

1 Accordingly, the ALJ's decision is REVERSED and the case REMANDED for further proceedings
2 consistent with this Order.

3 **BACKGROUND**

4 On August 5, 2010, Plaintiff filed an application for supplemental security income, alleging
5 disability beginning November 22, 2009. AR 65-66. Plaintiff's application was denied initially and
6 on reconsideration. AR 20-63. Subsequently, Plaintiff requested a hearing before an Administrative
7 Law Judge ("ALJ"). ALJ Christopher Inama held a hearing on February 15, 2012 and issued an order
8 denying benefits on February 24, 2012. AR 16. On March 14, 2013, the Appeals Council denied
9 review. AR 1. This appeal followed.

10 **Hearing Testimony**

11 The ALJ held a hearing on February 15, 2012, in Stockton, California. AR 20. Plaintiff
12 appeared and testified. AR 28. He was represented by attorneys Christopher O'Connor and
13 Alexander Collins. AR 20. Impartial Vocational Expert ("VE") George Meyers also testified. AR 55.

14 Plaintiff was 54 years old at the time of the hearing. AR 25. Plaintiff testified that he is
15 currently homeless but he explained that although he is separated from his wife, at times, he stays with
16 his wife or daughter. AR 25. Plaintiff did not finish high school, but he completed his GED. AR 26.
17 Plaintiff received a certification for auto and body fender repair and he previously worked in a body
18 and fender shop in either 2003 or 2004. AR 26. Plaintiff testified that he could no longer perform that
19 work because his lower back prevents him from bending down to pick up tools. AR 27-30. Plaintiff
20 also testified that he previously worked as a framer in construction, but overall his work history was
21 limited because he was previously incarcerated. AR 29.

22 When asked about his impairments, Plaintiff testified that he generally suffers from lower back
23 pain. Plaintiff needs to alternate sitting and standing generally every 20 to 40 minutes. Plaintiff also
24 lays down approximately two to three times a day from anywhere between 45minutes to three hours.
25 AR 31. Plaintiff has previously taken prescribed pain medication to alleviate his back pain, however
26 those prescriptions have expired and Plaintiff now self-medicates with Methadone. AR 33. Plaintiff
27 also testified that he regularly uses a cane. AR 36. Plaintiff also suffers from Hepatitis C which
28 causes him pain on his right side. AR 36. Based on his impairments, Plaintiff testified that he could

1 stand for 15 to 20 minutes before needing to sit down. AR 50. Plaintiff's pain causes him to be
2 distracted, and he testified that he could concentrate for 30-40 minutes at a time. Plaintiff can also sit
3 for up to 50 minutes at a time. AR 54.

4 Thereafter, the ALJ elicited testimony of the vocational expert ("VE") George Meyers. AR 48.
5 The VE testified that Plaintiff previously worked as a framer, which the VE classified as medium. AR
6 55. Plaintiff also worked as a hand packer, performed at the light work category. AR 55.

7 The ALJ asked the VE several hypothetical questions, contemplating an individual of the same
8 age, education, and work background as Plaintiff. AR 56. First, the vocational expert was asked to
9 assume an individual that could sit, stand, and walk for 6 hours in an 8-hour workday; lift and carry 20
10 pounds occasionally and 10 pounds frequently; could never climb ladders, ropes, or scaffolds, but
11 could frequently climb ramps and stairs, balance, stoop, kneel, crouch, crawl, and occasionally stoop.
12 AR 56. The vocational expert testified that individual could perform Plaintiff's hand packer position.
13 AR 56.

14 In a second hypothetical question, the ALJ asked the VE to consider the same individual
15 except that this person could sit or stand for 6 hours in an 8-hour workday, if allowed to stand and
16 stretch for 10 minutes every hour, and this individual could lift 10 pounds occasionally and lift less
17 than 10 pounds frequently; could stand and walk for 2 hours out of an eight hour work day; could
18 occasionally climb ramps, stairs, but never climb ladders, ropes or scaffolds, nor balance, stoop, kneel,
19 crouch, or crawl. The individual is limited to occasional reaching in all directions with his right hand
20 and no limit with his left hand. Finally, this individual must avoid all exposure to vibration and
21 hazards such as heights and machinery. AR 57. The VE testified that a person with such limitations
22 could not perform any jobs as they exist in the national economy. AR 58.

