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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

MARY MARGARET GUNNESS-
VALLANDINGHAM,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,

Defendant.

Case No. CV 16-09078-RAO

**MEMORANDUM OPINION AND
ORDER**

I. INTRODUCTION

Plaintiff Mary Margaret Gunness-Vallandingham (“Plaintiff”) challenges the Commissioner’s denial of her application for a period of disability and disability insurance benefits (“DIB”). For the reasons stated below, the decision of the Commissioner is REVERSED and REMANDED.

II. PROCEEDINGS BELOW

On August 10, 2011, Plaintiff filed a Title II application for DIB alleging disability beginning November 6, 2009. (Administrative Record (“AR”) 47, 59-

1 60.) Her application was denied on January 19, 2012.¹ (AR 61.) On March 13,
2 2012, Plaintiff filed a written request for hearing, and a hearing was held on
3 October 24, 2012. (AR 66, 648-668.) Represented by counsel, Plaintiff appeared
4 and testified, along with a medical expert and an impartial vocational expert. (AR
5 607-68.) On November 15, 2012, the Administrative Law Judge (“ALJ”) found
6 that Plaintiff had not been under a disability, pursuant to the Social Security Act,²
7 since November 6, 2009. (AR 22.) The ALJ’s decision became the
8 Commissioner’s final decision when the Appeals Council denied Plaintiff’s request
9 for review. (AR 4.)

10 Plaintiff filed an action in the District Court on June 23, 2014. (AR 688-92.)
11 On March 26, 2015, the Court reversed and remanded the matter for further
12 administrative proceedings. (AR 698-711.)

13 Another hearing was held on June 15, 2016, where Plaintiff again appeared
14 and testified, along with a medical expert and an impartial vocational expert. (AR
15 602-47.) On August 17, 2016, the ALJ again found that Plaintiff had not been
16 under a disability, pursuant to the Social Security Act, from November 6, 2009
17 through December 31, 2014, the date last insured (“DLI”). (AR 595.) Plaintiff
18 filed this action on December 7, 2016. (Dkt. No. 1.)

19 The ALJ followed a five-step sequential evaluation process to assess whether
20 Plaintiff was disabled under the Social Security Act. *Lester v. Chater*, 81 F.3d 821,
21 828 n.5 (9th Cir. 1995). At **step one**, the ALJ found that Plaintiff had not engaged
22 in substantial gainful activity since November 6, 2009, the alleged onset date
23 (“AOD”), through December 31, 2014, her date last insured. (AR 587.) At **step**

24
25 ¹ This case is a “prototype case” that skips the reconsideration level of appeal. (AR
26 59; Joint Stipulation (“JS”) 1, Dkt. No. 16.)

27 ² Persons are “disabled” for purposes of receiving Social Security benefits if they
28 are unable to engage in any substantial gainful activity owing to a physical or
mental impairment expected to result in death, or which has lasted or is expected to
last for a continuous period of at least 12 months. 42 U.S.C. § 423(d)(1)(A).

1 **two**, the ALJ found that through the date last insured, Plaintiff has the following
2 severe impairments: degenerative disc disease of the cervical and lumbar spine
3 areas; osteoarthritis of the bilateral hips; and obesity. (*Id.*) At **step three**, the ALJ
4 found that Plaintiff “did not have an impairment or combination of impairments
5 that met or medically equaled the severity of one of the listed impairments in 20
6 CFR Part 404, Subpart P, Appendix 1.” (AR 589.)

7 Before proceeding to step four, the ALJ found that Plaintiff had the residual
8 functional capacity (“RFC”) to:

9 [L]ift and/or carry fifteen pounds occasionally and ten pounds
10 frequently, stand and/or walk up to four hours in an eight-hour
11 workday (no more than forty-five minutes at a time), and sit up to six
12 hours in an eight-hour workday (no more than forty-five minutes at a
13 time), with no more than occasional bending, stooping, crawling, or
climbing stairs, and no climbing ladders, ropes, or scaffolds.

