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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - SOUTHERN DIVISION

DENNIS C,¹

Plaintiff,

v.

ANDREW M. SAUL, Commissioner
of Social Security,

Defendant.

Case No. SACV 19-02061-AS

**MEMORANDUM OPINION AND ORDER
AFFIRMING COMMISSIONER**

For the reasons discussed below, IT IS HEREBY ORDERED that, pursuant to Sentence Four of 42 U.S.C. § 405(g), the Commissioner's decision is affirmed.

¹ Plaintiff's name is partially redacted in accordance with Federal Rule of Civil Procedure 5.2(c)(2)(B) and the recommendation of the Committee on Court Administration and Case Management of the Judicial Conference of the United States.

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PROCEEDINGS

On October 29, 2019, Plaintiff filed a Complaint Seeking review of the Commissioner’s denial of Plaintiff’s application for disability insurance benefits (“DIB”). (Dkt. No. 1). The parties have consented to proceed before the undersigned United States Magistrate Judge. (Dkt. Nos. 13-14). On March 25, 2020, Defendant filed an Answer along with the Administrative Record (“AR”). (Dkt. Nos. 17-18). On June 18, 2020, the parties filed a Joint Stipulation (“Joint Stip.”) setting forth their respective positions regarding Plaintiff’s claim. (Dkt. No. 19).

The Court has taken this matter under submission without oral argument. See C.D. Cal. L.R. 7-15.

BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION

On February 29, 2016, Plaintiff, formerly employed as a sales associate at Wal-Mart² (see AR 94, 96-97), filed an application for DIB₇ alleging a disability onset date of February 16, 2016.³ (AR

² Plaintiff worked as a courier from July 1998 through January 2011, before working at Wal-Mart in 2013 as a sales associate, and subsequently working as a sales associate in Wal-Mart’s claims department and, in October 2015, a sales associate in Wal-Mart’s sporting goods department. (AR 88, 90, 94, 96). Plaintiff returned to Wal-Mart in 2017 in the position of host whose duties included greeting customers. (AR 97).

³ Plaintiff had previously filed an application for DIB on February 20, 2012 and was found to be disabled from March 7, 2011 through October 1, 2013. (See AR 123-134).

1 234-35). Plaintiff's applications were denied initially on April
2 5, 2016 (AR 156-59), and on reconsideration on June 28, 2016 (AR
3 165-69).

4
5 On August 1, 2018, Plaintiff, represented by counsel,
6 testified at a hearing before Administrative Law Judge ("ALJ")
7 Kenneth Ball. (See AR 76, 79-86, 88-98, 101). The ALJ also heard
8 testimony from vocational expert Kathleen Spencer. (See AR 86-87,
9 89, 97-100).

10
11 On August 15, 2018, the ALJ issued a decision denying
12 Plaintiff's applications. (See AR 25-34). Applying the five-step
13 sequential process, the ALJ found at step one that Plaintiff had
14 engaged in substantial gainful activity ("SGA") from June 29, 2017
15 through January 16, 2018 and denied Plaintiff's claim for that
16 period. (AR 28). However, the ALJ found that Plaintiff had not
17 engaged in SGA from Plaintiff's alleged onset date of February 16,
18 2016 through June 28, 2017, and from January 17, 2018 through the
19 date of the ALJ's decision, August 15, 2018⁴. (Id.).

20
21 At step two, the ALJ found that Plaintiff had the following
22 severe impairment: lumbar spine degenerative disc disease, status
23 post-surgery on February 16, 2016. (AR 28).

24
25
26 _____
27 ⁴ Plaintiff's claim for disability benefits are primarily
28 concerned with the disability period between February 16, 2016 to
June 28, 2017. (See Joint Stip. at 4).

1 At step three, the ALJ determined that Plaintiff did not have
2 an impairment or combination of impairments that meets or medically
3 equals the severity of any listing found in 20 C.F.R. Part 404,
4 Subpart P, Appendix 1.⁵ (AR 28). The ALJ then found that Plaintiff
5 had the Residual Functional Capacity ("RFC")⁶ to perform light work⁷
6 with the following limitation: "occasionally perform postural
7 activities." (AR 29).

