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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

JANIE BERTRAND,

Plaintiff,

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

Case No. 1:08-cv-00147-BAK (DLB)

MEMORANDUM AND ORDER ON PLAINTIFF’S
APPEAL FROM ADMINISTRATIVE DECISION

ORDER DENYING PLAINTIFF’S SOCIAL
SECURITY COMPLAINT

ORDER DIRECTING CLERK TO ENTER
JUDGMENT IN FAVOR OF DEFENDANT
MICHAEL J. ASTRUE, COMMISSIONER OF
SOCIAL SECURITY, AND AGAINST PLAINTIFF
JANIE BERTRAND

BACKGROUND

Plaintiff Janie Bertrand (“Plaintiff”) seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner”) denying her application for supplemental security income (“SSI”) pursuant to Title XVI of the Social Security Act (“the Act”). The matter is currently before the Court on the parties’ briefs, which have been submitted, without oral argument, to the Honorable Dennis L. Beck, United States Magistrate Judge.¹

PROCEDURAL HISTORY

On November 8, 2004, Plaintiff applied for SSI. (Administrative Record (“A.R.”) 29, 352,

¹ The parties consented to the jurisdiction of the United States Magistrate Judge. On April 6, 2009, the actions was temporarily assigned to the Honorable Dennis L. Beck for all purposes.

1 353.) Plaintiff initially alleged disability beginning December 23, 2003 (A.R. 95) but later amended
2 the date of onset to November 8, 2004, the protective filing date (A.R.11, 33.) Plaintiff claimed to
3 be disabled as a result of a back injury, lupus, lung disease, depression, Valley Fever, and a chemical
4 imbalance. (A.R. 88.) After Plaintiff's claim was denied initially and on reconsideration, Plaintiff
5 requested a hearing before the James Mitchell, Administrative Law Judge ("ALJ"). (A.R. 88, 80,
6 26.) On March 5, 2007, that hearing was conducted. (A.R. 31.) Plaintiff appeared and testified as
7 did Kenneth Ferra, vocational expert. (A.R. 361, 362.) Plaintiff had the assistance of legal counsel
8 throughout the hearing and, in fact, has been represented by an attorney in this matter since
9 November 1, 2005. (A.R. 28-30.) On September 21, 2007, the ALJ denied Plaintiff's applications
10 for benefits. (A.R. 8-18.) On November 29, 2007, the Appeals Council denied review. (A.R. 3-5.)
11 Plaintiff filed her complaint seeking judicial review of the Commissioner's final decision on January
12 28, 2008.

13 STATEMENT OF RELEVANT FACTS

14 Plaintiff was born on July 20, 1959 and was forty-seven years old at the time of the
15 administrative hearing. (A.R. 34.) She could read, write and speak English and had a tenth grade
16 education. (Id.) Plaintiff did not have a general equivalency degree nor had she taken any college-
17 level course work or vocational training. (Id., A.R. 35.) Plaintiff had begun working when she was
18 about sixteen years old, apparently at lower-skilled jobs. (A.R. 93-94.) Her work history during the
19 fifteen years prior to the hearing included jobs as a waitress, a cashier, a helper in a delicatessen, and
20 a baker in a delicatessen. (A.R. 36-44.) Her most recent job had ended in late December of 2003.
21 (A.R. 45-46.) Plaintiff sought benefits as a result of alleged health problems she claimed had become
22 disabling in November 2004. According to her application for assistance, those problems included a
23 back injury, lupus, lung disease, depression, Valley Fever, and a chemical imbalance. (A.R. 88.)

24 The ALJ questioned Plaintiff at some length about her allegedly disabling conditions, her
25 subjective complaints, the treatment she received for those conditions and symptoms throughout the
26 period in question, the effectiveness of that treatment, and the degree of impairment in the areas of basic
27 work-related functions that she experienced as a result of these conditions. (A.R. 33-70.) Plaintiff
28 testified that her autoimmune disease caused significant pain in her back and in her joints and produced