14 (*Id.*)

15 At **step four**, based on the Plaintiff’s RFC and the VE’s testimony, the ALJ
16 found that Plaintiff was capable of performing past relevant work as an account
17 manager, and therefore did not proceed to **step five**. (AR 594.) Accordingly, the
18 ALJ found that Plaintiff had not been under a disability from the AOD through the
19 date last insured. (AR 595.)

20 **III. STANDARD OF REVIEW**

21 Under 42 U.S.C. § 405(g), a district court may review the Commissioner’s
22 decision to deny benefits. A court must affirm an ALJ’s findings of fact if they are
23 supported by substantial evidence, and if the proper legal standards were applied.
24 *Mayer v. Massanari*, 276 F.3d 453, 458-59 (9th Cir. 2001). “‘Substantial evidence’
25 means more than a mere scintilla, but less than a preponderance; it is such relevant
26 evidence as a reasonable person might accept as adequate to support a conclusion.”
27 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (citing *Robbins v. Soc.*
28 *Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006)). An ALJ can satisfy the substantial

1 evidence requirement “by setting out a detailed and thorough summary of the facts
2 and conflicting clinical evidence, stating his interpretation thereof, and making
3 findings.” *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (citation omitted).

4 “[T]he Commissioner’s decision cannot be affirmed simply by isolating a
5 specific quantum of supporting evidence. Rather, a court must consider the record
6 as a whole, weighing both evidence that supports and evidence that detracts from
7 the Secretary’s conclusion.” *Aukland v. Massanari*, 257 F.3d 1033, 1035 (9th Cir.
8 2001) (citations and internal quotation marks omitted). “‘Where evidence is
9 susceptible to more than one rational interpretation,’ the ALJ’s decision should be
10 upheld.” *Ryan v. Comm’r of Soc. Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008) (citing
11 *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005)); *see Robbins*, 466 F.3d at
12 882 (“If the evidence can support either affirming or reversing the ALJ’s
13 conclusion, we may not substitute our judgment for that of the ALJ.”). The Court
14 may review only “the reasons provided by the ALJ in the disability determination
15 and may not affirm the ALJ on a ground upon which he did not rely.” *Orn v.*
16 *Astrue*, 495 F.3d 625, 630 (9th Cir. 2007) (citing *Connett v. Barnhart*, 340 F.3d
17 871, 874 (9th Cir. 2003)).

18 **IV. DISCUSSION**

19 Plaintiff raises three issues for review: (1) whether the ALJ properly assessed
20 Plaintiff’s subjective complaints; (2) whether the ALJ properly evaluated the
21 opinions of the treating and examining physicians; and (3) whether the ALJ erred in
22 finding that Plaintiff can return to her past relevant work. (JS 2.) The
23 Commissioner contends that the ALJ properly evaluated Plaintiff’s credibility,
24 properly weighed medical opinions, and properly found that Plaintiff can return to
25 her past relevant work. (JS 17, 30, 47-48.) For the reasons below, the Court agrees
26 with Plaintiff on the issue of her subjective complaints and remands on that ground.

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1 **A. The ALJ’s Assessment of Plaintiff’s Subjective Complaints Is Not**
2 **Supported By Substantial Evidence**

3 Plaintiff argues that the ALJ improperly discounted Plaintiff’s complaints of
4 pain and failed to provide legitimate reasons for finding Plaintiff’s complaints
5 inconsistent with the evidence in the record. (JS 2-3, 7.) The Commissioner argues
6 that substantial evidence supports the ALJ’s determination that Plaintiff’s
7 complaints are inconsistent with the evidence. (JS 7.)

8 **1. Plaintiff’s Testimony**

9 At the administrative hearing, Plaintiff testified that she was 65 years old and
10 last worked full time in 2009. (AR 622.) She was laid off from her job and began
11 receiving distributions from a long-term disability insurance policy. (AR 624-25.)
12 Plaintiff testified that she was able to receive long-term disability due to her
13 “injuries at the time.” (AR 625.) Plaintiff settled a workers’ compensation claim
14 about two years after she stopped working. (AR 625-26.) Plaintiff testified that she
15 “wasn’t able to” find other jobs because she “couldn’t work any hours
16 consistently.” (AR 625, 627.)