8
9 At step four, the ALJ determined that Plaintiff was able to
10 perform past relevant work as a "deliverer, outside" and sales
11 attendant as those jobs are generally performed, but not as
12 actually performed by plaintiff, past relevant work as a host⁸ both
13 as actually and generally performed, considering Plaintiff's RFC
14 with the physical and mental demands of Plaintiff's past work
15 experience. (AR 33). Accordingly, the ALJ found that Plaintiff
16 had not been under a disability, as defined in the Social Security

19 ⁵ The ALJ specifically considered whether Plaintiff's
20 medically determinable impairment meets the requirements of Listing
21 1.04 (disorders of the spine) and concluded that it did not. (AR
22 28).

23 ⁶ A Residual Functional Capacity is what a claimant can
24 still do despite existing exertional and nonexertional limitations.
25 See 20 C.F.R. § 404.1545(a)(1).

26 ⁷ "Light work involves lifting no more than 20 pounds at
27 a time with frequent lifting or carrying of objects weighing up to
28 10 pounds." See 20 C.F.R. § 404.1567(b).

⁸ The ALJ noted that Plaintiff was employed as a host from
June 29, 2017 to January 16, 2018 and therefore this position was
only considered past relevant work since January 17, 2018.

1 Act, from the alleged disability onset, February 16, 2016, to
2 August 15, 2018, the date of the decision. (Id.).

3
4 On September 4, 2019, the Appeals Council denied Plaintiff's
5 request to review the ALJ's decision. (See AR 1-6). Plaintiff
6 now seeks judicial review of the ALJ's decision, which stands as
7 the final decision of the Commissioner. See 42 U.S.C. §§ 405(g),
8 1383(c).

9
10 **STANDARD OF REVIEW**

11
12 This Court reviews the Commissioner's decision to determine
13 whether the findings are supported by substantial evidence and
14 whether proper legal standards were applied. 42 U.S.C § 405(g);
15 Brewes v. Commissioner, 682 F.3d 1157, 1161 (9th Cir. 2012).
16 "Substantial evidence" is more than a mere scintilla, but less than
17 a preponderance. Garrison v. Colvin, 759 F.3d 995, 1009 (9th Cir.
18 2014). To determine whether substantial evidence supports a
19 finding, "a court must consider the record as a whole, weighing
20 both evidence that supports and evidence that detracts from the
21 [Commissioner's] conclusion." Aukland v. Massanari, 257 F.3d 1033,
22 1035 (9th Cir. 2001)(internal quotation omitted). As a result,
23 "[i]f the evidence can support either affirming or reversing the
24 ALJ's conclusion, [a court] may not substitute [its] judgment for
25 that of the ALJ." Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882
26 (9th Cir. 2006).

1 **PLAINTIFF'S CONTENTION**

2
3 Plaintiff contends that the ALJ erred in failing to properly
4 evaluate Plaintiff's subjective symptom testimony. (See Joint
5 Stip. at 4-9; 20-23). As set forth above, Plaintiff is primarily
6 concerned with the period of disability between February 2016 to
7 June 2017. (Joint Stip. at 4).

8
9 **DISCUSSION**

10
11 After consideration of the record as a whole, the Court finds
12 that the Commissioner's findings are supported by substantial
13 evidence and are free from legal error.⁹

14
15 **A. The ALJ Provided Clear and Convincing Reasons for**
16 **Discrediting Plaintiff's Subjective Symptom Testimony**

17
18 Plaintiff asserts that the ALJ did not provide clear and
19 convincing reasons for rejecting Plaintiff's subjective symptom
20 testimony. (See Joint Stip. at 4-9; 20-23). Defendant asserts
21 that the ALJ provided proper reasons for finding Plaintiff's
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25 ⁹ The harmless error rule applies to the review of
26 administrative decisions regarding disability. McLeod v. Astrue,
27 640 F.3d 881, 886-88 (9th Cir. 2011); see Burch v. Barnhart, 400
28 F.3d 676, 679 (9th Cir. 2005) (an ALJ's decision will not be
reversed for errors that are harmless).