23 Finally, Plaintiff's attorney questioned the vocational expert regarding an individual that could
24 sit for 20 minutes before needing to take a break or reposition himself, cannot lift more than 10
25 pounds, squat, bend, crawl, or kneel. AR 60. This individual cannot concentrate for more than 30
26 minutes, has difficulty breathing and working in outdoor heat, cannot use his hands effectively, has
27 difficulty accepting instructions from supervisors, and suffers from complications from hypertension
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1 and sleep disturbance. AR 61. The vocational expert opined that an individual with these limitations
2 would be unemployable. AR 61.

3 **Relevant Medical Evidence**

4 The entire medical record was reviewed by the Court and the relevant medical evidence is
5 summarized as follows. AR 196-239.

6 Plaintiff underwent an MRI of his lumbar spine on May 13, 2009, in connection with his
7 complaints of chronic lower back pain. AR 197. This scan detected multilevel facet arthrosis
8 (degenerative arthritic changes), central canal stenosis (narrowing of the spinal canal), and foraminal
9 stenosis (narrowing of the nerve root openings). This scan also found the L5-S1 disk touching, but not
10 displacing, the right S1 nerve root. AR 197. A December 22, 2009, X-ray of Plaintiff's lumbar spine
11 similarly detected multilevel degenerative disk disease. AR 196. This X-ray additionally found
12 "possible mild" compression deformities at multiple levels. AR 196. Plaintiff visited with M.
13 Rashidi, M.D., on April 20, 2010, regarding his complaints of lower back pain. AR 198-99. Dr.
14 Rashidi observed that Plaintiff had normal motor power, sensation, and reflexes in his extremities.
15 AR 199. Dr. Rashidi noted that Plaintiff presented to his evaluation with a cane. AR 198. An X-ray
16 of Plaintiff's lumbar spine performed during this evaluation found multilevel degenerative changes.
17 AR 199.

18 On January 21, 2011, Leah Holly, D.O., assessed Plaintiff's residual functional capacity (RFC)
19 on behalf of California's Disability Determination Service (the State agency). AR 204-10. Dr. Holly
20 concluded that Plaintiff could lift up to ten pounds occasionally and less than ten pounds frequently
21 during a typical workday. AR 205. Dr. Holly stated that Plaintiff could stand and walk for at least
22 two hours and sit for about six hours total during a normal eight-hour workday; she also stated that
23 Plaintiff must periodically alternate sitting and standing to relieve pain and discomfort. AR 205. Dr.
24 Holly concluded that Plaintiff could climb ramps and stairs occasionally during a normal workday, but
25 that he was otherwise incapable of performing postural activities. AR 207. Dr. Holly found that
26 Plaintiff's ability to reach was limited. AR 207. She also found that Plaintiff should avoid all
27 exposure to hazards and vibration in the workplace. AR 208. Dr. Holly referenced Plaintiff's May
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1 2009 MRI and April 2010 X-ray to support her conclusions about Plaintiff's functional restrictions.
2 AR 205, 207.

3 Roger Wagner, M.D., performed a consultative physical examination of Plaintiff on May
4 20, 2011. AR 211-15. Plaintiff alleged at this evaluation that he experienced lower back pain that
5 radiated into his right groin. AR 211-12. Plaintiff stated that he could walk for about three blocks and
6 sit for thirty to forty-five minutes before changing activities. AR 212. Plaintiff alleged pain with
7 bending and lifting. AR 212. Plaintiff reported that he had been diagnosed with hepatitis C for
8 approximately five years. AR 211. Plaintiff stated that he had no history of bruising, bleeding, edema,
9 or jaundice. AR 211. Plaintiff reported that he could perform daily activities such as household
10 cleaning, taking out the trash, attending to his personal care, shopping, and exercising. AR 212.