1 painful sores on her face, hands, and arms, all of which contributed to her inability to work. (A.R.. 35,
2 44, 45, 60-61.) Plaintiff also testified to a back injury or condition, not described with any specificity,
3 that also interfered with her ability to work, as did swelling in her legs and hands. (Id., A.R. 46.)
4 Plaintiff stated during the course of her testimony that she had developed osteoporosis as a result of the
5 lupus. (A.R. 67.) Plaintiff also suffered from asthma that required the use of an inhaler three days each
6 day. (A.R. 60.) She said that she had “rebroke” her back but was unable to provide any comprehensible
7 details to the ALJ about this condition. (A.R. 69.) However, Plaintiff assured him that the information
8 he sought was in the medical records that he had. (Id.) Plaintiff said she was awaiting receipt of a back
9 brace. (Id.) Plaintiff testified that the pain was “real bad,” was continuous, and rendered her unable to
10 lift and carry anything heavier than a few pounds and interfered with her ability to reach and grasp.
11 (A.R. 32, 57, 60, 62, 65, 66.) The pain got worse with sitting and apparently and left her unable to stand
12 for more than ten minutes. (A.R. 56.) She had difficulty walking more than a block. (Id.) Plaintiff said
13 she took medication regularly throughout the day to manage the pain (“nothing seems to really help here
14 lately”- A.R. 68) as well as medication prescribed to treat other symptoms of her autoimmune disorder.
15 Plaintiff believed that overall she was getting worse. (Id.) Plaintiff testified that her autoimmune
16 disease was not under control at that time (A.R. 65) and that she experienced “flare ups” of the lupus
17 about once a month during which her pain worsened (A.R. 70). Plaintiff also testified that the duration
18 of these flare-ups was “getting better and better” but the sores that developed during the course of a
19 flare-up usually took a week to resolve. (Id.) Plaintiff’s testimony showed that she lived alone, received
20 no in-home care or supportive services, was able to perform routine activities of daily living competently
21 overall with minimal assistance from others. (A.R. 33-70.) She maintained a reasonable, albeit more
22 limited, social life in which she displayed competent social skills. (Id.) There was no current evidence
23 of significant deficits in adaptive functioning. (Id.)

24 In his questioning, the ALJ addressed both the medical treatment Plaintiff received and the status
25 of the documentation of that treatment in the administrative record. The ALJ opened the hearing with
26 a question to Plaintiff’s counsel asking if counsel had taken the opportunity to review all the exhibits
27 constituting the medical portion of the file (Exhibits 1F through 7F). (A.R. 33.) Plaintiff’s counsel
28 represented that she had, and that she had no objections to the admission of those documents into

1 evidence. (Id.) The ALJ also asked Plaintiff about various aspects of her medical care, including her
2 medication; the identity of her current and previous primary medical doctor (Plaintiff volunteered that
3 she had been seeing her current doctor for only a brief time – A.R. 52); the name and location of her
4 medical clinics or hospitals (Kern Medical Center “KMC” and Sagebrush Medical Clinic, an affiliate
5 of KMC); the number of times Plaintiff had seen a doctor in the previous twelve months (“probably
6 about 20 times ... or more” – id.); the length of time Plaintiff had seen her previous doctor; the last time
7 Plaintiff had seen a doctor (“just .. a couple of weeks ago” and “a couple of days ago [when she] had
8 a ‘nerve study’ done” – A.R. 53); what, if any, restrictions these doctors recommended regarding her
9 physical activities; the number of times Plaintiff had been seen in an emergency room in the last twelve
10 months (“a couple of times” – A.R. 54); the number of times she had been hospitalized overnight as an
11 inpatient during the previous twelve months (“twice” – id.); and whether Plaintiff was currently seeing
12 any type of mental health professional (“no” – id.). After this series of questions regarding the medical
13 care Plaintiff had sought and received for her conditions, which followed one after the other, the ALJ
14 then explicitly asked Plaintiff, “To your knowledge, do we have all the medical records?” (Id.) Plaintiff
15 answered, “Yes, sir.” (Id.) The ALJ next asked Plaintiff’s attorney, “Counsel, to your knowledge, do
16 we have all the medical records?” (Id.) Counsel’s response was “Yes, Your Honor.” (Id.)