17 Plaintiff testified that her low back made her “unable to sit for any length of
18 time” and her shoulders and neck made her unable to type and work on a computer.
19 (AR 625.) Plaintiff testified that she was able to sit for only about 15 or 20 minutes
20 before her back and shoulders prevented her from continuing without heavy
21 medication. (AR 627-28.) She would then go lie down for “a couple of hours”
22 before she could return to her tasks for about another 20 minutes. (AR 628.)
23 Plaintiff testified that she had difficulty using the computer because of problems
24 sitting, and neck and shoulder pain that extended into her arms and fingers. (AR
25 629.) Plaintiff testified that her hands would “get a little numb” and she could type
26 for only about 10 or 15 minutes. (*Id.*) Plaintiff testified that she the type of work
27 she did required about five to six hours of typing during an eight-to-nine hour day.
28 (*Id.*) Plaintiff also testified that she could stand for only about 15 or 20 minutes at a

1 time before she would “need to sit and move around because of the low back pain.”
2 (*Id.*)

3 Plaintiff testified that she had been taking Vicodin or Norco for pain,
4 Meloxicam and ibuprofen for inflammation, and something to settle her stomach
5 after a couple of attacks of diverticulitis. (AR 630-31.) Plaintiff testified that the
6 medications made it “hard to concentrate and work.” (AR 631.) Plaintiff testified
7 that she would take her medication when she “knew [she] wasn’t going to have to
8 sit for very long and [she] could go in and lay down, not drive at that time.” (*Id.*)
9 Plaintiff “tried not to take it if [she was] going to be going anywhere” because the
10 medication made her sleepy and less careful about moving around. (AR 631-32.)
11 Plaintiff also took medication for gastrointestinal problems. (AR 633-35.) Plaintiff
12 testified that her medications made her feel fatigued. (AR 635.)

13 Plaintiff testified that her pain made it hard for her to focus: when the pain
14 was at a high level, she could remain focused for only about 10 or 15 minutes
15 before she would need to take her pain medication. (AR 631.) Plaintiff testified
16 that her pain would be at a high level when she was sitting. (*Id.*) Plaintiff “needed
17 to be mobile,” and her “tossing and turning at night” caused her to be exhausted in
18 the morning. (*Id.*) Plaintiff testified that her pain was like that every day. (AR
19 632.)

20 Plaintiff testified that she had “hip discomfort” that between 2010 and 2012,
21 and her doctor recommended surgery in 2014. (AR 636-37.) Plaintiff’s surgery
22 was scheduled later, in 2015, “for insurance reasons” because Plaintiff would then
23 be eligible for Medicare. (AR 637.) Plaintiff testified that her doctor prescribed
24 her medication during the time until the surgery. (*Id.*)

25 **2. Applicable Legal Standards**

26 “In assessing the credibility of a claimant’s testimony regarding subjective
27 pain or the intensity of symptoms, the ALJ engages in a two-step analysis.” *Molina*
28 *v. Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012) (citing *Vasquez v. Astrue*, 572 F.3d

1 586, 591 (9th Cir. 2009)). “First, the ALJ must determine whether the claimant has
2 presented objective medical evidence of an underlying impairment which could
3 reasonably be expected to produce the pain or other symptoms alleged.” *Treichler*
4 *v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1102 (9th Cir. 2014) (quoting
5 *Lingenfelter*, 504 F.3d at 1036) (internal quotation marks omitted). If so, and if the
6 ALJ does not find evidence of malingering, the ALJ must provide specific, clear
7 and convincing reasons for rejecting a claimant’s testimony regarding the severity
8 of his symptoms. *Id.* The ALJ must identify what testimony was found not
9 credible and explain what evidence undermines that testimony. *Holohan v.*
10 *Massanari*, 246 F.3d 1195, 1208 (9th Cir. 2001). “General findings are
11 insufficient.” *Lester*, 81 F.3d at 834.