1 subjective testimony not fully credible. (See Joint Stip. at 9-
2 23).¹⁰

3
4 1. Legal Standard

5
6 When assessing a claimant's credibility regarding subjective
7 pain or intensity of symptoms, the ALJ must engage in a two-step
8 analysis. Trevizo v. Berryhill, 871 F.3d 664, 678 (9th Cir. 2017).
9 First, the ALJ must determine if there is medical evidence of an
10 impairment that could reasonably produce the symptoms alleged.
11 Garrison v. Colvin, 759 F.3d 995, 1014 (9th Cir. 2014). "In this
12 analysis, the claimant is not required to show that her impairment
13 could reasonably be expected to cause the severity of the symptom
14 she has alleged; she need only show that it could reasonably have
15 caused some degree of the symptom." Id. (emphasis in original)
16 (citation omitted). "Nor must a claimant produce objective medical
17 evidence of the pain or fatigue itself, or the severity thereof."
18 Id. (citation omitted).

19
20 If the claimant satisfies this first step, and there is no
21 evidence of malingering, the ALJ must provide specific, clear and
22 convincing reasons for rejecting the claimant's testimony about
23 the severity of his or her symptoms. Trevizo, 871 F.3d at 678
24 (citation omitted); see also Smolen v. Chater, 80 F.3d 1273, 1284
25 (9th Cir. 1996) ("[T]he ALJ may reject the claimant's testimony
26 regarding the severity of her symptoms only if he makes specific
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1 findings stating clear and convincing reasons for doing so.");
2 Robbins v. Soc. Sec. Admin., 466 F.3d 880, 883 (9th Cir. 2006)
3 ("[U]nless an ALJ makes a finding of malingering based on
4 affirmative evidence thereof, he or she may only find an applicant
5 not credible by making specific findings as to credibility and
6 stating clear and convincing reasons for each."). "This is not an
7 easy requirement to meet: The clear and convincing standard is the
8 most demanding required in Social Security cases." Garrison, 759
9 F.3d at 1015 (citation omitted).

10
11 Where, as here, the ALJ finds that a claimant suffers from a
12 medically determinable physical or mental impairment that could
13 reasonably be expected to produce the alleged symptoms, the ALJ
14 must evaluate "the intensity and persistence of those symptoms to
15 determine the extent to which the symptoms limit an individual's
16 ability to perform work-related activities for an adult." Soc.
17 Sec. Ruling ("SSR") 16-3p, 2017 WL 5180304, at *3.¹¹ SSR 16-3p
18 superseded SSR 96-7p and eliminated the term "credibility" from
19 the Agency's sub-regulatory policy. However, the Ninth Circuit has
20 noted that SSR 16-3p:

21
22 makes clear what [the Ninth Circuit's] precedent already
23 required: that assessments of an individual's testimony

24
25 ¹¹ SSR 16-3p, which superseded SSR 96-7p, is applicable to
26 this case, because SSR 16-3p, effective on March 28, 2016, was in
27 effect at the time of the Appeal Council's September 4, 2019 denial
28 of Plaintiff's request for review. Nevertheless, the regulations
on evaluating a claimant's symptoms, including pain, see 20 C.F.R.
§ 404.1529, have not changed.

1 by an ALJ are designed to "evaluate the intensity and
2 persistence of symptoms after the ALJ finds that the
3 individual has a medically determinable impairment(s)
4 that could reasonably be expected to produce those
5 symptoms, and not to delve into wide-ranging scrutiny of
6 the claimant's character and apparent truthfulness.

7
8 Trevizo, 871 F.3d at 679 n.5 (quoting SSR 16-3p) (alterations
9 omitted).

10
11 In discrediting the claimant's subjective symptom testimony,
12 the ALJ may consider: "ordinary techniques of credibility
13 evaluation, such as . . . prior inconsistent statements concerning
14 the symptoms, and other testimony by the claimant that appears less
15 than candid; unexplained or inadequately explained failure to seek
16 treatment or to follow a prescribed course of treatment; and the
17 claimant's daily activities." Ghanim v. Colvin, 763 F.3d 1154,
18 1163 (9th Cir. 2014) (citation omitted). Inconsistencies between
19 a claimant's testimony and conduct, or internal contradictions in
20 the claimant's testimony, also may be relevant. Burrell v. Colvin,
21 775 F.3d 1133, 1137 (9th Cir. 2014); Light v. Soc. Sec. Admin.,
22 119 F.3d 789, 792 (9th Cir. 1997). In addition, the ALJ may
23 consider the observations of treating and examining physicians
24 regarding, among other matters, the functional restrictions caused
25 by the claimant's symptoms. Smolen, 80 F.3d at 1284; accord
26 Burrell, 775 F.3d at 1137. However, it is improper for an ALJ to
27 reject subjective testimony based "solely" on its inconsistencies
28 with the objective medical evidence presented. Bray v. Comm'r of