17 After answering the series of questions posed to Plaintiff by her counsel, the ALJ asked Plaintiff
18 if there was anything else about her condition that neither she nor her attorney had gone over with her.
19 (A.R. 68.) Plaintiff answered, “no,” and represented that she believed everything necessary had been
20 covered. (Id.) After a brief discussion off the record, the hearing reconvened and Plaintiff testified that
21 she did not know if her attorney was aware that Plaintiff’s “back was rebroke again and that [Plaintiff
22 was] getting a brace for it.” (A.R. 68-69.) The ALJ asked Plaintiff again if he had the medical records
23 in the case file regarding that injury or deteriorating condition. Independent of each other, both Plaintiff
24 and Plaintiff’s counsel assured the ALJ that those records were contained in the case file. (A.R. 69.)
25 The vocational expert, Kenneth Ferra, next testified. (A.R. 71-75.)

26 At the close of Mr. Ferra’s testimony, the ALJ finished the hearing with the following:

27 ALJ: All right, with that we’ll go ahead and close
28 the case. This will be helpful to me there
being no further medicals as I understand it.
Is that correct, counsel?

1 to do basic work activities; (3) whether solely on the basis of medical evidence the impairment, or
2 combination of impairments, equals or exceeds in severity certain impairments described in Appendix
3 I of the regulations; (4) whether the claimant has sufficient residual functional capacity, defined as what
4 the individual can still do despite limitations, to perform the claimant's past work; and (5) if the
5 individual no longer has the capacity to do his or her past work, whether on the basis of the claimant's
6 age, education, work experience, and residual functional capacity, the claimant can perform any other
7 gainful and substantial work within the national economy.

8 The initial burden of proof rests upon a claimant to establish that s/he "is entitled to the benefits
9 claimed under the Act." Rhinehart v. Finch, 438 F.2d 920, 921 (9th Cir. 1971)(citations omitted). In
10 terms of the five step sequential evaluation process, the Ninth Circuit has held that "[t]he burden of
11 proof is on the claimant as to steps one to four," while at the same time noting that an ALJ's "affirmative
12 duty to assist a claimant to develop the record . . . complicates the allocation of burdens" such that "the
13 ALJ shares the burden at each step." Tackett v. Apfel, 180 F.3d 1094, 1098 & n.3 (9th Cir. 1999)(italics
14 in original). The initial burden is met once a claimant establishes that a physical or mental impairment
15 prevents him from engaging in his previous occupation. The burden then shifts to the Commissioner
16 to identify other jobs that the claimant is capable of performing considering the claimant's residual
17 functional capacity, as well as the claimant's age, education and last fifteen years of work experience
18 and that a significant number of jobs exist in the national economy which the claimant can perform. Kail
19 v. Heckler, 722 F.2d 1496, 1498 (9th Cir. 1984); Terry v. Sullivan, 903 F.2d at 1275.

20 **STANDARD AND SCOPE OF REVIEW**

21 Congress has provided a limited scope of judicial review of the Commissioner's decision to deny
22 benefits under the Act. In reviewing findings of fact with respect to such determinations, the Court must
23 determine whether the decision of the Commissioner is supported by substantial evidence. 42 U.S.C.
24 § 405(g). Substantial evidence means "more than a mere scintilla," Richardson v. Perales, 402 U.S.
25 389, 402 (1971), but less than a preponderance, Sorenson v. Weinberger, 514 F.2d 1112, 1119, n. 10
26 (9th Cir. 1975). It is "such relevant evidence as a reasonable mind might accept as adequate to support
27 a conclusion." Richardson, 402 U.S. at 401. The Court must consider the record as a whole, weighing
28 both the evidence that supports and the evidence that detracts from the Commissioner's conclusion; it

1 may not simply isolate a portion of the evidence that supports the decision. Robbins v. Soc. Sec.
2 Admin., 466 F.3d 880, 882 (9th Cir. 2006); Jones v. Heckler, 760 F. 2d 993, 995 (9th Cir. 1985). It is
3 immaterial that the evidence would support a finding contrary to that reached by the Commissioner; the
4 Commissioner’s determination as to a factual matter will stand if supported by substantial evidence
5 because it is the Commissioner’s job, not the Court’s, to resolve conflicts in the evidence. Sorenson v.
6 Weinberger, 514 F.2d at 1119.