12 **3. Discussion**

13 “After careful consideration of the evidence,” the ALJ found that Plaintiff’s
14 “medically determinable impairments could reasonably be expected to cause the
15 alleged symptoms,” but found that Plaintiff’s “statements concerning the intensity,
16 persistence, and limiting effects of these symptoms are not entirely consistent with
17 the medical evidence and other evidence in the record.” (AR 590.) The ALJ relied
18 on the following reasons: (1) Plaintiff’s course of treatment; and (2) lack of
19 objective medical evidence to support the alleged severity of symptoms. (AR 590-
20 93.) No malingering allegation was made, and therefore, the ALJ’s reasons must be
21 “clear and convincing.”

22 **a. Reason No. 1: Plaintiff’s Course of Treatment**

23 The ALJ found that Plaintiff’s course of treatment did not support her
24 allegations, noting that Plaintiff “received little treatment” from her two physicians
25 and reported that her back pain improved with conservative treatment. (AR 592-
26 93.) The ALJ also noted that Plaintiff’s condition improved with further treatment
27 after the date last insured, which “casts additional doubt on the claimant’s
28 allegations of totally disabling symptoms and functional limitations.” (AR 593.)

1 An ALJ may discount a claimant’s testimony based on routine and conservative
2 treatment. *See Parra v. Astrue*, 481 F.3d 742, 750-51 (9th Cir. 2007) (“[E]vidence
3 of ‘conservative treatment’ is sufficient to discount a claimant’s testimony
4 regarding severity of an impairment.”); *see also Meanel v. Apfel*, 172 F.3d 1111,
5 1114 (9th Cir. 1999) (rejecting a plaintiff’s complaint “that she experienced pain
6 approaching the highest level imaginable” as “inconsistent with the ‘minimal,
7 conservative treatment’ that she received”).

8 The ALJ noted that Plaintiff “received little treatment” from Jeff B. Tirsch,
9 D.C., and Glenn E. Lowenberg, D.C. (AR 592.) The evidence does not support
10 this finding. Treatment records reveal over 120 visits during the relevant period of
11 November 6, 2009 through December 31, 2014. (*See, e.g.*, AR 189-205, 213-17,
12 558-69, 981-98.) Plaintiff’s frequency of visits varied from one to eight visits per
13 month, with only a few one-month gaps and one three-month gap in treatment.
14 (*See, e.g.*, AR 213-17, 982-85, 989-93.)

15 The ALJ stated that Dr. Tirsch attributed Plaintiff’s delays in receiving
16 treatment to disputes with Plaintiff’s insurance provider. (AR 592; *see* AR 555.)
17 The ALJ observed, “It does not appear the claimant sought treatment at free, public,
18 or low-cost facilities while she awaited the decision of her insurance carrier.” (AR
19 592.) However, there is no evidence that such alternative facilities and treatment
20 were available to Plaintiff. *See Jones v. Astrue*, No. CV 08-2860-CT, 2008 WL
21 4609974, at *6 (C.D. Cal. Oct. 10, 2008) (rejecting an ALJ’s insistence that an
22 uninsured claimant should have obtained low-cost treatment when no evidence
23 indicated that such treatment was available). Moreover, when considering
24 treatment history, Social Security Ruling 16-3p requires an ALJ to consider that
25 “[a]n individual may not be able to afford treatment *and may not have access to*

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1 *free or low-cost medical services.*” Soc. Sec. Ruling 16-3p (Oct. 25, 2017), 2017
2 WL 5180304, at *10 (emphasis added).³