11 Dr. Wagner observed that Plaintiff could "easily" get out of his chair and walk to the
12 examination room without assistance. AR 212. Dr. Wagner noted that Plaintiff sat "comfortably"
13 through his clinical interview and got on and off the examination table without difficulty. AR 212.
14 Plaintiff could walk on his heels and toes during this evaluation. AR 213. Plaintiff had normal gait
15 and station. AR 213. Plaintiff also had normal balance and coordination. AR 213. Dr. Wagner noted
16 that while Plaintiff brought a cane to the examination, it did not appear necessary. AR 213. Plaintiff's
17 lumbar range of motion was restricted, but he had "only very slightest of lumbar paravertebral muscle
18 tenderness." AR 213-14. Plaintiff had normal motor strength, sensation, and reflexes. AR 214.
19 Plaintiff had negative seated straight leg raise testing; Plaintiff's supine straight leg raise testing
20 elicited complaints of lower back pain without radiation. AR 214.

21 Following his evaluation of Plaintiff, Dr. Wagner concluded that Plaintiff could lift up to ten
22 pounds frequently and up to twenty pounds occasionally during a typical workday. AR 215. Dr.
23 Wagner found that Plaintiff could stand and walk for up to six hours and sit without limitations during
24 a normal eight-hour workday. AR 215. Dr. Wagner stated that Plaintiff's use of a cane was not
25 necessary, "except for perhaps very long distances." AR 215. Dr. Wagner also stated that Plaintiff had
26 no postural, manipulative, or workplace environmental limitations. AR 215.

27 In an August 2, 2011, assessment of Plaintiff's RFC for the State agency, B. Harris, M.D.,
28 concluded that Plaintiff could lift up to ten pounds frequently and up to twenty pounds occasionally

1 during a normal workday. AR 217. Dr. Harris found that Plaintiff could stand and walk for about six
2 hours and sit for about six hours total during a normal eight-hour workday. AR 217. Dr. Harris,
3 though, stated that Plaintiff required an assistive device for walking prolonged distances. AR 217. Dr.
4 Harris determined that Plaintiff could stoop occasionally during a normal workday. AR 219.
5 However, Dr. Harris concluded that Plaintiff could perform all other postural activities frequently
6 during a typical workday. AR 219. To support these conclusions, Dr. Harris referenced Plaintiff's
7 May 2009 lumbar spine MRI and the objective clinical findings and Plaintiff's report of his daily
8 functioning from his May 2011 consultative physical examination. AR 217-18.

9 During a May 27, 2011 visit to the Stanislaus County Health Services Agency, Plaintiff was
10 diagnosed with "advanced" lumbar spondylosis (spinal degeneration). AR 236. Throughout Plaintiff's
11 visits to the Health Services Agency between May 2011 and January 2012, his treating physicians
12 prescribed pain medication and physical therapy for his complaints of lower back pain. AR 231-36.
13 Plaintiff, furthermore, had negative straight leg raise testing during a January 2012 examination at the
14 Health Services Agency. AR 232.

15 THE ALJ'S DECISION

16 Using the Social Security Administration's five-step sequential evaluation process, the ALJ
17 determined that Plaintiff did not meet the disability standard. AR 10-16. More particularly, the ALJ
18 found that Plaintiff had not engaged in substantial gainful activity since August 5, 2010. AR 12.
19 Second, the ALJ identified Plaintiff's hepatitis c and low back pain as severe impairments. AR 12.
20 Nonetheless, the ALJ determined that the severity of Plaintiff's impairments did not meet or exceed
21 any of the listed impairments. AR 12.

22 Based on his review of the entire record, the ALJ determined that Plaintiff retained the residual
23 functional capacity ("RFC") to perform light work except Plaintiff can frequently balance, kneel,
24 crouch, crawl, and climb ramps and stairs, occasionally stoop and never climb ladders, ropes, and
25 scaffolds. AR 12. The ALJ found that Plaintiff could return to his past relevant work as a hand
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1 packager.² The ALJ ended the sequential disability analysis at step four and did not proceed to step
2 five. Accordingly, the ALJ found that Plaintiff was not disabled under the Social Security Act. AR
3 16.

