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

YADIRA CARDENAS,  
  
Plaintiff,  
  
v.  
  
NANCY A. BERRYHILL, Acting  
Commissioner of Social Security,  
  
Defendant.

Case No. EDCV17-01525-AFM

**MEMORANDUM OPINION AND  
ORDER AFFIRMING DECISION  
OF COMMISSIONER**

Plaintiff filed this action seeking review of the Commissioner's final decision denying her applications for disability insurance benefits and supplemental security income. In accordance with the Court's case management order, the parties have filed memorandum briefs addressing the merits of the disputed issues.<sup>1</sup> This matter is now ready for decision.

**BACKGROUND**

Plaintiff filed applications for disability insurance benefits and supplemental security income on July 2, 2013, alleging disability beginning March 1, 2005. Her

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<sup>1</sup> Defendant's memorandum was mislabeled as a motion for summary judgment. (ECF No. 19.)

1 applications were denied on initial review and on reconsideration. (Administrative  
2 Record [“AR”] 178-198.) A hearing took place before an Administrative Law  
3 Judge (“ALJ”) on February 17, 2016. Plaintiff, who was represented by counsel,  
4 testified at the hearing, as did a vocational expert (“VE”). The ALJ issued a  
5 decision dated March 11, 2016, finding that Plaintiff was not under a disability  
6 within the meaning of the Social Security Act (“the Act”) from March 1, 2005  
7 through the date of the decision. (AR 63-73.) The Appeals Council subsequently  
8 declined review, rendering the ALJ’s decision the final decision of the  
9 Commissioner. (AR 1-7.)

### 10 **DISPUTED ISSUE**

11 Whether the ALJ failed to properly consider Plaintiff’s subjective complaints.

### 12 **STANDARD OF REVIEW**

13 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner’s decision to  
14 determine whether the Commissioner’s findings are supported by substantial  
15 evidence and whether the proper legal standards were applied. *See Treichler v.*  
16 *Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1098 (9th Cir. 2014). Substantial  
17 evidence means “more than a mere scintilla” but less than a preponderance. *See*  
18 *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Lingenfelter v. Astrue*, 504 F.3d  
19 1028, 1035 (9th Cir. 2007). Substantial evidence is “such relevant evidence as a  
20 reasonable mind might accept as adequate to support a conclusion.” *Richardson*,  
21 402 U.S. at 401. This Court must review the record as a whole, weighing both the  
22 evidence that supports and the evidence that detracts from the Commissioner’s  
23 conclusion. *Lingenfelter*, 504 F.3d at 1035. Where evidence is susceptible of more  
24 than one rational interpretation, the Commissioner’s decision must be upheld. *See*  
25 *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007).

### 26 **THE ALJ’S DECISION**

27 The ALJ found that Plaintiff suffered from severe impairments – namely,  
28 lumbar spine degenerative disk disease, diabetes, left lower extremity disorder, and

1 obesity – but that no impairment or combination of impairments met or medically  
2 equal the severity of one of the listed impairments. (AR 67-68.) Based upon her  
3 review of the record, the ALJ determined that Plaintiff retained the residual  
4 functional capacity (“RFC”) to perform sedentary work as defined by 20 C.F.R.  
5 404.1567(a) and 416.967(a) except lifting/carrying 20 pounds occasionally and 10  
6 pounds frequently; pushing/pulling within the weight limits of lifting/carrying;  
7 standing and/or walking for one hour in an eight-hour workday; sitting for eight  
8 hours in an eight-hour workday; no ladders, ropes, or scaffolds; no crawling; rarely  
9 stairs, bending or crouching; no work hazards such as working at unprotected  
10 heights, operating fast or dangerous machinery, or driving commercial vehicles;  
11 and requires the use of a cane for any prolonged walks. (AR 69.) Accepting the  
12 testimony of the VE, the ALJ determined that given Plaintiff’s RFC, she was  
13 capable of performing jobs existing in significant numbers in the national economy.  
14 (AR 72.)