3 The ALJ also noted that during a March 2010 orthopedic evaluation, Plaintiff
4 told Phillip J. Kanter, M.D., that her back pain improved with rest, medications, hot
5 showers, massages, and heating pads. (AR 592-93; *see* AR 301.) The ALJ
6 determined that this “evidence of limited treatment” suggested that Plaintiff’s
7 symptoms “were not as serious as she alleged through the date last insured.” (AR
8 593.) Plaintiff testified at the hearing that she had been prescribed Vicodin or
9 Norco for pain and Meloxicam for inflammation. (AR 630, 637.) Treatment
10 records reveal a long history of Plaintiff also taking various other prescription
11 painkillers and anti-inflammatories, including Tramadol. (*See* AR 263 (March
12 2011); AR 270 (May 2011); AR 276 (July 2011); AR 282 (August 2011); AR 357
13 (September 2010); AR 377 (November 2011); AR 1083, 1106 (November 2014);
14 AR 1085-86 (December 2013); AR 1103-04 (December 2014).) The ALJ’s
15 reliance on Plaintiff’s single statement to Dr. Kanter does not provide substantial
16 evidence to support a conclusion that Plaintiff’s treatment was conservative or
17 “limited.” *See Shepard v. Colvin*, No. 1:14-CV-1166-SMS, 2015 WL 9490094, at
18 *7 (E.D. Cal. Dec. 30, 2015) (finding that a record that reflected “substantial
19 medical treatment and heavy reliance on pain medication,” including narcotics and
20 Meloxicam, did not support a finding that treatment was conservative); *Ruiz v.*
21 *Colvin*, No. CV 14-08867-AS, 2016 WL 471208, at *6 (C.D. Cal. Feb. 5, 2016)
22 (finding that treatment was not conservative when it consisted of taking Tramadol
23 for pain, physical therapy, and a referral to an orthopedist for surgical options).

24 Finally, the ALJ observed that Plaintiff’s condition improved with continued
25 treatment, including hip surgery, after the date last insured. (AR 593.) The ALJ

26 ³ Although the Ruling was republished in March 2017, after the date of the ALJ’s
27 decision, the revisions to the Ruling were minor clarifications. *See* 2017 WL
28 5180304, at *1. The revisions did not affect the quoted language, which was in
effect on the date of the ALJ’s decision.

1 noted that, because the evidence would establish disability after the date last
2 insured, it was of “limited probative value.” (*Id.*) Nevertheless, the ALJ concluded
3 that the “evidence of improvement in the claimant’s condition and functioning with
4 treatment casts additional doubt on the claimant’s allegations of totally disabling
5 symptoms and functional limitations.” (*Id.*)

6 The ALJ must consider only impairments that existed prior to the DLI, but
7 evidence that postdates the DLI can be probative of pre-DLI disability. *Turner v.*
8 *Comm’r of Soc. Sec.*, 613 F.3d 1217, 1228-29 (9th Cir. 2010) (citing *Smith v.*
9 *Bowen*, 849 F.2d 1222, 1225 (9th Cir. 1988)). Although Plaintiff’s DLI was
10 December 31, 2014, her August 2015 left hip replacement (*see* 1041) is still
11 relevant to the determination of disability. *See Logan v. Colvin*, No. ED CV 12-
12 107-PJW, 2013 WL 5332454, at *3 (C.D. Cal. Sept. 23, 2013) (“[B]ecause
13 Plaintiff’s burden in this case was to establish that he became disabled before
14 December 31, 2008, his date last insured, and that his impairment lasted or was
15 expected to last for at least 12 months, the ending date for purposes of the disability
16 analysis was December 31, 2009.” (citing 42 U.S.C. § 423(d)(1)(A)). In November
17 and December 2014—before Plaintiff’s DLI—Plaintiff’s orthopedic records noted
18 that Plaintiff had severe degenerative joint disease and may require a total hip
19 replacement in the next several months. (AR 1103-04, 1107-08.) Plaintiff testified
20 that her surgery was scheduled later in 2015 “for insurance reasons” because she
21 would then be eligible for Medicare. (AR 637.) The fact that Plaintiff did indeed
22 undergo surgery (*see* AR 1022, 1041) is probative of the severity of her hip
23 condition when the surgery was recommended, before her DLI.

24 The ALJ noted that treatment records indicated that Plaintiff was improving
25 and progressing well after her surgery. (AR 593; *see* AR 863, 885, 895, 899, 909,
26 1013-21.) However, this evidence of improvement is only relevant to Plaintiff’s
27 hip condition. At the hearing, Plaintiff primarily testified about pain in her low
28 back, neck, and shoulders, as well as about the side effects of her medications. (*See*

1 AR 625, 627-32, 635.) The evidence of Plaintiff’s hip surgery and the subsequent
2 improvement of her condition and functioning is not a legitimate reason to discredit
3 Plaintiff’s subjective complaints about other symptoms and limitations.

4 The Court finds that this reason is not a clear and convincing reason,
5 supported by substantial evidence, to discount Plaintiff’s subjective testimony.