4 SCOPE OF REVIEW

5 Congress has provided a limited scope of judicial review of the Commissioner's decision to
6 deny benefits under the Act. In reviewing findings of fact with respect to such determinations, this
7 Court must determine whether the decision of the Commissioner is supported by substantial evidence.
8 42 U.S.C. § 405 (g). Substantial evidence means "more than a mere scintilla," *Richardson v. Perales*,
9 402 U.S. 389, 402 (1971), but less than a preponderance. *Sorenson v. Weinberger*, 514 F.2d 1112,
10 1119, n. 10 (9th Cir. 1975). It is "such relevant evidence as a reasonable mind might accept as
11 adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971). The record as a
12 whole must be considered, weighing both the evidence that supports and the evidence that detracts
13 from the Commission's conclusion. *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985). In weighing
14 the evidence and making findings, the Commission must apply the proper legal standards. *E.g.*,
15 *Burkhart v. Bowen*, 856 F.2d 1335, 1338 (9th Cir. 1988). This Court must uphold the Commissioner's
16 determination that the claimant is not disabled if the Secretary applied the proper legal standards, and
17 if the Commission's findings are supported by substantial evidence. *See Sanchez v. Sec'y of Health*
18 *and Human Serv.*, 812 F.2d 509, 510 (9th Cir. 1987).

19 DISABILITY STANDARD

20 In order to qualify for benefits, a claimant must establish that he or she is unable to engage in
21 substantial gainful activity due to a medically determinable physical or mental impairment which has
22 lasted or can be expected to last for a continuous period of not less than twelve months. 42 U.S.C. §
23 1382c (a)(3)(A). A claimant must show that he or she has a physical or mental impairment of such
24 severity that he or she is not only unable to do his or her previous work, but cannot, considering his or
25 her age, education, and work experience, engage in any other kind of substantial gainful work which
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27 ² Plaintiff testified that his previous was as a "packer," but the ALJ determined that Plaintiff could return to his past
28 relevant work as a 'hand packager.' For this reason, the Court uses the terms "hand packager" and "hand packer"
interchangeably.

1 exists in the national economy. *Quang Van Han v. Bowen*, 882 F.2d 1453, 1456 (9th Cir. 1989). The
2 burden is on the claimant to establish disability. *Terry v. Sullivan*, 903 F.2d 1273, 1275 (9th Cir.
3 1990).

4 Here, Plaintiff challenges the ALJ’s disability finding in three respects. First, Plaintiff argues
5 that the ALJ erred at step four of the sequential evaluation process because his work as a hand
6 packager was not performed at SGA levels, and is therefore, not past relevant work. Second, Plaintiff
7 challenges the RFC finding because the ALJ failed to consider Plaintiff’s use of a cane. Finally,
8 Plaintiff argues that the ALJ erred in rejecting his credibility. (Doc. 13).

9 **DISCUSSION**³

10 **A. Past Relevant Work at Step Four of the Sequential Evaluation**

11 Plaintiff argues the ALJ erred at step four because his work history, combined with his
12 earnings report, indicates that none of his past jobs were performed at substantial gainful activity
13 levels and, therefore, the ALJ erred in considering Plaintiff’s previous work as a hand packager as past
14 relevant work. (Doc. 13 at 6). Specifically, Plaintiff argues “the record does not establish that he
15 performed [work as a hand packager] at substantial gainful activity (SGA) levels.” The Commissioner
16 does not respond to Plaintiff’s argument directly but instead insists that any error at step four is
17 harmless because Plaintiff is not disabled under the medical-vocational guidelines.

18 Step four of the sequential evaluation process requires the ALJ to engage in two inquires. First,
19 the ALJ must determine whether the individual has any work that constitutes past relevant work
20 (“PRW”). To qualify as PRW, three requirements must be satisfied. First, the recency requirement,
21 the individual must have performed the work within the last 15 years or 15 years prior to the date that
22 disability must be established. *See* 20 C.F.R. § 404.1565; *see also* SSR 82-62, 1982 SSR LEXIS 27.
23 Second, the duration requirement, the work must have lasted long enough for the individual to learn.
24 *Id.* Third, the income requirement, the work must have been performed as SGA. *See* 20 C.F.R. §
25 404.1560(b). After determining whether the individual has any PRW, the ALJ must turn to the second
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27 ³ The parties are advised that this Court has carefully reviewed and considered all of the briefs, including
28 arguments, points and authorities, declarations, and/or exhibits. Any omission of a reference to any specific argument or
brief is not to be construed that the Court did not consider the argument or brief.