1 Soc. Sec. Admin., 554 F.3d 1219, 1227 (9th Cir. 2009) (citation
2 omitted).

3
4 The ALJ must make a credibility determination with findings
5 that are "sufficiently specific to permit the court to conclude
6 that the ALJ did not arbitrarily discredit claimant's testimony."
7 Tommasetti v. Astrue, 533 F.3d 1035, 1039 (9th Cir. 2008) (citation
8 omitted); see Brown-Hunter v. Colvin, 806 F.3d 487, 493 (9th Cir.
9 2015) ("A finding that a claimant's testimony is not credible must
10 be sufficiently specific to allow a reviewing court to conclude
11 the adjudicator rejected the claimant's testimony on permissible
12 grounds and did not arbitrarily discredit a claimant's testimony
13 regarding pain.") (citation omitted). Although an ALJ's
14 interpretation of a claimant's testimony may not be the only
15 reasonable one, if it is supported by substantial evidence, "it is
16 not [the court's] role to second-guess it." Rollins v. Massanari,
17 261 F.3d 853, 857 (9th Cir. 2001).

18
19 2. Plaintiff's Subjective Statements and Testimony

20
21 Plaintiff had lumbar fusion surgery at L5-S1 on February 16,
22 2016. (AR 345). On May 21, 2016, Plaintiff submitted an Exertion
23 Questionnaire, providing the following information: (1) the
24 symptoms preventing Plaintiff from carrying out normal workday
25 activities were "pain in lower back when standing walking or
26 sitting for longer than 20 to 30 minutes at a time, lack of sleep
27 due to pain when pains meds wear off + weakness + fatigue from
28 normal activities + chores" (AR 282); (2) light cooking, washing

1 dishes, light sweeping or vacuuming, small loads of laundry and
2 walking in nearby parks were among the daily activities that caused
3 weakness and fatigue after ten minutes; (3) Plaintiff experienced
4 lower back pain while standing, walking or light lifting and
5 pushing or pulling objects less than ten pounds and could climb
6 one flight of stairs slowly while using the handrail and a cane,
7 drive about 20 to 30 minutes at a time, between 5 to 15 miles with
8 stops to rest, wash a car, check the car's fluid levels and tire
9 pressure once or twice per month, and do light yard work for 10 to
10 20 minutes at a time, but these activities also caused lower back
11 pain (AR 283); (4) Plaintiff needed to rest or nap 2-3 times a day,
12 wore a back brace for lower back support and used a cane while
13 walking; and (5) Plaintiff took the following medications: 300 mg
14 of Gabapentin 3 times per day, 10 mg of Hydrocodone with 325 mg of
15 Acetaminophen 2 times per day, and 10 mg Cyclobenzaprine and 15 mg
16 of morphine at night. (AR 284).

17
18 On June 10, 2016, Warren Yu, M.D., an orthopedic consultant
19 examiner, reported that Plaintiff was happy with the results of
20 his surgery and noted significant improvement. (AR 494). Upon
21 examination, Dr. Yu observed that Plaintiff was able to move
22 "freely in and out of the office" without the use of an assistive
23 device, had a normal gait (AR 494-95), and found that Plaintiff
24 was able to push and pull without limitations, sit, walk and stand
25 for six hours out of an eight hour day with appropriate breaks.
26 (AR 498).

1 Progress notes from Tien T. Nguyen, M.D., who performed
2 Plaintiff's surgery, indicated that Plaintiff generally used a
3 brace between March 2016 through June 2017 and only used a cane
4 through June 2016. (See AR 479 [March 3, 2016], 482 [June 6,
5 2016], 566 [August 31, 2016], 569 [November 30, 2016], 571-72
6 [February 15, 2017]). Plaintiff complained of pain, numbness and
7 tingling radiating into his right lower extremity. (See AR 479
8 [March 3, 2016], 566 [August 31, 2016], 570-71 [February 15,
9 2017]). In June 2017, Plaintiff reported only minimal pain with
10 prolonged activity. (See AR 572, 574-575).