7 In weighing the evidence and making findings, the Commissioner must apply the proper legal
8 standards. Burkhart v. Bowen, 856 F.2d 1335, 1338 (9th Cir. 1988). This Court must review the whole
9 record and uphold the Commissioner’s determination that the claimant is not disabled if the
10 Commissioner applied the proper legal standards, and if the Commissioner’s findings are supported by
11 substantial evidence. See Sanchez v. Secretary of Health and Human Services, 812 F.2d 509, 510 (9th
12 Cir. 1987); Jones v. Heckler, 760 F.2d at 995.

13 ALJ’S FINDINGS

14 At step one, the ALJ found that Plaintiff had not engaged in substantial gainful activity since
15 November 8, 2004, the date on which Plaintiff applied for SSI. (A.R. 15.) At step two, the ALJ
16 determined that Plaintiff had severe medically determinable impairments consisting of a discoid lupus,
17 chronic venous insufficiency to the feet bilaterally, asthma and depression. (Id.) At step three, the ALJ
18 found that Plaintiff did not have an impairment or combination of impairments that met or medically
19 equaled one of the impairments listed in Appendix 1, Subpart P, of 20 C.F.R., Part 404. (Id.)

20 The ALJ determined that Plaintiff had the residual functional capacity to perform light work
21 with unlimited attention, concentration, understanding and memory; unlimited vision and hearing; slight
22 limitations in reaching and gross manipulation; slight limitations in doing simple and routine tasks;
23 occasional asthma restrictions; unlimited contact with the general public, requiring only occasional
24 supervision; and slight-to-moderate pain consistent with moderate levels. (Id.) In reaching this
25 determination, the ALJ considered the evidence of record, including all Plaintiff’s symptoms and the
26 extent to which those symptoms could reasonably be accepted as consistent with the objective medical
27 evidence and the other evidence, based on the requirements contained in 20 C.F.R. § 416.929 and Social
28 Security Rulings (“SSRs”) 96-4p and 96-7p. (Id.) The ALJ also considered the opinion evidence in the

1 manner required by 20 C.F.R. § 416.927 and SSRs 96-2p, 96-5p, 96-6p, and 06-3p. (Id.) In doing so,
2 the ALJ summarized the opinions of the consultative examiners (psychiatric and medical), the State
3 Agency physicians who did not examine or treat Plaintiff, and all the information, including diagnoses,
4 treatment, and objective medical evidence, contained in the KMC medical records from Plaintiff's
5 treating physicians. (A.R. 12-15.) The ALJ analyzed this information and explained his interpretation
6 of that evidence; identified the sources and opinions upon which he relied; identified those opinions of
7 Plaintiff's treating physicians with which he disagreed and gave legally adequate explanations for that
8 disagreement; explained his reasons and identified the evidence for his conclusion that some of
9 Plaintiff's alleged disabling conditions, or the degree of impairment she claimed, were not supported by
10 the medical record; and articulated and made findings accordingly. (A.R. 12-16.)

11 The ALJ's residual functional capacity assessment included a consideration of the alleged
12 impacts of Plaintiff's symptoms on her functional abilities. (A.R. 15-17.) The ALJ concluded, after
13 considering the evidence before him, that Plaintiff's medically determinable impairments could
14 reasonably be expected to produce the symptoms she claimed to have suffered. (A.R. 16.) However,
15 the ALJ also found that Plaintiff's statements concerning the intensity, persistence and limited effects
16 of those symptoms were not entirely credible. (Id.) He did so after thoroughly describing those
17 symptoms and other alleged limitations, as well as the physical manifestations and functional impacts
18 of those symptoms and limitations. The ALJ explained the various bases of the rationale he used in
19 determining the degree to which these various subjective complaints could be considered credible and
20 pointed to the specific pieces of evidence that underpinned his reasoning, including its consistency with
21 objective medical findings and medical opinions, her levels of adaptive functioning as demonstrated by
22 her capacity to perform her activities of daily living without assistance and her overall social functioning
23 competencies. The ALJ also discussed Plaintiff's lack of treatment for some of the impairments alleged
24 to be disabling as well as a number of significant inconsistencies in Plaintiff's statements to various
25 health care professionals and others about the existence and/or severity of her alleged complaints and
26 their functional impacts during the period in question. (A.R. 16-17.)