1 inquiry in which he compares the limitations in the RFC with the demands of the PRW as the
2 individual described it and as it is described in the Dictionary of Occupational Titles (“DOT”). *See* 20
3 C.F.R. § 404.1545; *see also* 20 C.F.R. § 404.1520; SSR 82-61, 1982 SSR LEXIS 31. Plaintiff
4 primarily challenges whether the evidence establishes that his earnings and length of employment
5 satisfy the duration and income requirements at Step 4 of the sequential evaluation process.⁴

6 In this case, the ALJ summarily found that Plaintiff is capable of performing his past relevant
7 work as a “hand packager.” AR 16. At the hearing, the ALJ asked Plaintiff about his past relevant
8 work. Plaintiff first testified that he primarily worked as an auto body repairer. AR 26. The ALJ
9 asked Plaintiff detailed questions about his work in auto body repair as follows:

10 [A]: It was at a body and fender shop, yeah.

11 [Q]: Okay.

12 [A]: But it was – like, part time, whenever they needed somebody to come and do some
body work.

13 ...

14 [Q]: When you say part-time, how much would you have made in a – say, in a month, how
much would you have earned?

15 [A]: As far as in paying me? It was – I would say in a month, like, maybe—like the whole
16 month I would say probably like – maybe between four and 600 give or take, kind of
hard to say.

17 [Q]: And that was in '03, '04?

18 [A]: Yeah.

19 AR 27- 28.

20 [Q]: Going back to the auto body repair, which you did part time, did you tell me you think
you were getting about \$400 a month on average?

21 [A]: Yeah, because I worked maybe three four days, weeks – I’d say average, he paid cash

22 ...

23 [Q]: I’m going to the find that that’s not significant gainful employment, I looked at the
24 level for those years and you were making less than that, so we’re not going to count
that against you...

25 AR 52-53.

28 ⁴ Plaintiff worked as a hand packer in 2005, which was within 15 years of the date of the hearing.

1 In follow up testimony, Plaintiff stated that he also performed work as a construction framer
2 and hand packer as follows.

3 AR 27.

4 [Q]: What other jobs did you have?

5 [A]: Construction, framing.

6 [Q]: Okay, and any other jobs, over the last 15 years?

7 [A]: Just, well, mostly just construction, framing and packing.

8 [Q]: Okay, we'll get to those jobs in a little bit...⁵

9 AR 29.

10 Here, while the ALJ determined that Plaintiff's work as an auto body repairer was performed at
11 less than the SGA level, the ALJ failed to illicit any additional details regarding Plaintiff's work as a
12 hand packager. However, the ALJ implicitly found that Plaintiff's work as a hand packager constituted
13 substantial and gainful activity. AR 16. In determining that Plaintiff's work as a hand packer was
14 performed at SGA levels the ALJ seemingly relied on the vocational expert's testimony that Plaintiff's
15 past relevant work was as a "framer, DOT 860.381-022" and "hand packer, DOT 920.587-018,
16 medium, unskilled." AR 55. The vocational expert's testimony appears to be based on Plaintiff's
17 Disability Report — Adult and Work History Report, which indicates Plaintiff worked (a) as a framer
18 from "2004 to 2005," working eight hours per day for six days a week at \$9.00 per hour, and (b) as a
19 "packer" from "2005 to 2005," working eight hours per day for five days a week at \$8.25 per hour.
20 AR 151, 152. Based on this information, Plaintiff earned \$330 per week or \$1,320 per month as a
21 packer in 2005, which was above the monthly threshold for substantial gainful activity in 2005 if
22 Plaintiff made that amount on average each month.⁶

23 On the other hand, the Summary Earnings Query shows \$0.00 earnings in 2004 (when Plaintiff
24 worked as a framer) and \$1477.72 in 2005 (when Plaintiff worked as both a framer and a hand
25 packager). AR 139. There is no detailed earning query explaining how much Plaintiff earned from
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27 ⁵ The ALJ never returned to this line of questioning.

28 ⁶ Work performed constitutes substantial gainful activity if the plaintiff earned more than \$830 per month on average in 2005. See Monthly Substantial Gainful Activity Amounts Chart, available at <http://www.ssa.gov/OACT/COLA/sga.html>.