11
12 At the August 1, 2018 hearing, Plaintiff testified to the
13 following: (1) he was currently taking both Cyclobenzaprine, a
14 muscle relaxer to treat muscle spasms, and extended release
15 morphine to help him sleep through the night without pain ; (2)
16 after the surgery, he could only manage to sit for 30 to 45 minutes
17 without having to lie down and would lie down on and off between 8
18 to 10 hours daily; (3) he has had no treatment since his surgery,
19 and was able to resume activity after the one-year mark of his
20 surgery in February 2016; (4) currently, his daily activities
21 consist of watching a lot of TV, lying down, vacuuming, washing
22 dishes and grocery shopping and his chores and errands do not take
23 more than two hours per day; (5) he has difficulty driving in
24 excess of 45 minutes due to lower back pain; and (6) Plaintiff
25 estimated he could currently be on his feet for up to four hours a
26 day. (AR 84-86).

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3. The ALJ's Credibility Findings

The ALJ found Plaintiff's testimony about the intensity, persistence and limiting effects of his pain and symptoms to be inconsistent with the medical evidence and other evidence in the record, stating:

In sum, the above-specified residual functional capacity reflects an analysis of all of the relevant evidence in the record, which does not generally support the claimant's statements regarding the alleged intensity, persistence, and limiting effects of his symptoms. Accordingly, the residual functional capacity determined in this decision indicates the most that the claimant could do despite his impairment-related limitations.

(AR 32).

4. Analysis

As set forth below, the ALJ provided specific, clear and convincing reasons, supported by evidence in the record, to discredit Plaintiff's complaints of pain and other symptoms.

1 a. Improvement

2
3 The ALJ found that Plaintiff's symptoms improved following
4 surgery. (See AR 29). An ALJ can properly reject a plaintiff's
5 testimony where there is medical evidence of improvement after a
6 surgery. See Fletcher-Silvas v. Saul, 791 Fed. Appx. 647, 649 (9th
7 Cir. 2019); see also Warre v. Comm'r of Soc. Sec. Admin., 439 F.3d
8 1001, 1006 (9th Cir. 2006)(evidence that a claimant's condition
9 is improving can support the ALJ's decision if "the severity of
10 the problem had decreased sufficiently to enable him to engage in
11 gainful activity." The ALJ noted that four months after surgery,
12 Plaintiff told Dr. Yu, the consultative examiner that he was happy
13 with the results of his surgery and noted significant improvement
14 despite reporting residual back and gluteal pain. (AR 30).
15 Although Plaintiff was taking pain medication and wearing a back
16 brace, he had a normal gait and did not use any assistive device
17 to ambulate. (See AR 30, citing AR 494-95). The ALJ also noted
18 that although a healed surgical scar was evident when Plaintiff's
19 lumbar spine was examined, there was no significant tenderness,
20 spasm, or atrophy, the straight leg raising was negative and the
21 neurological examination was "wholly unremarkable."¹² (See AR 30,
22 citing AR 496-97).

23
24 The ALJ also found that Dr. Nguyen, who saw Plaintiff
25 approximately every two to three months from March 2016 through

26 _____
27 ¹² The ALJ noted that because Plaintiff's surgeon had
28 advised him not to bend, Plaintiff's range of motion was not
evaluated. (See AR 30, citing AR 496).

1 June 2017, consistently indicated that Plaintiff was doing well.
2 (See AR 30, citing AR 479 [March 3, 2016], 482 [June 6, 2016], 567
3 [August 31, 2016], 570 [November 30, 2016], 572 [February 15,
4 2017], 575 [June 12, 2017]). Although Plaintiff claims that the
5 ALJ's findings regarding medical improvement were not supported by
6 the three CT scans showing that Plaintiff's spine had not yet
7 fused¹³ (see Joint Stip. at 4, citing AR 516-17, 584), as Defendant
8 points out, the partial fusion did not preclude Dr. Nguyen from
9 finding that Plaintiff could work with certain restrictions -
10 namely, that could lift up to 25 pounds (see AR 572 [February 25,
11 2017] and later up to 50 pounds (AR 575 [June 12, 2017]; see Joint
12 Stip. at 16-17). To the extent the partial fusion impacted
13 Plaintiff's symptoms, Dr. Nguyen opined that it was caused by
14 Plaintiff's continued smoking¹⁴. (See AR 30, citing 479, 482, 566,
15 570-71, 575, 577-84).

