8p explains:

8 At step 4 of the sequential evaluation process, the [residual functional  
9 capacity] must not be expressed initially in terms of the exertional  
10 categories of "sedentary," "light," "medium," "heavy," and "very heavy"  
work because the first consideration at this step is whether the individual  
can do past relevant work as he or she actually performed it.

11 [Residual functional capacity] may be expressed in terms of an exertional  
12 category, such as light, if it becomes necessary to assess whether an  
individual is able to do his or her past relevant work as it is generally  
13 performed in the national economy. However, without the initial function-  
by-function assessment of the individual's physical and mental capacities, it  
14 may not be possible to determine whether the individual is able to do past  
relevant work as it is generally performed in the national economy because  
15 particular occupations may not require all of the exertional and  
nonexertional demands necessary to do the full range of work at a given  
16 exertional level.

17 At step 5 of the sequential evaluation process, [residual functional capacity]  
must be expressed in terms of, or related to, the exertional categories when  
18 the adjudicator determines whether there is other work the individual can  
do. However, in order for an individual to do a full range of work at a  
19 given level, such as sedentary, the individual must be able to perform  
substantially all of the exertional and nonexertional functions required in  
20 work at that level. Therefore, it is necessary to assess the individual's  
capacity to perform each of these functions in order to decide which  
21 exertional level is appropriate and whether the individual is capable of  
doing the full range of work contemplated by the exertional level.

22 Social Security Ruling 96-8p. "Preparing a function-by-function analysis for medical  
23 conditions or impairments that the ALJ found neither credible nor supported by the record  
24 is unnecessary." *Bayliss v. Barnhart*, 427 F.3d 1211, 1217 (9th Cir. 2005).

25 The hearing decision states:

26 [T]he claimant has the residual functional capacity to perform light work as  
27 defined in 20 CFR 416.967(b) except the limitations outlined below in  
exhibit 19F.

1 The Social Security regulation cited, 20 C.F.R. § 416.967(b), provides the following  
2 definition for light work:

3 Light work involves lifting no more than 20 pounds at a time with frequent  
4 lifting or carrying of objects weighing up to 10 pounds. Even though the  
5 weight lifted may be very little, a job is in this category when it requires a  
6 good deal of walking or standing, or when it involves sitting most of the  
7 time with some pushing or pulling of arm or leg controls.

8 Exhibit 19F is Dr. Sosinsky's medical assessment that Stewart can frequently carry and  
9 lift up to 10 pounds, occasionally carry and lift 11 to 50 pounds, sit without interruption  
10 for 4 hours, stand without interruption for 3 hours, walk without interruption for 3 hours,  
11 sit for a total of 6 hours in an 8-hour work day, stand for a total of 4 hours in an 8-hour  
12 work day, and walk for a total of 4 hours in an 8-hour work day. The assessment also  
13 indicates that Stewart can frequently reach, handle, finger, feel, and push/pull with either  
14 hand and frequently operate foot controls with either foot. It further indicates that  
15 Stewart can occasionally climb stairs and ramps, climb ladders or scaffolds, balance,  
16 kneel, crouch, and crawl and frequently stoop. Finally, Exhibit 19F states that Stewart  
17 can frequently operate a motor vehicle and occasionally be exposed to unprotected  
18 heights; moving mechanical parts; humidity and wetness; dust, odors, fumes, and  
19 pulmonary irritants; extreme cold; extreme heat; and vibrations.

20 Thus, the residual functional capacity assessment expressly incorporates functional  
21 limitations from the regulation's definition of "light work" and from Exhibit 19F.

22 IT IS THEREFORE ORDERED affirming the final decision of the Commissioner  
23 of Social Security denying Debra K. Stewart disability benefits.

24 IT IS FURTHER ORDERED that the Clerk enter judgment in favor of Defendant  
25 against Plaintiff and that Plaintiff take nothing. The Clerk shall terminate this action.

26 DATED this 13<sup>th</sup> day of February, 2012.

27   
28 \_\_\_\_\_  
Neil V. Wake  
United States District Judge