### 15 **DISCUSSION**

16 Where, as here, a claimant has produced objective medical evidence of an  
17 impairment which could reasonably be expected to produce some degree of pain  
18 and/or other symptoms, and the record is devoid of any affirmative evidence of  
19 malingering, the ALJ must provide “specific, clear and convincing reasons” for  
20 rejecting the claimant’s testimony regarding the severity of pain or other symptoms.  
21 *Burrell v. Colvin*, 775 F.3d 1133, 1136 (9th Cir. 2014) (quoting *Molina v. Astrue*,  
22 674 F.3d 1104, 1112 (9th Cir. 2012)). “General findings [regarding a claimant’s  
23 credibility] are insufficient; rather, the ALJ must identify what testimony is not  
24 credible and what evidence undermines the claimant’s complaints.” *Burrell*, 775  
25 F.3d at 1138 (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995)). Further,  
26 the ALJ’s findings “must be sufficiently specific to allow a reviewing court to  
27 conclude the adjudicator rejected the claimant’s testimony on permissible grounds  
28 and did not arbitrarily discredit a claimant’s testimony regarding pain.” *Brown-*

1 *Hunter v. Colvin*, 806 F.3d 487, 493 (9th Cir. 2015) (quoting *Bunnell v. Sullivan*,  
2 947 F.2d 345-46 (9th Cir. 1991) (en banc)). An ALJ may consider a variety of  
3 factors ordinarily used in assessing credibility, including inconsistencies within the  
4 claimant's testimony or between the claimant's testimony and the claimant's  
5 conduct, the claimant's work record, and information from physicians, relatives, or  
6 friends concerning the nature, severity, and effect of the claimant's symptoms. *See*  
7 *Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9th Cir. 2002); *Light v. Social Sec.*  
8 *Admin.*, 119 F.3d 789, 792 (9th Cir. 1997); *Fair v. Bowen*, 885 F.2d 597, 604 n.5  
9 (9th Cir. 1989). Since the Commissioner has not argued that there was evidence of  
10 malingering, the "clear and convincing" standard applies to the ALJ's adverse  
11 credibility determination. *See Burrell*, 775 F.3d at 1136.

12 Plaintiff alleged disability due to symptoms related to diabetes, high blood  
13 pressure, leg and back pain, and carpal tunnel syndrome. (AR 121, 335.) At the  
14 hearing, Plaintiff testified that she generally used a walker but sometimes used a  
15 wheelchair and had done so "off and on" for six years. (AR 116.) She stated that  
16 she needed a walker or wheelchair because of stiffness in her left leg. (AR 116.)  
17 Plaintiff explained that she previously used a cane, but discontinued approximately  
18 three years prior to the hearing because she was too heavy to be supported by a  
19 cane. (AR 116-117, 119.) Plaintiff estimated that she could walk using a walker for  
20 five minutes before becoming tired; could stand for a period of ten to fifteen  
21 minutes before becoming tired; could sit for a period of fifteen minutes before  
22 experiencing pain and needing to stand up; could not bend down and kneel; and as  
23 of approximately one year before the hearing, she was unable to climb stairs. (AR  
24 125-129.)

25 The ALJ provided the following reasons for discounting Plaintiff's testimony  
26 as to the severity of her symptoms: (1) Plaintiff received generally routine and  
27 conservative treatment; (2) the objective medical evidence supported the ALJ's  
28 RFC; (3) Plaintiff's testimony contained inconsistencies; and (4) Plaintiff's daily

1 activities were inconsistent with the severity of her alleged limitations. (AR 71-72.)

2 **1. Conservative treatment**

3 An ALJ may properly consider a claimant’s conservative treatment in  
4 assessing the credibility of her subjective complaints. *See Marsh v. Colvin*, 792  
5 F.3d 1170, 1173 n.2 (9th Cir. 2015) (“routine or conservative” treatment is a clear  
6 and convincing reason for which an ALJ may reject a claimant’s testimony about  
7 symptom severity); *Parra v. Astrue*, 481 F.3d 742 (9th Cir. 2007) (conservative  
8 treatment consisting of over the counter pain medication was sufficient reason to  
9 discount a claimant’s testimony regarding the severity of their symptoms).