1 each position. There are also no months indicating the time period Plaintiff worked at either position.
2 Aside from the speculative testimony by the VE, the record is unclear as to whether Plaintiff's
3 earnings as a hand packer were presumptively performed at SGA levels. The record contains only
4 scant references to any details surrounding Plaintiff's work as a hand packer. When Plaintiff was
5 asked by his attorney at the hearing about his previous work history, Plaintiff testified in detail about
6 his auto repair job in "2003 or 2004." AR 27. When asked about his other work, Plaintiff further
7 explained that he previously worked in construction as a framer. AR 28. When asked a third time if
8 Plaintiff performed any other jobs over the past 15 years, Plaintiff testified "just, well, mostly just
9 construction, framing, and packing" with no further detail on the packing position. AR 29.

10 Plaintiff argues that based on this evidence, "it is doubtful that Plaintiff worked more than a
11 few weeks as a packager." (Doc. 13 at 7). This assertion is not inconsistent with the record. By all
12 indications, the evidence in the record presents at least two possible scenarios resulting in the
13 conclusion that Plaintiff's work as a hand packager does not qualify as past relevant work. Either
14 Plaintiff worked solely as a hand packager for a little over one month, which may be an insufficient
15 amount of time for the ALJ to reasonably determine that the job lasted long enough for Plaintiff to
16 have learned it; or Plaintiff worked as a hand packager for two months or longer, making his average
17 monthly income below SGA levels. Perhaps both of these statements are accurate, or perhaps both
18 statements are incorrect. The Court simply cannot make a rational interpretation based on such vague
19 evidence. Therefore, the Court cannot conclude on the current record that the ALJ's finding at step
20 four of the sequential evaluation process is supported by substantial evidence.

21 While claimants have the burden at step four to show they are unable to return to their past
22 relevant work, the ALJ must make specific factual findings to support the conclusion that Plaintiff can
23 perform past relevant work. *Pinto v. Massanari*, 249 F.3d 840, 845 (9th Cir. 2001); *see also* SSR 82-
24 62, 1982 SSR LEXIS 27 (1982), [WL] at *4, available at 1982 SSR LEXIS 27, 1982 WL 31386.
25 Plaintiff appeared at the hearing and was able to provide detail as to the length of time he worked in
26 these positions and a description of how and when his past jobs were performed. Yet the ALJ did not
27 ask clarifying questions nor did the ALJ make any findings with respect to Plaintiff's past relevant
28 work in his decision denying benefits. For all of these reasons, and after an exhaustive review of the

1 record, the Court finds the ALJ erred in finding that Plaintiff's previous work of "hand packager" was
2 substantial gainful activity. "Requiring the ALJ to make specific findings on the record at each phase
3 of the step four analysis provides for meaningful judicial review. When ... the ALJ makes findings
4 only about the claimant's limitations, and the remainder of the step four assessment takes place in the
5 [vocational expert's] head, we are left with nothing to review." *Pinto*, 249 F.3dat 847.

6 This matter will be remanded so that the ALJ can reconsider the findings at step four and
7 clarify whether the job as a hand packager constituted substantial gainful activity. Although the
8 Commissioner argues that the error is harmless because Plaintiff would be found not disabled at step
9 five of the sequential analysis, the ALJ should make that determination in the first instance. As this is
10 a threshold issue, the Court need not address Plaintiff's additional challenges to the ALJ's findings.

11 CONCLUSION

12 Based on the foregoing, the Court finds that the ALJ's decision is not supported by substantial
13 evidence and is not based on proper legal standards. Accordingly, this Court **GRANTS** Plaintiff's
14 appeal from the administrative decision of the Commissioner of Social Security. This action is
15 **REMANDED** back to the Commissioner for further administrative proceedings consistent with this
16 opinion. The Clerk of this Court is **DIRECTED** to enter judgment in favor of Plaintiff Richard Frank
17 Bernal, against Carolyn W. Colvin, Commissioner of Social Security and close this action.

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19 IT IS SO ORDERED.

20 Dated: March 6, 2015

/s/ Barbara A. McAuliffe
21 UNITED STATES MAGISTRATE JUDGE