27 At step four, the ALJ found that Plaintiff was capable of performing past relevant work as a
28 cashier and a deli helper and that such work did not require the performance of work-related activities

1 precluded by her residual functional capacity. (A.R. 17.) The ALJ compared Plaintiff's residual
2 functional capacity with the physical and mental demands of that work and found Plaintiff capable of
3 performing it as it is generally performed. (Id.) Consequently, the ALJ concluded that Plaintiff has not
4 been disabled, as defined in the Act, since November 8, 2004. (A.R. 18.)

5 ISSUE

6 Plaintiff raises only one issue in this appeal. She maintains that the ALJ's non-disability
7 conclusion is impermissibly flawed because the ALJ failed to consider important medical evidence from
8 health care provider KMC about Plaintiff's various conditions and related impairments. Plaintiff
9 acknowledges that the missing information (i.e., any KMC records dated after September 8, 2005) was
10 not contained in the case record. The contents of those allegedly omitted records are not otherwise
11 described with any particularity in her brief. However, Plaintiff argues that aspects of her testimony
12 demonstrated that she had been treated and tested medical treatment at Kern Medical Center within the
13 twelve months prior to the date of the administrative hearing and that records from this more recent
14 medical care were not before the ALJ when he rendered his decision. Based on these contentions,
15 Plaintiff maintains that the ALJ failed to comply with his legal obligation to fully and fairly develop the
16 record insofar as he failed to supplement an incomplete medical record. According to Plaintiff, that
17 failure constituted reversible error. Plaintiff's Opening Brief at 11:4-14.

18 As discussed supra, this Court must uphold the Commissioner's determination that a claimant
19 is not disabled unless it contains legal error or is not supported by substantial evidence in the record as
20 a whole. Orn v. Astrue, 495 F.3d 625, 630 (9th Cir. 2007).

21 DISCUSSION

22 Simply put, Plaintiff's argument is not persuasive. It is certainly true that in Social Security
23 cases, the ALJ has a special duty to develop the record fully and fairly and to ensure that the claimant's
24 interests are considered, even when the claimant is represented by counsel. Tonapetyan v. Halter, 242
25 F.3d 1144, 1150 (9th Cir. 2001); Brown v. Heckler, 713 F.2d 441, 443 (9th Cir.1983). The duty to
26 develop the record further is triggered in limited circumstances, including where the evidence is
27 ambiguous or the record is inadequate to allow for proper evaluation of the evidence. Tonapetyan v.
28 Halter, 242 F.3d at 1150. Plaintiff argues here that the absence of that portion of her medical records

1 corroborating her testimony about having been treated at the KMC emergency room twice in the
2 previous twelve months and having recently undergone a nerve study created the requisite ambiguity
3 triggering the ALJ's duty to probe more fully into the condition of the medical record.

4 The Court cannot agree with that characterization, given the facts of this case. At the outset of
5 the hearing, before any testimony began, the ALJ asked Plaintiff's counsel if she had the opportunity to
6 review all the exhibits which constituted the medical portion of the file. Plaintiff's counsel said she had
7 and that she had no objections to the admission of those exhibits. On two separate points during
8 Plaintiff's testimony, the ALJ specifically asked both Plaintiff and her counsel about the completeness
9 of the medical records. Each time, the ALJ was assured by both Plaintiff and counsel, independent of
10 each other, that the medical records documenting Plaintiff's treatment history were all there, that the
11 medical case history records were complete. Immediately before closing the hearing, the ALJ restated
12 his understanding that there were no further medical records and asked Plaintiff's counsel if his
13 understanding was correct. She stated that it was. Given these repeated assurances by counsel for
14 Plaintiff and by Plaintiff that all the necessary documentation had been produced and made available,
15 the ALJ could reasonably conclude that the medical record was complete. The fact that Plaintiff testified
16 to receiving medical care at KMC not contained in the case's medical records did not necessarily create
17 ambiguity. It was reasonable for the ALJ to infer from the representations about the completeness of
18 the medical record that Plaintiff's statements about treatment not described in the records in the case file
19 were simply not credible. (An ALJ is entitled to draw inferences logically flowing from the evidence.
20 Sample v. Schweiker, 694 F.2d 639, 642 (9th Cir. 1982).)