10 Here, the ALJ discounted Plaintiff’s allegations regarding the severity of her  
11 pain and symptoms in part because the medical record revealed that she received  
12 routine and conservative treatment. (AR 71-72.) The ALJ’s characterization of  
13 Plaintiff’s treatment is supported by substantial evidence. As the ALJ accurately  
14 noted, Plaintiff’s complaints of disabling leg and back pain were treated only with  
15 referrals for diagnostic testing – none of which revealed any significant findings –  
16 and generally with over-the-counter medication, namely ibuprofen. (AR 71, 418-  
17 419, 426, 439-440, 448-453.) Plaintiff points to nothing in the record suggesting  
18 that any physician recommended, or petitioner sought, more aggressive treatment,  
19 such as narcotic pain medication, steroid injections, or surgery. *See Osenbrock v.*  
20 *Apfel*, 240 F.3d 1157, 1166 (9th Cir. 2001) (ALJ properly rejected the claimant’s  
21 testimony because he did not use “Codeine or Morphine based analgesics that are  
22 commonly prescribed for severe and unremitting pain”); *Meanel v. Apfel*, 172 F.3d  
23 1111, 1114 (9th Cir. 1999) (a physician’s failure “to prescribe ... any serious  
24 medical treatment for [a claimant’s] supposedly excruciating pain” may be  
25 evidence of conservative treatment). Plaintiff points out that she was prescribed  
26 gabapentin for her nerve disorder (*see* AR 438, 449), but this medication alone does  
27 not alter the conservative nature of her treatment. *See Rodriguez v. Colvin*, 2016  
28 WL 552648, at \*2 (C.D. Cal. Feb. 10, 2016) (ALJ properly characterized claimant’s

1 treatment as conservative and rejected subjective complaints where claimant was  
2 prescribed gabapentin and did not rely solely on over-the-counter medication).

3 The ALJ also noted that Plaintiff's blood pressure and carpal tunnel  
4 syndrome were managed, and no aggressive treatment was recommended or  
5 anticipated for either condition. (AR 68.) With regard to her diabetes, Plaintiff was  
6 prescribed Metformin, but she reported that she had stopped taking the medication  
7 in 2013. The medical records confirm that Plaintiff's diabetes condition was  
8 managed with oral medication. (See AR 71-72, 122, 419, 422, 424, 426, 439-440,  
9 446, 448.) See *Warre v. Comm'r of Social Sec. Admin.*, 439 F.3d 1001, 1006 (9th  
10 Cir. 2006) ("Impairments that can be controlled effectively with medication are not  
11 disabling for the purpose of determining eligibility for SSI benefits.").

12 Plaintiff contends that the ALJ erroneously inferred that over-the-counter  
13 medication provided total relief of her symptoms because if that were true, Plaintiff  
14 "would presumably not be complaining of [pain] to her provider." (Plaintiff's Mem.  
15 at 8.) In support of this argument, Plaintiff points out that notwithstanding the  
16 medication, she continued to report back and leg pain, and that on one occasion she  
17 reported burning pain, numbness, and tingling in her legs. (Plaintiff's Mem. at 7-8  
18 (citing AR 448, 451-452).) Plaintiff's argument is unpersuasive. The reports on  
19 which Plaintiff relies merely reflect her subjective complaints of pain, and so they  
20 beg the question. The fact that Plaintiff reported experiencing pain does not  
21 undermine the ALJ's conclusion that Plaintiff's physicians did not recommend or  
22 prescribe anything more than conservative treatment for her complaints.<sup>2</sup>  
23 Accordingly, the ALJ properly relied upon Plaintiff's conservative treatment to  
24 discredit her subjective complaints. See *Tommasetti v. Astrue*, 533 F.3d 1035, 1040  
25 (9th Cir. 2008) (ALJ properly considered the claimant's use of "conservative

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26  
27 <sup>2</sup> It is also noteworthy that the report Plaintiff cites as evidence of her complaint of  
28 burning pain also includes Plaintiff's acknowledgement that "[t]he pain is relieved by  
OTC medicines (ibuprofen)." (AR 451.)