6 **b. Reason No. 2: Lack of Supporting Objective Medical**
7 **Evidence**

8 The remaining reason for discounting Plaintiff’s subjective testimony—lack
9 of supporting objective evidence—cannot form the sole basis for discounting pain
10 testimony. *See Burch*, 400 F.3d at 681 (“Although lack of medical evidence cannot
11 form the sole basis for discounting pain testimony, it is a factor that the ALJ can
12 consider in his credibility analysis.”).

13 The ALJ did not give clear and convincing reasons, supported by substantial
14 evidence, for discounting Plaintiff’s subjective testimony. Accordingly, remand is
15 warranted on this issue.

16 **B. The Court Declines to Address Plaintiff’s Remaining Arguments**

17 Having found that remand is warranted, the Court declines to address
18 Plaintiff’s remaining arguments that the ALJ improperly evaluated physicians’
19 opinions and erred in finding that Plaintiff can return to her past relevant work. *See*
20 *Hiler v. Astrue*, 687 F.3d 1208, 1212 (9th Cir. 2012) (“Because we remand the case
21 to the ALJ for the reasons stated, we decline to reach [plaintiff’s] alternative ground
22 for remand.”); *see also Augustine ex rel. Ramirez v. Astrue*, 536 F. Supp. 2d 1147,
23 1153 n.7 (C.D. Cal. 2008) (“[The] Court need not address the other claims plaintiff
24 raises, none of which would provide plaintiff with any further relief than granted,
25 and all of which can be addressed on remand.”).

26 **C. Remand For Further Administrative Proceedings**

27 Because further administrative review could remedy the ALJ’s errors,
28 remand for further administrative proceedings, rather than an award of benefits, is

1 warranted here. *See Brown-Hunter v. Colvin*, 806 F.3d 487, 495 (9th Cir. 2015)
2 (remanding for an award of benefits is appropriate in rare circumstances). Before
3 ordering remand for an award of benefits, three requirements must be met: (1) the
4 Court must conclude that the ALJ failed to provide legally sufficient reasons for
5 rejecting evidence; (2) the Court must conclude that the record has been fully
6 developed and further administrative proceedings would serve no useful purpose;
7 and (3) the Court must conclude that if the improperly discredited evidence were
8 credited as true, the ALJ would be required to find the claimant disabled on
9 remand. *Id.* (citations omitted). Even if all three requirements are met, the Court
10 retains flexibility to remand for further proceedings “when the record as a whole
11 creates serious doubt as to whether the claimant is, in fact, disabled within the
12 meaning of the Social Security Act.” *Id.* (citation omitted).

13 Here, remand for further administrative proceedings is appropriate. The
14 Court finds that the ALJ failed to provide clear and convincing reasons supported
15 by substantial evidence to discount Plaintiff’s subjective testimony.

16 On remand, the ALJ shall reassess Plaintiff’s subjective allegations in light of
17 SSR 16-3p – Evaluation of Symptoms in Disability Claims, 2016 WL 1119029
18 (Mar. 16, 2016), which would apply upon remand. The ALJ shall then reassess
19 Plaintiff’s RFC in light of the reassessment of Plaintiff’s subjective allegations and
20 proceed through step four and step five, if necessary, to determine what work, if
21 any, Plaintiff is capable of performing.

22 **V. CONCLUSION**

23 IT IS ORDERED that Judgment shall be entered REVERSING the decision
24 of the Commissioner denying benefits, and REMANDING the matter for further
25 proceedings consistent with this Order.

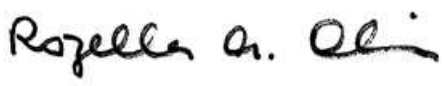
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IT IS FURTHER ORDERED that the Clerk of the Court serve copies of this Order and the Judgment on counsel for both parties.



DATED: December 13, 2017

ROZELLA A. OLIVER
UNITED STATES MAGISTRATE JUDGE

NOTICE

THIS DECISION IS NOT INTENDED FOR PUBLICATION IN WESTLAW, LEXIS/NEXIS, OR ANY OTHER LEGAL DATABASE.