16
17 b. Objective Medical Evidence

18
19 The ALJ also found that Plaintiff's testimony about the
20 intensity and limiting effects of his symptoms was not supported

21 _____
22 ¹³ To the extent there were conflicts in the record, it was
23 the ALJ's duty to resolve any such conflicts. See Diedrich v.
24 Berryhill, 874 F.3d 634, 638 (9th Cir. 2017). ("The ALJ is
25 responsible for studying the record and resolving any conflicts or
ambiguities in it."); see also DeLorme v. Sullivan, 924 F.2d 634,
638 (9th Cir. 1991) ("The ALJ has a duty to develop the record.").

26 ¹⁴ See Warre v. Comm'r of Soc. Sec. Admin., 439 F.3d 1001,
27 1006 ("Impairments that can be controlled effectively with
28 medication are not disabling for the purpose of determining
eligibility for SSI benefits.").

1 by the objective medical evidence. (See AR 30). See Burch v.
2 Barnhart , 400 F.3d 676, 681 (9th Cir. 2005) (“Although lack of
3 medical evidence cannot form the sole basis for discounting pain
4 testimony, it is a factor that the ALJ can consider in his
5 credibility analysis.”); Rollins v. Massanari , 261 F.3d 853, 857
6 (9th Cir. 2001)(“While subjective pain testimony cannot be rejected
7 on the sole ground that it is not fully corroborated by objective
8 medical evidence, the medical evidence is still a relevant factor
9 in determining the severity of the claimant’s pain and its
10 disabling effects.”); SSR 16-3p, *5 (“objective medical evidence
11 is a useful indicator to help make reasonable conclusions about
12 the intensity and persistence of symptoms, including the effects
13 those symptoms may have on the ability to perform work-related
14 activities”).

15
16 As the ALJ pointed out, the medical records concerning
17 Plaintiff’s back issues reflected only minimal, static examination
18 findings and consistently indicated that Plaintiff was doing well.
19 (See AR 30, citing AR 479 [March 3, 2016], 482 [June 6, 2016], 567
20 [August 31, 2016], 570 [November 30,2016], 572 [February 15, 2017],
21 574 [June 12, 2017]). Plaintiff’s subjective testimony was also
22 not supported by the opinions of his various doctors who found that
23 Plaintiff was capable of working, including B. Vaghaiwalla, M.D.,
24 a State Agency medical consultant, (see AR 134-42 [April 4, 2016]),
25 Warren Yu, M.D., a board certified orthopedic surgeon, (see AR 494-
26 98 [June 10, 2016]), Karen Sarpolis, MD, a State Agency medical
27 consultant, (see AR 144-54 [June 27, 2016]), and Dr. Nguyen,
28

1 Plaintiff's treating doctor (see AR 572 [February 25, 2017], 575
2 [June 12, 2017]).

3
4 However, the objective medical record was not the sole basis
5 for the ALJ's rejection of Plaintiff's subjective symptom
6 testimony. As set forth above, the ALJ also found that the
7 improvement in Plaintiff's condition following surgery was
8 inconsistent with Plaintiff's claims regarding his inability to
9 work due to pain and other symptoms. The Court finds that the ALJ
10 offered clear and convincing reasons, supported by substantial
11 evidence in the record, for discounting Plaintiff's statements
12 regarding the limiting effects of his pain and symptoms.
13 Accordingly, no remand is required.

14
15 **ORDER**

16
17 For the foregoing reasons, the decision of the Commissioner
18 is AFFIRMED.

19
20 LET JUDGMENT BE ENTERED ACCORDINGLY.

21
22 DATED: August 5, 2020

23 _____
24 /s/ ALKA SAGAR
25 UNITED STATES MAGISTRATE JUDGE
26
27
28