1 treatment including physical therapy and the use of anti-inflammatory medication, a  
2 transcutaneous electrical nerve stimulation unit, and a lumbosacral corset”).

### 3 **2. Lack of objective medical evidence**

4 “Although lack of medical evidence cannot form the sole basis for  
5 discounting pain testimony, it is a factor that the ALJ can consider in his credibility  
6 analysis.” *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005); *see Batson v.*  
7 *Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1197 (9th Cir. 2004) (lack of objective  
8 medical evidence to support claimant’s subjective complaints constitutes substantial  
9 evidence in support of an ALJ’s adverse credibility determination).

10 Here, the ALJ accurately summarized the objective medical evidence and  
11 concluded that it did not support the severity of Plaintiff’s allegations. (AR 71.) In  
12 particular, the ALJ noted during an examination in August 2015, Plaintiff exhibited  
13 left foot and ankle swelling, non-pitting edema and painful range of motion, but  
14 otherwise her physical examination was unremarkable. (AR 71, 454.) During that  
15 examination, Plaintiff indicated that her pain was relieved with over-the-counter  
16 ibuprofen. (AR 451.) Plaintiff’s December 1, 2015 physical examination revealed  
17 edema in the left calf, severity 2+ and pitting type, but otherwise her physical  
18 examination was unremarkable. (AR 71, 446-450.) Physical examination on  
19 December 30, 2015 revealed mild swelling and stiffness in the left leg, tenderness  
20 in the low back, shoulder, and ankle. Otherwise, the physical examination was  
21 unremarkable. (AR 417-418.) Plaintiff was prescribed Metformin, lisinopril and  
22 ibuprofen. (AR 418, 424, 426.)

23 The ALJ also noted that Plaintiff’s diagnostic tests showed minimal, if any,  
24 findings. Specifically, Plaintiff’s 2013 lumbar spine images showed mild to  
25 moderate degenerative disc disease from L1 to L3 and mild degenerative disease at  
26 L5-S1 (AR 71, 416); September 2015 images of Plaintiff’s lumbar spine showed  
27 moderate degenerative disc disease, most notably at L2-L3 (AR 71, 442); a  
28 September 2015 X-ray of Plaintiff’s ankle showed a “tiny calcaneal spur” (AR 71,

1 441); X-rays of Plaintiff's left knee from the same date were unremarkable (AR 71,  
2 443); and a February 2016 ultrasound of Plaintiff's legs revealed no evidence of  
3 deep venous thrombosis bilaterally (AR 71, 444).

4 As the ALJ noted, Plaintiff had surgery for carpal tunnel syndrome in 2002  
5 and nothing in the medical records suggesting that additional treatment was either  
6 anticipated or recommended. (*See* AR 68, 70, 82, 100, 122, 127, 435.) In addition,  
7 the ALJ noted that Plaintiff's high blood pressure and diabetes were effectively  
8 treated with medication, and her diabetes was noted to be without complication.  
9 (AR 68, 71-72, 439, 446.)

10 In light of the foregoing record, the ALJ properly relied upon the absence of  
11 objective medical support as one factor in her decision to discount Plaintiff's  
12 subjective complaints.

### 13 **3. Inconsistencies in Plaintiff's testimony**

14 An ALJ may use ordinary techniques of credibility evaluation, such as the  
15 claimant's prior inconsistent statements concerning the symptoms, and other  
16 testimony by the claimant that appears less than candid. *See Molina*, 674 F.3d at  
17 1112; *Tommasetti*, 533 F.3d at 1039. If the ALJ's finding is supported by  
18 substantial evidence, the Court "may not engage in second-guessing." *Thomas*, 278  
19 F.3d at 959.

20 Here, in assessing the credibility of Plaintiff's subjective complaints, the ALJ  
21 considered what she found to be inconsistencies in Plaintiff's testimony. In  
22 particular, the ALJ noted that Plaintiff testified that she was no longer able to use a  
23 cane because she was too heavy. At the time, Plaintiff weighed 190 pounds. (AR  
24 70, 72, 116-117, 119, 122.) Yet, the medical records (and the testimony at the  
25 hearing) showed that Plaintiff used a cane at the time of her consultative  
26 examination in September 2013 when she was heavier, weighing 205 pounds. (AR  
27 72, 119-120, 413-415.) The ALJ also noted that despite Plaintiff's protestations that  
28 she needed a walker or wheelchair, no physician had ever recommended an



1 assistive device. (AR 72.)