21 Plaintiff cites the Court to Webb v. Barnhart, 433 F.3d 683 (9th Cir. 2005) as authority for her
22 position that the ALJ had an affirmative duty to supplement Plaintiff's medical record. Webb is
23 inapposite. There, the ALJ concluded that the claimant had no medically determinable severe
24 impairment at step two of the sequential evaluation process despite objective medical evidence
25 demonstrating physical impairments during the relevant period and other evidence showing that
26 claimant's health underwent periods of improvement and worsening in this same time frame. The Webb
27 court concluded that the ALJ's finding of "not disabled" at step two was error because the medical
28 evidence did not clearly establish the absence of a medically severe impairment or combination of

1 impairments. “The ALJ had an affirmative duty to supplement Webb’s medical record, to the extent that
2 it was incomplete, before rejecting Webb’s petition *at so early a stage in the analysis*” (emphasis added).
3 Webb v. Barnhart, 433 F.3d at 687. Unlike Mr. Webb, the ALJ in this case found Plaintiff to have
4 severe medically determinable impairments and proceeded to further consider and analyze the merits
5 of her disability claim throughout the remaining applicable steps of the sequential evaluation process.
6 Moreover, the state of the medical evidence in this case was represented by Plaintiff to be longitudinally
7 complete, capturing all the medical records relevant to the period in question. That was certainly not
8 so in Webb.

9 Plaintiff also argues that the consultative examiner’s report of April 7, 2005 should have been
10 too “stale” to be considered reliable in view of Plaintiff’s testimony at the hearing that her symptoms
11 had worsened and her functional capacities deteriorated. But Plaintiff did not produce objective medical
12 evidence documenting any further deterioration such that the reliability of the consultative examiner’s
13 conclusions was called into question. Moreover, had Plaintiff thought that the report was outdated and
14 no longer accurate, Plaintiff could have asked the ALJ to consider ordering a further consultative
15 examination. She did not do so. And, finally, the ALJ was free to discount the credibility of Plaintiff’s
16 testimony about her symptomatology and her treatment efforts.² Finding Plaintiff less than entirely
17 credible about these issues would permit the ALJ to conclude that the consultative examiner’s April
18 2005 report was still useful.

19 It was the Plaintiff’s burden included to produce full and complete medical records, not the
20 Commissioner’s. Meanel v. Apfel, 172 F.3d 1111, 1113 (9th Cir. 1999). While the ALJ may have a
21 duty to assist in the production of those records under certain circumstances, that obligation was not
22 triggered here. The state of the medical evidence was not understood by anyone at the hearing to be
23 incomplete, and, consequently, it cannot be considered to have been ambiguous for that reason, contrary
24 to Plaintiff’s contention. Moreover, excusing compliance with Plaintiff’s burden of production of
25 evidence in order to avoid a manifest injustice is unnecessary here given these facts: Plaintiff was
26 represented by legal counsel at the March 2007 hearing; Plaintiff had been represented in the
27 administrative proceedings by that same attorney since November 1, 2005; Plaintiff and Plaintiff’s

² Plaintiff has not challenged the ALJ’s findings regarding the credibility of her subjective complaints.

1 counsel repeatedly assured the hearing officer that he had all relevant medical records; and Plaintiff's
2 counsel asked the Appeals Council to review the decision of the ALJ without submitting any additional
3 evidence (i.e., the alleged omitted medical records).

4 Under these circumstances, the evidence before the ALJ was neither ambiguous nor inadequate
5 to allow for proper evaluation and adequate decision-making. Consequently, the ALJ's did not fail in
6 any duty he might otherwise have had to more fully develop the record by seeking to obtain any
7 additional medical records pertaining to Plaintiff's medical impairments.

8 **CONCLUSION**

9 Based on the foregoing, the Court concludes that the ALJ's decision was supported by substantial
10 evidence in the record as a whole and was based on the application of correct legal standards.

11 Accordingly, the Court AFFIRMS the administrative decision of the Defendant Commissioner
12 of Social Security and DENIES Plaintiff's Social Security complaint.

13 The Clerk of the Court is DIRECTED to enter judgment for Defendant Michael J. Astrue,
14 Commissioner of Social Security, and against Plaintiff Janie Bertrand.

15
16 IT IS SO ORDERED.

17 **Dated: September 22, 2009**

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE

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