2 Plaintiff argues that her testimony was not inconsistent because she had  
3 explained that her ability to use a cane decreased over time. Notwithstanding  
4 Plaintiff's assertion, the ALJ's interpretation of the record was both reasonable and  
5 supported by substantial evidence. The fact that an alternative interpretation of the  
6 record may have been possible does not warrant reversal. *See Orn*, 495 F.3d at 630  
7 (where evidence is susceptible of more than one rational interpretation, the  
8 Commissioner's decision must be upheld).

9 Plaintiff also contends that the ALJ improperly relied on the absence of a  
10 prescription for a walker or wheelchair because new evidence submitted to the  
11 Appeals Council showed that Plaintiff was prescribed a walker in September 2016.  
12 (Plaintiff's Mem. at 9.) Relying upon *Brewes v. Comm'r of Soc. Sec. Admin.*, 682  
13 F.3d 1157 (9th Cir. 2012), Plaintiff argues that the Court must consider the  
14 September 2016 prescription in reviewing the ALJ's decision.

15 *Brewes* held that "when a claimant submits evidence for the first time to the  
16 Appeals Council, which considers that evidence in denying review of the ALJ's  
17 decision, the new evidence is part of the administrative record, which the district  
18 court must consider in determining whether the Commissioner's decision is  
19 supported by substantial evidence." *Id.* at 1159-1160. The Ninth Circuit's decision  
20 was based upon the regulations, which require the Appeals Council to consider new  
21 evidence submitted by a claimant, "so long as the evidence relates to the period on  
22 or before the ALJ's decision." *Id.* at 1162 (citing 20 C.F.R. § 404.970(b)).  
23 Significantly, *Brewes* involved later-submitted evidence that the Appeals Council  
24 "made part of the record." *Id.* at 1161.

25 Unlike *Brewes*, the Appeals Council here explicitly declined to consider the  
26 September 2016 prescription for a walker, explaining that the evidence was not  
27 relevant to Plaintiff's disability at a date prior to the ALJ's March 11, 2016  
28 decision. (AR 2.) Further, in identifying the additional evidence which it made part

1 of the record, the Appeals Council did not include the prescription. (AR 6.)  
2 Accordingly, the Court rejects Plaintiff's contention that it must consider the  
3 prescription as evidence undermining the ALJ's decision. *See Smith v. Berryhill*,  
4 2017 WL 993072, at \*13 (N.D. Cal. Mar. 15, 2017) (distinguishing *Brewes* and  
5 declining to consider evidence that post-dated ALJ's decision to be part of the  
6 administrative record where Appeals Council "expressly rejected [that evidence] as  
7 falling outside the relevant time period"). In any event, even if this evidence  
8 regarding a walker prescription was considered, it would not remove the  
9 inconsistencies in Plaintiff's testimony regarding use of a cane.

#### 10 **4. Daily activities**

11 An ALJ may properly rely on a claimant's daily activities to support an  
12 adverse credibility determination when those activities are inconsistent with the  
13 claimant's alleged symptoms. *See Molina*, 674 F.3d at 1112.

14 Here, Plaintiff reported that her typical day was spent sitting down, "trying to  
15 do kitchen work" such as washing dishes, preparing breakfast and dinner for her  
16 husband and children, and doing some laundry, although she required assistance  
17 moving clothes into the dryer and putting them away. (AR 130-131.) Plaintiff  
18 testified that she was able to go to the grocery store and that she went with her  
19 husband once a month. (AR 131-132.) In addition, Plaintiff was able to bathe and  
20 dress herself. (AR 132.) In her function report, which Plaintiff completed in August  
21 2013, Plaintiff stated that her daily activities included a "routine of housework"  
22 which she completed "little [by] little," and which included mopping, sweeping,  
23 and doing the dishes. (AR 342-343.) By the time of the hearing, however, Plaintiff  
24 testified that she was not able to vacuum, dust or sweep. (AR 131.)

25 The ALJ described Plaintiff's daily activities as "sitting down, picking up,  
26 washing dishes, preparing breakfast and dinner, doing laundry, putting clothes in  
27 the washer and dryer with the help of her husband and son, going shopping once a  
28 month, and watching television," and noted that Plaintiff bathed and dressed

1 herself. (AR 70.) The ALJ then concluded that Plaintiff’s “ability to participate in  
2 such activities undermined [her] allegations of disabling functional limitations.”

3 (AR 70.) In addition, the ALJ explained:

4       Despite her alleged impairments, the claimant has engaged in a  
5       somewhat normal level of daily activity and social interaction as noted  
6       above. These daily activities support the residual functional capacity.  
7       Moreover, some of the physical and mental abilities and social  
8       interactions required in order to perform these activities are the same  
9       as those necessary for obtaining and maintaining employment.

10 (AR 70.)

11       The Ninth Circuit has “repeatedly warned that ALJs must be especially  
12       cautious in concluding that daily activities are inconsistent with testimony about  
13       pain, because impairments that would unquestionably preclude work and all the  
14       pressures of a workplace environment will often be consistent with doing more than  
15       merely resting in bed all day.” *Garrison v. Colvin*, 759 F.3d 995, 1015-1016 (9th  
16       Cir. 2014). Indeed, “the mere fact that a plaintiff has carried on certain daily  
17       activities, such as grocery shopping, driving a car, or limited walking for exercise,  
18       does not in any way detract from her credibility as to her overall disability.”  
19       *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001).

20       Here, the ALJ merely referred to Plaintiff’s daily activities and concluded  
21       that they were generally inconsistent with Plaintiff’s claimed disability. The ALJ  
22       failed to describe how any particular daily activity was inconsistent with any  
23       specific claims made by Plaintiff or explain how any daily activity corresponded  
24       with obtaining and maintaining employment. This was legally insufficient. *See*  
25       *Burrell*, 775 F.3d at 1138 (“the ALJ did not elaborate on *which* daily activities  
26       conflicted with *which* part of Claimant’s testimony”); *Lester*, 81 F.3d at 834  
27       (“General findings are insufficient; rather, the ALJ must identify what testimony is  
28       not credible and what evidence undermines the claimant’s complaints.”).

1           Nevertheless, although the ALJ’s lack of specificity renders her reliance  
2 upon Plaintiff’s daily activities improper, this error is harmless in light of the other  
3 sufficiently clear and convincing reasons supporting her credibility determination.  
4 *See Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1227 (9th Cir. 2009)  
5 (where the ALJ presented four other independent proper bases for discounting the  
6 plaintiff’s testimony, reliance on claimant’s continued smoking to discredit her,  
7 even if erroneous, amounted to harmless error); *Carmickle v. Comm’r, Soc. Sec.*  
8 *Admin.*, 533 F.3d 1155, 1163 (9th Cir. 2008) (ALJ’s error in relying on claimant’s  
9 receipt of unemployment benefits and on relatively conservative pain treatment  
10 regime was harmless where ALJ provided other specific and legitimate reasons for  
11 finding claimant’s testimony incredible); *Batson*, 359 F.3d at 1197 (even if the  
12 record did not support one of ALJ’s stated reasons for disbelieving claimant’s  
13 testimony, the error was harmless).

14   \*       \*       \*

15           In sum, the ALJ did not commit reversible error in making the adverse  
16 credibility determination. The ALJ provided clear and convincing reasons for  
17 discounting Plaintiff’s testimony regarding her subjective complaints, and those  
18 reasons are supported by substantial evidence.

19           IT THEREFORE IS ORDERED that Judgment be entered affirming the  
20 decision of the Commissioner and dismissing this action with prejudice.

21  
22 DATED: 4/16/2018

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24 \_\_\_\_\_  
25 ALEXANDER F. MacKINNON  
26 UNITED STATES MAGISTRATE JUDGE  
27  
28